CASE LAW UPDATE

21th ANNUAL JUVENILE LAW CONFERENCE

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EDUCATION

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

- Fellow of the Texas Bar Foundation
- Editor – State Bar Juvenile Law Section Report.
- 1999 - Present, Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
- 1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
- 1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
- Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

SPEECHES AND PRESENTATIONS

- Juvenile Search & Seizure, Live Nationwide Broadcast via Webinar, Sponsored by LegalSpan, January 10, 2008.
- Legislative Updates; Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Arrests, Searches, Confessions, Juvenile Processing Offices, and Waiver of Rights. Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Caselaw Updates; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Caselaw Update; Fall Judicial Education Session, Sponsored by The Texas Association of Counties, Austin, Texas, November, 2006.
- Arrest, Searches, Confessions, Juvenile Processing Offices & Waiver of Rights, Nuts and Bolts of Juvenile Law 2006, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, Texas, August, 2006.
- Caselaw Update; 32nd Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, Dallas, Texas, July, 2006.
- Caselaw Updates; 19th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2006.

PUBLICATIONS

- 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.

TABLE OF TOPICS

JUVENILE CASELAW UPDATE
by Pat Garza

ADJUDICATION PROCEEDINGS—

LOSS OF COURT REPORTER'S TRANSCRIPT OF DISPOSITION HEARING REQUIRES REMAND AND RETRIAL OF DISPOSTION

¶ 07-2-8. **In the Matter of E.C.D., Jr.,** No. 04-05-00391, 2007 Tex.App.Lexis 1270 (Tex.App.— San Antonio, 2/21/07) .

Facts: On the night of September 21, 1991, taxicab driver Curtis Edwards was found dead in his cab. He had been shot once in the head, and his cab had crashed into a house on Onslow Street. A revolver and a black tennis shoe were recovered from the cab. Floyd Thomas testified that later that same night, he called EMS when E.C.D., his twelve year-old stepson, arrived home n1 in a dazed and incoherent state. He was wearing one tennis shoe and a bloody t-shirt and smelled of alcohol. E.C.D. was transported to Southeast Baptist Hospital, where he was admitted for a few days. While at the hospital, E.C.D. made statements to nurses, security guards, and a chaplain that raised suspicion regarding his involvement in Edwards' murder. Shortly thereafter, the State filed its petition alleging delinquent conduct based on E.C.D.'s commission of Edwards' murder. At trial, the defense claimed that E.C.D. acted at the direction of Floyd Hardeman, E.C.D.'s uncle and a convicted felon on parole, who had asked E.C.D. if he wanted to make some money by robbing a taxicab driver. n2

n1 EMS was dispatched to 419 Dorie Street. San Antonio Police Officer Adrian Miller testified that the distance between Onslow and Dorie Streets is "probably four miles at the most." It also appears that police officers brought E.C.D. home because he was found wandering the street, "dazed and incoherent."

n2 Floyd Hardeman was also charged with the murder of Curtis Edwards.

After finding that E.C.D. engaged in delinquent conduct as alleged in the petition, which included a deadly weapon finding, the jury assessed a 27-year determinate sentence. On March 5, 1992, the trial court rendered judgment on the jury's verdict and imposed a 27-year determinate sentence, ordering E.C.D. committed to the Texas Youth Commission (TYC) until the age of 18 years with a transfer to the Texas Department of Criminal Justice (TDCJ) to serve the remainder of his sentence. E.C.D. requested, and was granted, an out-of-time appeal.

Held: AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Some Issues Omitted by editor.

Opinion: Defendant argued, inter alia, that the missing portion of the reporter's record was necessary to resolve his complaint that the evidence was insufficient to support the trial court's finding that it was in his best interest to be placed outside his home and that reasonable efforts were made to prevent the need for his removal. The court of appeals agreed. Because the transcript of the disposition hearing was lost, there was

no testimony from defendant's probation officer, or from any other witness, attesting to the need to remove defendant from his home and to the efforts, if any, made to prevent his removal from the home. In addition, other than the facts pertaining to the underlying murder offense, there was no testimony that related to those matters during the adjudication phase.
Conclusion: The trial court's order of disposition was reversed and the case was remanded for a new disposition hearing. The judgment was otherwise affirmed.

Editor's Note: E.C.D. had a second jury trial on disposition in October, 2007. He received a 40 year sentence, 13 years more than his original sentence.

APPEALS—

ONCE A PROBATION EXPIRES, AN APPEAL FROM AN ORDER MODIFYING THE DISPOSITION BECOMES MOOT.

¶ 07-2-14. **In the Matter of R.M.**, No. 08-06-00008-CV, 2007 Tex.App.Lexis 2243 (Tex.App.— El Paso, 3/22/07) .

Facts: On November 22, 2004, the State filed a petition alleging R.M. engaged in delinquent conduct by committing assault. The State filed an amended petition on April 27, 2005, alleging that R.M. committed aggravated assault and two counts of burglary of a habitation. On May 31, 2005, R.M. pled true to the lesser included offense of criminal trespass and the State dismissed the other counts. The juvenile court entered a disposition order on June 22, 2005 placing R.M. on juvenile probation. On October 11, 2005, the State filed a motion to modify disposition based on allegations that R.M. had violated several conditions of the probation order. The juvenile court conducted a hearing and found that R.M. had violated certain conditions. On November 22, 2005, the juvenile court placed R.M. on intensive supervised juvenile probation. Approximately two weeks later, the State filed a new motion to modify disposition based on allegations that R.M. had refused to allow his probation officer to enter his home and had been suspended from school. The juvenile court sustained those allegations and on January 4, 2006 committed R.M. to the Challenge Boot Camp Program. R.M. filed a notice of appeal. Based on the juvenile department's recommendation, the juvenile court, on July 5, 2006, entered an order terminating R.M.'s probation with the notation that the probation was unsuccessful.

Held: Dismissed

Opinion: On appeal, R.M. raises three issues related to the modification order entered on December 7, 2005: (1) the modification order was void because the juvenile court did not make the findings required by *Section 54.04 of the Family Code*; (2) the juvenile court denied R.M. due process and due course of law by prejudging R.M.'s disposition at the modification hearing held on December 7, 2005; and (3) the evidence is legally insufficient to support the juvenile court's determination, as stated in the modification order, that R.M. had violated the terms of probation. The State, noting that R.M. has challenged only the modification of probation order, responds that the appeal has become moot because the juvenile court terminated R.M.'s probation on July 5, 2006. The court agreed. Since the juvenile's probation had been terminated, there was no reasonable expectation that he would again be subjected to a modification of his probation. The juvenile had not appealed the adjudication order but only appealed from the order modifying his disposition. The

court's resolution of the issues presented on appeal could not have any impact on the collateral effects and legal consequences of being adjudged a juvenile delinquent. Therefore, the case did not fall within the collateral consequences exception to the mootness doctrine.

Conclusion: The court concluded that the appeal from the order modifying the disposition had become moot because R.M.'s juvenile probation had been terminated. Accordingly, the appeal is moot.

COURTS OF APPEALS DO NOT HAVE ORIGINAL JURISDICTION TO ISSUE WRITS OF HABEAS CORPUS FOR CHILDREN WHO HAVE ALREADY BEEN TRANSFERRED FROM TYC TO TDCJ.

¶ 07-2-15. **In the Matter of C.G.**, 219 S.W.3d 548, No. 12-06-00210-CV, 2007 Tex.App.Lexis 2548 (Tex.App.— Tyler, 3/30/07) .

Facts: In July 1999, C.G. participated in the murder of Jeffrey Adam Carrier. She was fourteen years old. In May 2000, C.G. admitted that she was a child in need of services and that she had committed a delinquent act that constituted capital murder. After her admission, the juvenile court committed her to the Texas Youth Commission (Commission) for a determinate period of twenty years.

In March 2005, the Commission wrote to the juvenile court requesting that the court order C.G. transferred to the parole division of the Texas Department of Criminal Justice (adult parole). In its request the Commission noted that C.G.'s twenty-first birthday was July 13, 2005, and it requested that a hearing be held several months before that day. In a report furnished to the juvenile court the next month, the Commission's court liaison wrote that if the court did not release C.G. to adult parole, she "would then be transferred to the Texas Department of Criminal Justice--Institutional Division on or around her 21st birthday." The court held a hearing on June 13, 2005 and heard evidence from the court liaison as well as from C.G. and witnesses called by the State. At the conclusion of the hearing, the court determined that C.G. should not be released to adult parole, but instead ordered that she be transferred to the institutional division of the Texas Department of Criminal Justice (institutional division).

C.G. filed an application for a writ of habeas corpus in March 2006. The district court denied the application. This appeal followed.

In her sole issue, C.G. asserts that she received ineffective assistance of counsel at the June 13, 2005 hearing in juvenile court. Specifically, she complains that her attorney should have objected when the trial court considered transferring her to the institutional division of the Texas Department of Criminal Justice, because the Texas Youth Commission had requested only that she be released to adult parole.

Held: Dismissed for want of jurisdiction

Opinion: During the time a person is committed to the Commission, the Commission may request that the trial court release the person to parole or transfer the person to the institutional division. If the Commission requests that the person be released to adult parole, the trial court may return the person to the Commission with or without approval to release that person under supervision. If the Commission requests that a person be transferred to the institutional division, the trial court may return the person to the Commission or order that she be transferred to the institutional division. For those who were adjudicated for a delinquent act that

constituted capital murder committed before September 1, 2003, and assessed a determinate sentence, transfer to the institutional division of the Texas Department of Criminal Justice is automatic on the person's twenty-first birthday if the person has not been released to parole or served at least ten years of the sentence.

Restraint is given a broad definition, but C.G. was not restrained by the juvenile court order that she be transferred to the institutional division when she filed her application for writ of habeas corpus. C.G. filed her application in March 2006. Even if we view C.G.'s argument in the most favorable light, the juvenile court's order that she be transferred to the institutional division restrained n2 her only from June 15, 2005, the date the Commission said it would be transferring her to the institutional division, until July 13, 2005, the date the Commission was otherwise obligated to transfer her to the institutional division. On July 13, 2005, the legal authority to restrain Appellant in the institutional division shifted from the transfer order to a combination of factors: (1) C.G. had been adjudicated for capital murder, (2) she had served less than ten years, (3) the court refused to release her to adult parole, and (4) she reached the age of twenty-one. Said another way, the juvenile court's order transferring her to the institutional division, the order she attacks, ceased to be the legal reason for her restraint on her twenty-first birthday. The argument C.G. presented in her application for writ of habeas corpus only related to her restraint from June 15 until July 13, 2005. That time had passed, and C.G. was no longer restrained by the transfer order when she filed her application for writ of habeas corpus in March 2006.

n2 This was a restraint only in the sense that she was held in the institutional division instead of by the Commission for the period of less than thirty days.

Because she was no longer restrained by the juvenile court's transfer order when she filed her application, C.G. did not invoke the jurisdiction of the district court. We do not have original jurisdiction to consider matters of habeas corpus in cases such as this one. The appropriate appellate remedy is a dismissal when we have no original jurisdiction and the jurisdiction of the court below is not properly invoked.

Conclusion: This appeal is ***dismissed*** for want of jurisdiction.

RULINGS ON MOTION TO SUPPRESS NOT APPEALABLE BY THE STATE, OTHER THAN IN CASES OF HABITUAL OR VIOLENT JUVENILE OFFENDERS.

¶ 07-3-8. **In the Matter of F.G.**, MEMORANDUM, No. 13-06-216-CV, 2007 Tex.App.Lexis 4887 (Tex.App.— Corpus Christi, 6/21/07) .

Facts: On October 24, 2005, the State filed a "PETITION ALLEGING DELINQUENT CONDUCT" against F.G. asserting that on or about August 26, 2005, F.G. "did then and there, intentionally or knowingly possess a useable quantity of marihuana, in an amount of two ounces or less and Respondent did then and there possess said marihuana in, on and within 1,000 feet of the premises of a school, namely, the Lockhart Junior High School. . . ." On December 1, 2005, F.G. filed a motion to suppress the marihuana obtained from the search contending that her detention and subsequent search violated *Amendments IV, V, VI*, and *XVI of the United States Constitution*, *Article 1, Sections 9, 10*, and *19 of the Texas Constitution*, and *articles 1.04, 1.05, 38.22*, and *38.23* of the Texas Code of Criminal Procedure.

The trial court heard the motion to suppress, and at the conclusion of the hearing, the trial court took the

matter under advisement. On February, 24, 2006, the trial court granted the motion to suppress. By four issues, the State challenges the trial court's decision to grant the motion to suppress.

Held: Dismiss for want of jurisdiction

Memorandum Opinion: F.G. complains in her appellate brief that we do not have jurisdiction over this appeal. *Article 44.01(a)(5) of the Texas Code of Criminal Procedure* gives the State the right to appeal certain orders in criminal cases, including a trial court's grant of a motion to suppress evidence. *See TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5)* (Vernon 2006). However, juvenile cases, although quasi-criminal in nature, are civil proceedings that are governed by the Texas Family Code and not the Texas Code of Criminal Procedure. *Section 56.01 of the Texas Family Code* provides that the right to appeal in a juvenile case rests solely with the child, leaving the State without any statutory or common-law authority to appeal from an adverse ruling in such a case. *See TEX. FAM. CODE ANN. § 56.01* (Vernon 2002); *see also C.L.B. v. State, 567 S.W.2d 795, 796 (Tex. 1978)*; *In re S.N., 95 S.W.3d 535, 537 (Tex. App.--Houston [1st Dist.] 2003, pet. denied).*

In 2003, our Legislature expressly authorized the State to appeal an order of a court in a juvenile case that grants a motion to suppress evidence. *TEX. FAM. CODE ANN. § 56.03(b)(5)* (Vernon Supp. 2006). However, *section 56.03* only applies to State's appeals in cases involving violent or habitual juvenile offenders. *See TEX. FAM. CODE ANN. §§ 53.045, 56.03(b)* (Vernon Supp. 2006). Because this case does not involve an habitual or a violent juvenile offender, *section 56.03* does not authorize the State to appeal from the trial court's order granting the motion to suppress. *See Id.*

Conclusion: We dismiss this attempted appeal for want of jurisdiction.

ONCE A PROBATION IS TERMINATED, AN APPEAL OF THAT DISPOSITION BECOMES MOOT.

¶ 07-3-12. **In the Matter of G.E.,** 225 S.W.3d 647, 2006 Tex.App.Lexis 7553 (Tex.App.— El Paso, 8/24/06) rel. for pub. 6/14/07 .

Facts: Appellant, G.E., a juvenile, appeals from a disposition order placing him on probation until his eighteenth birthday with out-of-home placement in the Challenge Boot Camp Program as a condition of his probation.

In its second amended petition, the State alleged that Appellant committed the offenses of evading arrest, criminal mischief over $ 1,500 but less than $ 20,000, possession of marijuana under two ounces, and assault of a family member. On January 10, 2005, an adjudication hearing was held and Appellant pled true to evading arrest, possession of marijuana, and assault of a family member. [1] The trial court found that Appellant engaged in delinquent conduct and scheduled a disposition hearing.

1 The State dropped the criminal mischief charge pursuant to a restitution agreement.

At the disposition hearing, Probation Officer Patricia Soto recommended that Appellant receive probation with out-of-home placement in the Challenge Boot Camp Program until his eighteenth birthday. The trial court agreed with Probation Officer Soto's recommendation and placed Appellant on probation

until his eighteenth birthday. Appellant was also required to participate in the Challenge Boot Camp Program as a condition of his probation.

In his sole issue, Appellant argues the trial court abused its discretion by placing him in a boot camp program as a condition of his probation when alternative, less restrictive programs were available. The State contends that since Appellant is no longer on probation, his issue on appeal is now moot.

Held: Appeal Dismissed

Opinion: In this case, a review hearing was held subsequent to the disposition hearing and Appellant's probation was terminated. We note Appellant did not appeal the trial court's adjudication. Rather, Appellant only challenged the condition of probation which required him to participate in a boot camp program. Because Appellant's probation was terminated, no decision of this Court regarding the condition of probation would have any effect. *See* In re of J.P.D., 2003 Tex. App. LEXIS 3466, No. 03-02-00425-CV, 2003 WL 1922466, *at *1 (Tex.App.--Austin, April 24, 2003, no pet.).*

When the judgment of this Court can have no effect on an existing controversy, a case becomes moot. *Restrepo v. First National Bank of Dona Ana County, New Mexico, 888 S.W.2d 606, 607 (Tex.App.--El Paso 1994, no writ).* Thus, Appellant's issue has become moot. *See In re of J.P.D., 2003 Tex. App. LEXIS 3466, 2003 WL at 1922466, at *1*. Generally, an appellate court must dismiss the cause and not simply the appeal when a case becomes moot. *Hanna v. Godwin, 876 S.W.2d 454, 457 (Tex.App.--El Paso 1994, no writ).* However, in this case, the entire cause is not moot, only Appellant's issue. *See In re of J.P.D., 2003 Tex. App. LEXIS 3466, 2003 WL 1922466, at *2*. Therefore, only the appeal should be dismissed as moot.

Conclusion: Accordingly, we dismiss this appeal as moot.

MANDAMUS GRANTED – TRIAL JUDGE MUST RULE ON WRIT OF HABEAS CORPUS.

¶ 07-4-11. **In Re Altschul**, __S.W.3d.__, No. 10-07-00202-CV, 2007 Tex.App.Lexis 7758 (Tex.App.—Waco, 9/26/07) .

Facts: In this original proceeding, Relator Todd-Warren Altschul seeks mandamus relief in the form of ordering Respondent, the Honorable Ralph T. Strother, Judge of the 19th District Court of McLennan County, to rule on Altschul's petition for writ of habeas corpus. Altschul's situation is familiar to us. *See In re Altschul, 207 S.W.3d 427 (Tex. App.--Waco 2006, orig. proceeding).* We discussed the subject matter of the habeas corpus relief that he seeks:

> Altschul is currently imprisoned at the Eastham Unit of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). It is unclear what state felony sentence he is currently serving in TDCJ-ID, but he asserts that under the United States Sentencing Guidelines, his allegedly void prior juvenile conviction increased two federal sentences that he is apparently serving concurrently with his state felony sentence: an 87-month sentence for mail fraud, and a 120-month sentence for assaulting a federal officer. *See U.S.S.G. § 4A1.2(d)(2)(A), (B); § 4A1.3(a)* (providing for upward departures based in part on defendant's criminal history); *see, e.g., United States v. Holland, 26 F.3d 26, 27-29 (5th Cir. 1994)* (holding that district court properly used defendant's juvenile adjudications to calculate his criminal history score). Altschul, citing U.S. Supreme Court decisions and a U.S. Sentencing Guideline

note, claims that before he can re-open his federal convictions and seek relief on the ground of a void state conviction, he must first successfully obtain relief in the state court of conviction. *See O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)*; *Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994)*; *U.S.S.G. § 4A1.2, Application Note 6*.

Altschul's complaints center on his prior Texas juvenile adjudication. He alleges that in March 1989, in his juvenile delinquency trial (for criminal mischief, possession of a prohibited weapon, and burglary of a building), the jury found him not responsible by means of mental illness. *See TEX. FAM. CODE ANN. § 55.51* (Vernon 2002). Altschul alleges that the trial court disregarded the jury's verdict and found that he had engaged in delinquent conduct and ordered him into the custody of the Texas Youth Commission. Altschul claims that he was released from custody shortly thereafter. He also alleges that his appointed lawyer provided ineffective assistance because he did not object to the trial court's alleged actions and did not appeal the adjudication. *Id. at 428-29* (footnotes omitted).

After noting that a habeas corpus proceeding is the proper forum for Altschul's complaints (in either the Court of Criminal Appeals or the court of Altschul's original juvenile adjudication--the 19th District Court of McLennan County), we held that we lacked jurisdiction over Altschul's original proceeding for a writ of habeas corpus. *Id. at 430-31*.

Thereafter, Altschul sought habeas corpus relief in the Texas Supreme Court, which has appellate jurisdiction over juvenile proceedings because they are considered civil actions. *See TEX. FAM. CODE ANN. § 56.01* (Vernon 2002). The supreme court transferred the habeas proceeding to the Court of Criminal Appeals. *In re Altschul,* No. 06-1048, http://www.supreme.courts.state.tx.us/historical/2006/dec/122906.htm (Tex. Dec. 29, 2006) (order). According to Altschul, the Court of Criminal Appeals declined to docket the transferred proceeding. He filed a petition for discretionary review of our decision, but the Court of Criminal Appeals refused it. *In re Altschul,* No. PD-0145-07, http://www.cca.courts.state.tx.us/opinions/handdown.asp?FullDate=20070627 (Tex. Crim. App. June 27, 2007).

Altschul therefore filed an application for writ of habeas corpus in the 19th District Court of McLennan County, the court of his original juvenile adjudication. He complains in the instant proceeding that Respondent will not act on his application for writ of habeas corpus and that, because he has exhausted our suggested remedies and cannot file his application in another court, we should order Respondent to consider and rule on his application.

Opinion: "A court with mandamus authority 'will grant mandamus relief if relator can demonstrate that the act sought to be compelled is purely 'ministerial' and that relator has no other adequate legal remedy.'" *In re Piper, 105 S.W.3d 107, 109 (Tex. App.--Waco 2003, orig. proceeding)* (quoting *State ex rel. Rosenthal v. Poe, 98 S.W.3d 194, 197-99 (Tex. Crim. App. 2003)* (orig. proceeding)). In this case, Altschul tends to show that Respondent has a mandatory or ministerial duty to issue the writ. [1] *See id. at 109-10*. Given and assuming as true Altschul's allegations that the trial court in his juvenile proceeding disregarded a jury finding of "not responsible by means of mental illness" and that his attorney was ineffective in not objecting to or appealing the trial court's action, we view Respondent as having a duty to issue the writ and consider Altschul's allegations. *See id.* ("Assuming the facts as Piper states them, it would be beyond question that Judge Neill has a duty to issue the writ. . . . Assuming that this record speaks the true facts, Judge Neill thus would have a mandatory duty to issue the writ of habeas corpus. . . ."); *cf. TEX. CODE CRIM. PROC. CODE ANN. art. 11.15* (Vernon 2005) ("The writ of habeas corpus shall be granted without

delay by the judge or court receiving the petition, unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever.").

1 Respondent did not file a response to Altschul's petition for writ of mandamus. The State filed a response asserting that *article 11.07* applies and that, from the face of Altschul's application, the trial court could have determined that there are no "controverted, previously unresolved facts material to the legality of the applicant's confinement." *TEX. CODE CRIM. PROC. CODE ANN. art. 11.07, § 3(c)* (Vernon 2005). But we seriously question the direct application of *article 11.07* to Altschul's juvenile adjudication that is the subject of his underlying habeas application because *article 11.07*, by its own terms, is limited to habeas relief from a felony judgment. *Id. art. 11.07, § 1*; *see Ex parte Valle, 104 S.W.3d 888, 888-89 (Tex. Crim. App. 2003)* (holding that article 11.07 governing applications for writs of habeas corpus in which applicant seeks relief from felony judgment may not be used to challenge juvenile's imprisonment because adjudication of delinquency is not felony conviction). Altschul's underlying habeas application is brought under the authority of the Family Code (*section 56.01(o)*) and the *Texas Constitution (art. I, § 12*, and *art. V, § 8*).

Generally, an appellate court may not afford mandamus relief over a trial court's refusal to consider a writ of habeas corpus application because the applicant can present the application to another district court. *See Piper, 105 S.W.3d at 110*; *In re Davis, 990 S.W.2d 455, 457 (Tex. App.--Waco 1999, orig. proceeding)*. But a "technically available legal remedy will not defeat a petitioner's entitlement to mandamus relief when the remedy is 'so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate.'" *Davis, 990 S.W.2d at 457* (citing *State ex rel. Holmes v. Court of Appeals, 885 S.W.2d 389, 394 (Tex. Crim. App. 1994)* (quoting *Smith v. Flack, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987))*, and *Kozacki v. Knize, 883 S.W.2d 760, 762 (Tex. App.--Waco 1994, orig. proceeding))*; *see Ex parte Hargett, 819 S.W.2d 866, 868 (Tex. Crim. App. 1991)* (under proper circumstances, applicant may pursue writ of mandamus when trial court refuses to consider habeas application) (citing *Von Kolb v. Koehler, 609 S.W.2d 654 (Tex. Civ. App.--El Paso 1980, orig. proceeding))*.

Given Altschul's predicament, *i.e.*, that his juvenile record is affecting his ability to re-open his federal sentences, and the fact that he can file his application only in the court of his juvenile adjudication, [2] he has no other available legal remedy, technically or otherwise, and he is entitled to mandamus relief. [3] *See Davis, 990 S.W.2d at 457*; *see also In re Debrow, 2005 Tex. App. LEXIS 1769, 2005 WL 544031 (Tex. App.--San Antonio Mar. 9, 2005, orig. proceeding)* (discussing juvenile's attempt to mandamus trial court to consider juvenile's habeas application); *In re Debrow, 2004 WL 2612533, 2004 Tex. App. LEXIS 7146, (Tex. App.--San Antonio Aug. 11, 2004, orig. proceeding)* (same); *In re Solis, 2004 Tex. App. LEXIS 5245, 2004 WL 1336266 (Tex. App.--San Antonio June 16, 2004, orig. proceeding)* (holding that defendant was entitled to writ of mandamus ordering trial court to consider and rule on his habeas corpus application).

2 *See* MCLENNAN (TEX.) DIST. CT. LOC. R. 1.01.B. ("all juvenile cases shall be filed in the 19th District Court"); *see also Altschul, 207 S.W.3d at 430* ("And under *Valle,* the court of Altschul's original juvenile adjudication has authority to address Altschul's complaints in a habeas corpus proceeding because he alleges collateral consequences.") (citing *Valle, 104 S.W.3d at 889-90*, and *TEX. FAM. CODE ANN. § 56.01(o)*).

3 Should a party appeal the trial court's ruling on Altschul's habeas application, we would then appear to have appellate jurisdiction. *See Valle, 104 S.W.3d at 890* & nn.12-13.

Conclusion: We conditionally grant the petition for writ of mandamus. Respondent is ordered to rule on Altschul's application for writ of habeas corpus within thirty days of the date of this opinion. The writ will issue only if Respondent does not timely act on the application.

IF A JUVENILE'S PARENTS ARE CAPABLE OF RETAINING AN ATTORNEY ON APPEAL, BUT ELECT NOT TO DO SO, THE TRIAL COURT CAN ORDER THEM TO PAY FOR JUVENILE'S COUNSEL ON APPEAL.

¶ 07-4-13. **In the Matter of A.G.N.**, No. 07-07-0312-CV, 2007 Tex.App.Lexis 7819 (Tex.App.—Amarillo, 9/28/07) .

Facts: A.G.N., a juvenile, appeals an order of commitment to the Texas Youth Commission. Finding he is without appellate counsel and the record is incomplete, we abate and remand the case for proceedings consistent with this opinion.

On June 22, 2007, A.G.N. was committed to the Texas Youth Commission by indeterminate order modifying disposition. *Tex. Fam. Code Ann. § 54.05* (Vernon Supp. 2006). [1] His trial counsel, Vance Edward Ivy, filed a notice of appeal on July 9, 2007, and was thereafter granted leave to withdraw from the representation. On August 7, 2007, the juvenile court denied the application of A.G.N.'s mother for court-appointed counsel. We find no indication that A.G.N. has subsequently received appointed or retained appellate counsel.

1 Further citation to Tex. Fam. Code Ann. (Vernon 2002 & Supp. 2006) shall be by the abbreviation "Section" followed by the relevant number.

The appellate record was due in this court by August 21, 2007. *Tex. R. App. P. 35.1*. We received the clerk's record on September 21, 2007, but have not received the reporter's record. On September 11, 2007, the reporter filed a status report that indicated A.G.N. had not requested preparation of the reporter's record. In a status report filed September 25, 2007, the reporter indicated on September 20, 2007, the mother of A.G.N. paid a deposit for preparation of the reporter's record.

A juvenile who may be found delinquent and subjected to loss of liberty has the right to appointed counsel. *See In re Gault, 387 U.S. 1, 41, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)*; *In re D.A.S., 973 S.W.2d 296, 298 (Tex. 1998)*. The Legislature has mandated that indigent juveniles receive the assistance of appointed counsel on appeal. *Sections 51.10(f)(2)* and *56.01(d)(2),(3)*. Once a juvenile expresses the desire to appeal by filing a notice of appeal "[c]ounsel shall be appointed under the standards provided in *Section 51.10* of this code unless the right to appeal is waived in accordance with Section 51.09 of this code." *Section 56.01(f)*. "A child may be represented by an attorney at every stage of proceedings under this title including . . . : (8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title." *Section 51.10(a)*.

This case potentially raises the issue of a juvenile's right to appellate counsel when his or her parents are capable of retaining an attorney but do not engage counsel for the child. Under such circumstances *Section 51.10* further provides:

(d) The court shall order a child's parent or other person responsible for support of the child to employ

an attorney to represent the child, if:
(1) the child is not represented by an attorney;
(2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and
(3) the child's right to representation by an attorney:
(A) has not been waived under Section 51.09 of this code; or
(B) may not be waived under Subsection (b) of this section.
Section 51.10 (d).

The court may also appoint counsel in any case it deems representation necessary to protect the interests of the juvenile. *Section 51.10(g).*

"The court may enforce orders under Subsection (d) by proceedings under Section 54.07 or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under Section 54.07." *Section 51.10(e).*

Conversely, if the court determines a juvenile's parents are "financially unable to employ an attorney" for the child, it shall appoint an attorney. *Section 51.10(f).* Counsel appointed under *Section 51.10 (f)* or *(g)* may be compensated from the general fund of the county and the juvenile's parents ordered to reimburse the county for fees it pays appointed counsel. *Section 51.10 (k).* For the purpose of determining indigency, the court shall consider the assets and income of the child, his or her parents, and any other person responsible for the support of the child. *Section 56.01(m).*

Held: Abate and Remand

Opinion: While the Family Code's mechanism under Title 3 for ensuring counsel on appeal is relatively detailed, the same may not be said for the provision for payment of costs attending appeal in the absence of indigency. As noted above, this court has received the clerk's record; however, counsel for A.G.N. may desire supplementation. More problematic is the issue of payment for the reporter's record. According to the reporter's current status report, the transcript of A.G.N.'s modification hearing is approximately 120 pages covering four days of testimony. This court has received notification that the mother of A.G.N. recently tendered a deposit for preparation of the reporter's record, but this alone does not eradicate the possibility of future delay for non-payment of this cost. *Section 56.01(l)* authorizes the court, in the absence of indigency, to order the payment of costs on appeal by the child, his or her parent, or person responsible for support. Thus, should the court determine that a juvenile is not entitled to a free reporter's record under *Section 56.02*, it is empowered to make orders sufficient for payment of the clerk's record and reporter's record by the child, his or her parents, or other persons responsible for support.

In light of the foregoing, we abate the appeal and remand the case to the County Court at Law No. 1 of Potter County for further proceedings. Upon remand, the trial court shall use all necessary means, including a hearing if the court finds it necessary, to determine the following:

1. whether appellant desires to prosecute the appeal;
2. whether appellant is indigent, applying the standard of *Section 56.01(m)*;
3. whether appellant is entitled to appointed counsel due to indigence;

4. whether appointment of an attorney for appeal is necessary to protect the interests of appellant according to *Section 51.10(g)*;
5. after applying *Section 51.10(d)*, whether to order appellant's father and mother to retain an attorney for appellate representation of appellant;
6. whether appellant is entitled to a free reporter's record under *Section 56.02*;
7. in the absence of an indigency finding, whether to order appellant's parents to pay the costs for preparation of the clerk's record and reporter's record.

If the trial court determines that A.G.N. desires to prosecute the appeal, it shall make all orders necessary to ensure representation and a complete record on appeal.

This court finds no indication that the case comes within *Section 56.01(n)*; however, if it does, the trial court shall also certify that A.G.N. is entitled to appeal under *Section 56.01(n)(1)* or *(2)* or that he is not entitled to appeal and the reason.

Conclusion: The trial court shall cause any hearing held to be transcribed and shall conduct it in a manner designed to protect A.G.N.'s rights which may include presentation of testimony in any manner permitted by law. The trial court shall (1) execute findings of fact and conclusions of law addressing the foregoing issues, (2) cause to be developed a supplemental clerk's record containing the findings of fact and conclusions of law and all orders and certificates it may issue as a result of compliance with this order, and (3) cause to be developed a reporter's record transcribing the evidence and arguments presented at any hearing conducted.

Additionally, the trial court shall file the supplemental record with the clerk of this court on or before November 9, 2007. Should further time be required by the trial court to perform these tasks, it shall be so requested before November 9, 2007.

Finally, if the trial court determines A.G.N. is entitled to appointed counsel and appoints counsel, it shall inform this court of the name, address, and state bar number of the appointed counsel.
Per Curium

ATTORNEY GENERAL—

A SCHOOL DISTRICT MAY FILE A NEW FAILURE TO ATTEND SCHOOL COMPLAINT, LISTING SOME OF THE SAME ABSENCES AS WELL AS A SUBSEQUENT TENTH UNEXCUSED ABSENCE, AS LONG AS IT IS FILED WITHIN TEN SCHOOL DAYS OF THE TENTH ABSENCE LISTED IN THE COMPLAINT OR REFERRAL.

¶ 07-4-16. **Texas Attorney General Opinion No. GA-0574**, 2007 Tex.AG Lexis 77 (10/02/07) .

Subject: School district responsibilities under *section 25.0951(a) of the Texas Education Code* (RQ-0584-GA)

You ask two questions about a school district's responsibility to file a complaint for failure to attend school under *section 25.0951(a) of the Texas Education Code*.

A child between the ages of six and eighteen generally must attend school "each school day for the entire period the program of instruction is provided." *TEX. EDUC. CODE ANN. §25.085(a)*-(b) (Vernon 2006). A child who is required to attend school commits an offense if, without a legitimate excuse, he or she "fails to attend school on 10 or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period." *Id.* § 25.094(a); *see also id.* § 25.087 (establishing guidelines for excused absences). Under section 25.0951, a school district must initiate legal action against a child or the parent of a child who fails to comply with the statutory school-attendance requirements. *See id.* § 25.0951. In the following excerpt from section 25.0951, relevant legislative amendments to section 25.0951 adopted during the 2007 legislative session are indicated:

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

> (a) If a student fails to attend school without excuse on 10 or more days or parts of days within a six-month period in the same school year, a school district shall within 10 [[O>seven<O]] school days of the student's 10th [[O>last<O]] absence:
>
> (1) file a complaint against the student or the student's parent or both in a county, justice, or municipal court for an offense under Section 25.093 ["Parent Contributing to Nonattendance"] or 25.094 ["Failure to Attend School"], as appropriate, or refer the student to a juvenile court in a county with a population of less than 100,000 for conduct that violates Section 25.094; or
>
> (2) refer the student to a juvenile court for conduct indicating a need for supervision . . . .
>
> . . . .
>
> (d) A court shall dismiss a complaint or referral made by a school district under this section that is not made in compliance with this section.

In 2006 this office interpreted section 25.0951 as it was written at that time. *See generally* Tex. Att'y Gen. Op. No. GA-0417 (2006). In that opinion, GA-0417, this office determined that section 25.0951(a) requires a school district to file a complaint or referral n2 within seven days of the student's tenth unexcused absence. *See id.* at 5. Failure to do so, the opinion concluded, "inevitably leads to the complaint's or referral's dismissal." *Id.* Moreover, if a complaint is dismissed as untimely, subsection (a) prohibits a school district from refiling the exact same complaint based upon the same ten unexcused absences--but "[i]f the student has failed to attend school without excuse since the original complaint was filed," the school district must file a new complaint "that lists the latest absence as well as some or all of the absences listed in the original complaint" within seven school days of the latest absence. *Id.* at 6. Thus, each subsequent absence that occurs within a six-month period of the same school year renews the seven-day period within which the school district may file a timely complaint. *See id.*

> n2 Throughout the remainder of this opinion, we will use the term "complaint" to encompass both a complaint filed in a county, justice, or municipal court under section 25.0951(a)(1) and a referral to juvenile court made under section 25.0951(a)(2).

Question 1: You now ask whether "a school district's failure to file a truancy complaint ... under § 25.095[1](a) ... within the seven[-]day period after the tenth unexcused absence affect[s] in any way its ability to file a complaint . . . against the same student based on a subsequent absence, assuming that the most recent ten absences are within a sixth-month period." Request Letter, *supra* note 1, at 1. Nothing in the statute forbids a school district from filing a new complaint listing some of the absences listed in the dismissed complaint in addition to a new, subsequent tenth unexcused absence, so long as all the absences

have occurred within a six-month period of the same school year.
Opinion: A recent legislative amendment to section 25.0951(a) supersedes a portion of GA-0417's conclusion. Under the amendment, a school district must file the complaint within ten, not seven, school days. n3 *See* Act of May 23, 2007, 80th Leg., R.S., ch. 984, § 1, 2007 Tex. Sess. Law Serv. 3463, 3463 (Vernon) (to be codified at *TEX. EDUC. CODE ANN. § 25.0951(a)*). A second amendment, changing the word "last" to "10th," codifies that portion of GA-0417 concluding that a school district must file a complaint after the student's tenth absence. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 908, § 31, 2007 Tex. Sess. Law Serv. 2277, 2291 (Vernon) (to be codified at *TEX. EDUC. CODE ANN. § 25.0951(a)*); House Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. Comm. Substitute H.B. 2884, 80th Leg., R.S., § 24 (2007). As the second amendment makes clear, a student's tenth unexcused absence triggers the school district's responsibility to file a complaint. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 908, § 31, 2007 Tex. Sess. Law Serv. 2277, 2291 (Vernon) (to be codified at *TEX. EDUC. CODE ANN. § 25.0951 (a)*). *See generally TEX. GOV'T CODE ANN. § 311.025(b)* (Vernon 2005) (directing that multiple amendments to the same statute enacted at the same legislative session should be harmonized if possible to effectuate each). Otherwise, GA-0417's construction of section 25.0951(a) is unaffected.

n3 The bill amending section 25.0951(a) to increase the filing period from seven to ten school days became effective immediately. *See* Act of May 23, 2007, 80th Leg., R.S., ch. 984, § 2 [Tex. S.B.1161]; *see also* H.J. of Tex., 80th Leg., R.S. 5268-69 (2007) (recording a vote of 144-0 in favor of passage on the bill's third reading); S.J. of Tex., 80th Leg., R.S. 986-87 (2007) (recording a vote of 30-0 in favor of passage on the bill's third reading).

Question 2: You also ask whether a school district that fails to file a timely complaint under section 25.0951(a) suffers any penalty under the Education Code other than the dismissal of the complaint under section 25.0951(d). We find no other penalties in the Education Code.

Conclusion: Under *section 25.0951(a) of the Education Code*, a school district must file a complaint or referral against a student who has accumulated ten or more unexcused absences within a six-month period in the same school year within ten school days of the student's tenth absence. Failure to file within the requisite time will lead to dismissal of the complaint or referral, but the school district may file a new complaint, listing some of the same absences as well as a subsequent tenth unexcused absence, within ten school days of the tenth absence listed in the complaint or referral. To the extent Attorney General Opinion GA-0417 construes section 25.0951(a) to require filing a complaint or referral within seven school days, it has been superseded by amendments to the statute.

Other than requiring a court to dismiss the complaint or referral, the Education Code imposes no penalties on a school district that fails to file a complaint or referral within ten school days of the student's tenth unexcused absence.

CONFESSIONS—

[OUT OF DELAWARE] COURT HELD THAT, IN A JUVENILE CONFESSION, THE LACK OF GUIDANCE FROM A PARENT OR INTERESTED ADULT IS A FACTOR IN DETERMINING WHETHER WAIVER OF *MIRANDA* WAS KNOWING.

¶ 07-2-5. **Smith v. Delaware**, No. 43,2006, 2007 Del.Lexis 68 (Sup.Ct. Del., 2/16/07) .
Facts: Appellant, a juvenile, was adjudicated in the New Castle County Family Court (Delaware) to be a delinquent child on two counts of second degree rape and one count of second degree unlawful sexual contact after his motion to suppress his confession was denied. He appealed his adjudication and the denial of his motion.

The incidents that gave rise to this delinquency proceeding took place on September 20, 2003. Rita Smith took her children, James and Cheryl, to visit her sister, Mary Hawn, and Mary's daughter, Georgia Gallo. At that time James was 14 years old and Georgia was three. According to Georgia, at some time during that day, she was in the bathroom with James and he told her to "lick his wee-wee." Later that day, while they were playing frisbee, they went behind a shed and he again demanded that she perform fellatio. Georgia reported what happened to her mother, who immediately sought assistance from her family physician and the authorities. Georgia was examined at the A.I. duPont Hospital. Although the examining physician found no physical evidence of sexual contact, he opined that Georgia had been abused based on her spontaneous statements in the waiting room and in the examining room. In October, 2003 Terri Kaiser, a forensic interviewer from The Children's House interviewed Georgia about the events in question. Georgia repeated her earlier statements and also said that James touched her "wee-wee" and her behind.

Detective Jason Atallian, of the New Castle County Police Department, went to the motel where James and his family were living on December 19, 2003. Rita answered the door and told Atallian that her son was asleep, having stayed home from school for the past two days because of a cold. Atallian told Rita that he wanted to talk to James and that she should call to schedule the interview. As Atallian was returning to his car, however, Rita called out and told him that James was awake and that they would come to the station right then. Rita and James followed Atallian to the station in their own car.

Atallian questioned James for approximately 45 minutes. At the outset, Atallian asked James whether he could read and write. James said he had trouble with reading. Atallian said that he would read the rights to James and that James could stop him and ask questions. Atallian then stated:

> Okay number one you have the right to remain silent. And what that means is you can be quiet if you want to. You don't have to answer anything if you don't want to. Anything you say can and will be used against you in a Court of law. It just means whatever we're talking about today you know is legal, you know whether it happens from here on out whatever we talk about you know is pertinent to what's going to happen okay. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you can't afford to hire a lawyer one will be appointed to represent you. If you wish one we've already talked to your mom about that and that's fine. At any time during this interview if you wish to discontinue your statement you have the right to do so. All that means is at any time we're talking if you want to talk to me or you don't. You understand these things I explained to you?

James answered, "Uh Uh" and then wrote his name in the appropriate space on the form (he could not sign his name because he did not know how to write in cursive). During the questioning, Atallian repeatedly told James that he knew what had happened, but that he had to hear it from James so Atallian would be able to help James. Frequently, after Atallian's questions, James gave no response. He simply sat silently, bent over, looking at the floor. After many attempts to get James to open up, and another period of silence, Atallian said, "I'm not going anywhere. The only way we're walking out of here is if you're straight up and honest with me and we deal with this and then I can help you." During the course of the

interrogation, James confessed to several of the sexual encounters Georgia described. At the end of the interrogation, Atallian explained to James, and then his mother, that James was going to be arrested for sexual crimes.

Held: Reversed and Remanded

Opinion: When the trial court ruled on the motion to suppress, the court did not have the benefit of Mensch's competency evaluation. In fact, after Mensch testified, the trial court noted that, "probably if I re-heard that (the suppression motion) today would have required much more detailed explanation of the Miranda rights than I saw today. But that's water over the dam."

This Court has viewed the videotape with the added perspective that the trial court lacked. As a result, we know that there was no credibility issue about James's inability to read or understand the "standard" *Miranda* warnings. His word recognition skills were those of a second grader. In addition, Atallian's simplification of the *Miranda* warnings was not as clear and understandable as the trial court suggested. For example, in explaining that James's statements will be used against him, Atallian said, "It just means whatever we're talking about today you know is legal, you know *whether it happens from here on out whatever we talk about you know is pertinent to what's going to happen today.* " The italicized portion of that "explanation" is almost unintelligible. The same is true for Atallian's explanation of James's right to "discontinue [his] statement." Atallian explained, "All that means is at any time we're talking *if you want to talk to me or you don't*."

Atallian's explanation of James's right to an attorney was particularly troublesome. He told James, "If you wish one (an attorney) we've already talked to your mom about that and that's fine." The simplest meaning of that message is, "Your mother took care of that for you." The trial court discounted Atallian's comment because James testified during the suppression hearing and did not say that he thought his mother had waived his right to an attorney. The trial court noted, "I heard him say it didn't mean anything to him. He didn't feel pressured by the fact that his mother said that." Again, with the perspective of Mensch's report, the trial court's first statement undoubtedly is correct - the right to an attorney, and the right to have one appointed for you, "didn't mean anything" to James.

The remainder of the videotape adds to our concern about James's understanding of his rights. He was told at the outset that he could "be quiet" if he wanted to and that he did not have to answer anything. When Atallian asked James to come clean and tell him what really happened, James repeatedly responded by being quiet not answering. To the extent that James understood the first, and arguably simplest, of the *Miranda* warnings, the videotape strongly suggests that he was trying to do what he was told he could do, by remaining silent. We do not hold that James's silence in response to numerous questions constituted an invocation of his right to terminate the interrogation. Rather, we find his repeated silences to be evidence of his limited and inadequate understanding of his rights.

Conclusion: Based on the foregoing, the Family Court's judgment of delinquency is REVERSED and this matter is remanded for a new trial. Jurisdiction is not retained.

[FROM THE 9TH U.S. CIRCUIT] TITLE *18 U.S.C. § 5033* OF THE JUVENILE DELINQUENCY ACT, PRESCRIBES THAT AN ARRESTING OFFICER MUST ADVISE THE PARENTS OF THEIR CHILD'S *MIRANDA* RIGHTS CONTEMPORANEOUSLY WITH ADVISING THEM OF

THEIR CHILD'S CUSTODY, AND MAY NOT UNREASONABLY REFUSE A REQUEST BY EITHER THE JUVENILE OR THE PARENT TO COMMUNICATE WITH ONE ANOTHER BEFORE THE JUVENILE IS INTERROGATED.

¶ 07-3-1. **U.S. v. C.M.**, __F.3d__, No. 05-50585, 2007 U.S.App.Lexis 10858 (9th Cir., 5/8/07) .

Facts: Around 4:25 a.m. on May 20, 2005, seventeen-year old C. M., a Mexican national, approached the border patrol checkpoint on the I-8 westbound near Pine Valley, CA. He stopped his vehicle and the officer on duty observed two persons seated in the back with their heads down. C. M. responded briefly to the officer's questions and then proceeded forward without having been visibly flagged on. The officer yelled for deployment of a "spike mat," which flattened the tires on the vehicle and brought it to a rest about a half-mile from the checkpoint. C. M. and the six other occupants of the vehicle were apprehended as they scattered into the nearby brush. The arresting agents, Saul Enriquez and Rebecca Brudnok, transported C. M. and the six other occupants of the vehicle to the checkpoint for processing. A keyless entry remote for the vehicle was found on C. M.

At the checkpoint, arresting agents Enriquez and Brudnok locked C. M. in a holding cell and began processing the detainees, including asking each of them basic biographical questions. From the birth date that C. M. gave the arresting agents, they realized he was a minor. Neither arresting agent, nor any other agent at the checkpoint, informed C. M. of his rights or attempted to contact his parents.

After two hours had elapsed, Agent Enriquez informed C. M. that he had the right to speak with the Mexican consulate. C. M. asked to exercise this right. Agent Enriquez called the consulate, but upon receiving no answer, hung up the phone without leaving a message. Agent Enriquez did not make any further attempts to contact the consulate. Instead, he called a supervisor, who told Agent Enriquez that they would try to contact the consulate "later." Agent Enriquez testified that, "at the time," he did not have an all-hour emergency number for the consulate and did not know "for sure" that such a number existed. Agent Brudnok, however, testified that an all-hour number for the Mexican consulate was kept at the border checkpoint. Agent Brudnok also testified that she never attempted to contact the consulate with that all-hour number.

Four hours later, at 10:15 a.m., Supervisory Border Patrol Agent David Holt contacted consular official Ivan Castillo and advised Castillo that C. M. was a juvenile being held for alien smuggling. C. M. was not concurrently given the opportunity to speak with the consulate.

At 10:20 a.m., Border Patrol Agent Luis Gutierrez arrived at the checkpoint from San Diego to assist with processing C. M. Forty minutes later, around 11 a.m., Agent Gutierrez first notified C. M. of his *Miranda* rights in Spanish. C. M. waived his right to remain silent and Agent Gutierrez proceeded to question him. Sometime after beginning the interrogation, Agent Gutierrez asked C. M. whether he had contact information for his parents. C. M. responded that he did not.

Around 12:40 p.m., Agent Gutierrez re-advised C. M. of his *Miranda* rights. The record does not indicate whether C. M. waived his rights this time. Nonetheless, Agent Gutierrez continued questioning C. M., who again asked to speak with the Mexican consulate. Agent Gutierrez ignored C. M.'s request, telling C. M. that he would get a chance to speak with the consulate and an attorney later. During the second period of questioning, C. M. indicated that he was living with his uncles in Los Angeles. Presentence Report ("PSR") 2. Agent Gutierrez did not attempt to contact C. M.'s uncles, but instead continued to

question C. M., who ultimately gave a sworn statement incriminating himself.

The government used C. M.'s incriminating statements to support a juvenile information that it filed against C. M. that afternoon, alleging six counts of delinquency. After obtaining C. M.'s incriminating statement, the government transported the juvenile to San Diego, where he was arraigned around 4 p.m. on the information. The information charged C. M. with three counts of transporting an illegal alien in violation of *8 U.S.C. § 1324(a)(1)(A)(ii)*, and three counts of bringing in illegal aliens for "commercial advantage or private financial gain," in violation of *8 U.S.C. § 1324(a)(2)(B)(ii)*. At the arraignment, the magistrate judge appointed C. M. counsel and noted that no family members or representatives of the Mexican consulate were present. C. M., through counsel, denied the allegations in the information. Dist. Ct. Rec. 4.

On June 1, 2005, C. M. filed motions to suppress statements, to suppress evidence, and to dismiss the information due to multiple violations of *18 U.S.C. § 5033*. The government filed its response on June 13, 2005, also filing motions in limine to exclude expert testimony, admit evidence of transport, admit evidence of prior misconduct, admit demeanor evidence, and admit statements concerning financial arrangements.

The motion hearing and trial were conducted together on June 15, 2005. The District Court granted the government's motions in limine, except the motion to admit *Rule 404(b)* evidence of prior misconduct. The District Court concluded there were violations of the JDA, but that these violations did not deny C. M. due process. As such, the Court denied C. M.'s motion to dismiss the information. The District Court also discussed prejudice, but declined to make a specific finding as to whether the violations of the JDA prejudiced C. M., indicating that the remedy for such prejudice would be "suppression of the statement," which, in the District Court's view, had already occurred because the government stipulated it would not use C. M.'s post-arrest statements in its case-in-chief.

During trial, the government called three occupants of the vehicle as material witnesses. The witnesses testified to substantially similar stories of how they crossed the border into the United States and waited for transport along the side of a highway. The witnesses also testified to their understanding that they would have to pay for their transport -- either to a friend, or a friend of a friend. The witnesses generally did not know how much they would owe, when payment was due, or how they were expected to pay. None saw the driver of the vehicle or knew C. M.

At the close of the government's case, C. M. made a *Fed. R. Crim. P. 29* motion on all counts, which the District Court denied. The District Court found C. M. delinquent on the six counts and sentenced him to twenty-one months in custody and three years of supervised release. C. M. timely appeals to this Court, contending that his juvenile information should be dismissed due to multiple, egregious violations of the JDA, which prejudiced his statutory rights and amounted to a denial of due process. C. M. also claims there was insufficient evidence presented at trial to find him delinquent.

Held: **REVERSE,** and **DISMISS** the juvenile information, and **REMAND** for further proceedings not inconsistent with this opinion.

Opinion: This Court has repeatedly held that a juvenile is entitled to relief under *§ 5033* when the government violates the requirements of the statute and causes the juvenile constitutional or statutory harm. Where the government's violations deprive the juvenile of his or her constitutional rights, reversal is required. *See RRA-A, 229 F.3d at 744*. If the violations result in statutory prejudice, and irrespective of

whether they amount to a constitutional deprivation, this Court has the "discretion to reverse the conviction so as to ensure that the prophylactic safeguard for juveniles not be eroded or neglected." *Id.* (internal quotation marks and citation omitted). Accordingly, we first determine whether the JDA has been violated. If it has, we then consider the harm, if any, caused by the violations.

A. The Government Violated the JDA

The JDA provides in relevant part:

> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.
>
> The juvenile shall be taken before a magistrate judge forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate judge.*18 U.S.C. § 5033*.

The burden is on the government to show compliance with *§ 5033*. *Jose D.L., 453 F.3d at 1120*. Here, C. M.'s arresting officers violated every requirement mandated by Congress in *§ 5033*: they failed timely to notify C. M. of his rights; failed to engage in reasonable efforts to contact C. M.'s parents or guardian; failed to provide adequate consular notification in the event C. M.'s parents could not be reached; failed to honor C. M.'s request to speak with a consular representative; and failed to arraign C. M. forthwith.

It is this system of juvenile justice, as well as C. M.'s individual rights, that we are charged with protecting. Here, the government's conduct effectively nullified the unequivocal provisions of the statute defining the process that Congress has mandated juveniles in federal custody are due. We caution against further erosion of the critical protections due to juveniles under the JDA. *See Jose D.L., 453 F.3d at 1125* (finding that the government "flagrantly violated" the JDA); *Wendy G., 255 F.3d at 768* (reversing due to multiple, prejudicial violations of the JDA); *RRA-A, 229 F.3d at 747* (same); *Doe IV, 219 F.3d at 1014-15* (same); *Doe III, 170 F.3d 1162* (finding the government violated the JDA); *L.M.K., 149 F.3d at 1035* (same); *Doe II, 862 F.2d at 780-81* (remanding due to multiple violations of the JDA); *Doe I, 701 F.2d at 821* (finding multiple violations of the JDA). As we recently observed,

> [O]ver thirty years after the JDA was enacted, government law enforcement agents trample even the most basic requirements of the JDA. . . . We do not believe that it furthers Congress's intent to allow the government, in case after case, to ignore with impunity the protective requirements of the JDA. Courts should not close their eyes to these continuing violations by mindlessly reciting the rubric of harmless error as an overarching excuse for ignoring what Congress has clearly ordained . . . .
> *Jose D.L., 453 F.3d at 1125* (citations omitted).

Conclusion: C. M. was deprived of his rights under *§ 5033* to immediate notification and prompt arraignment, and to the advice and counsel of a responsible adult prior to interrogation. His resulting confession was highly prejudicial and should not have been used against him to initiate his proceedings. Accordingly, we **REVERSE** the District Court's adjudication of delinquency, **DISMISS** the juvenile information, and **REMAND** for further proceedings not inconsistent with this opinion. n6

n6 Having reversed based on our finding of statutory prejudice, we need not reach the alternative grounds for relief advanced by Appellant.

AN OUT OF STATE STATEMENT, TAKEN IN VIOLATION OF THE TEXAS FAMILY CODE, WAS ADMISSIBLE BECAUSE IT ACHIEVED A FITTING AND RIGHT BALANCE OF CONSIDERATIONS SUCH THAT BOTH PARTIES WERE ASSURED A FAIR HEARING.

¶ 07-4-1. **Vega v. State**, ___S.W.3d.___, No. 13-98-044-CR, 2007 Tex.App.Lexis 6315 (Tex.App—Corpus Christi, 8/9/07) .

Background: On June 26, 2002, the Court of Criminal Appeals considered the question of the admissibility of a statement given by respondent to the Chicago Police Department that complied with Illinois law but not with Texas law. In finding Texas law applied, the court remanded the case to the Court of Appeals to decide the question (under Texas law) as to the admissibility of such a statement. *Vega v. State*, 84 S.W.3d 613, 2002 WL 1379247, 2002 Tex.Crim.App.Lexis 139 (Tex.Crim.App. 6/26/02), Tex. Juv. Rep. ¶ 02-3-15. [Texas Juvenile Law (5th Edition 2000).

Facts: In late December 1994, Vega, who was sixteen at the time, and her boyfriend, nineteen-year-old Jaime Nonn, were implicated in a capital murder in Starr County, Texas. They had fled to Chicago, Illinois. On December 28, 1994, Vega and Nonn were arrested by the Chicago police after Starr County deputies advised the Chicago Police Department that Texas warrants had been issued for the two suspects. Both Nonn and Vega gave statements in Illinois. The trial court overruled Vega's motion to suppress the written statement she made to the Illinois authorities.

On direct appeal following the convictions, Vega raised eighteen issues, thirteen of which complained of the trial court's admission of her written statement obtained in Illinois by Illinois law enforcement officers. Vega also complained that the trial court erred by admitting evidence of extraneous offenses and giving an inappropriate limiting instruction regarding the extraneous offenses. Relying on *Davidson v. State, 25 S.W.3d 183 (Tex. Crim. App. 2000)* (en banc), a panel of this Court held that the trial court abused its discretion when it admitted Vega's Illinois statement into evidence. *See Vega v. State, 32 S.W.3d 897, 906 (Tex. App.--Corpus Christi 2000), reversed and remanded, 84 S.W.3d 613 (Tex. Crim. App. 2002)* (en banc). We reversed all three judgments of the trial court and remanded for a new trial. *Id.*

On the State's petition for discretionary review, the Texas Court of Criminal Appeals held that this case is not a *Davidson* case by statute, circumstances, or command to "strictly construe," and that *Davidson* is inapplicable here. [3] *Vega v. State, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002)* (en banc). The court also concluded that "[b]ecause appellant was a juvenile at the time she gave her statement, its admissibility must be determined under Title 3 of the Family Code." *Id.* And we are not to "strictly" construe Title 3 because the legislature did not so mandate. *Id.* Additionally, although Vega and the State take the position that the issue on remand is the review of the fairness factor in a conflict-of-laws analysis, we believe that the court of criminal appeals has decided that issue. In its opinion, the court determined that procedural issues in this case were governed by the law of Texas, the forum state, and that substantive issues were also governed by Texas law because the conflict-of-law schemes of both Illinois and Texas militate for such application. [4] *See id. at 617*; *see also id. at 621* (Keller, J., dissenting).

3 The *Vega* Court summarized its holding in *Davidson* as follows:

[B]ecause *art. 38.22 § 3(a) of the Texas Code of Criminal Procedure* was procedural in nature, a trial judge is required to apply Texas law to determine the admissibility of an oral confession obtained in another state. [The *Davidson* Court] also held that because the mandatory requirement of *art. 38.22 § 3(a)*, that an oral custodial statement must be recorded before it can be used against a defendant, was not followed by the authorities in Montana, appellant's oral confession was inadmissible at his Texas trial. *Vega v. State, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002)* (en banc) (citing *Davidson v. State, 25 S.W.3d 183, 185-86 n.2 (Tex. Crim. App. 2000))*. In *Vega*, the court of criminal appeals concluded *Davidson* did not apply because (1) the challenged statement was written and, thus, did not violate the provisions of *article 38.22*, and (2) "pursuant to the Code Construction Act, the sections of the Family Code relevant to confessions prevail over *art[icle] 38.22*." *Id.*

4 The court of criminal appeals reasoned that the question of which directives in Title 3 are substantive and which are procedural is not relevant because, if procedural in nature, the issues are governed by the laws of the forum state, or Texas in this instance, and, if substantive in nature, the conflict-of-law schemes of both Illinois and Texas militate for the application of Texas substantive law. *See Vega, 84 S.W.3d at 617*. The court arrived at its Texas substantive law conclusion by considering five factors Texas courts review in determining which forum has the most significant relationship to the case and by deciding that four of the five factors, including (1) where the injury or unlawful conduct occurred, (2) the place where the relationship between the parties is the strongest, (3) the number and nature of contacts that the non-forum state has with the parties and with the transaction involved, and (4) the relative materiality of the evidence that is sought to be excluded, favor Texas law, and that only resolution of the issue of fairness, the fifth factor, was not obvious. *See id.* (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145* (1971); *Gonzalez, 45 S.W.3d 101, 104 n.4 (Tex. Crim. App. 2001)* (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139* (1971)). Because Illinois has a similar method of determining which state has the most significant relationship to the case, the court of criminal appeals determined that all of the Illinois factors also favored application of Texas law to the substantive issues. *See id.*

The court of criminal appeals remanded this case for an analysis, but not for our analysis of how fairness should be factored into a conflict-of-laws analysis. Rather, we have been charged to analyze how the absence of a magistrate impacts the fairness to the parties, with our focus being on the purpose expressed in *section 51.01 of the family code*: "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." [5] *Id. at 619*; *see* Acts 1973, 63rd Leg., p. 1460, ch. 554, § 1, eff. Sept. 1, 1973 (current version at *TEX. FAM. CODE ANN. § 51.01(6)* (Vernon 2002)).

5 In 1994, *section 51.01* read as follows:
This title shall be construed to effectuate the following public purposes:
(1) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
(2) to protect the welfare of the community and to control the commission of unlawful acts by children;
(3) consistent with the protection of the public interest, to remove the children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation;

(4) to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and when a child is removed from his family, to give him the care that should be provided by parents; and
(5) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.
Acts 1973, 63rd Leg., p. 1460, ch. 554, § 1, eff. Sept. 1, 1973 (current version at *TEX. FAM. CODE ANN. § 51.01* (Vernon 2002)).

The court of criminal appeals asks only that we focus on subsection (5). *Id*. Therefore, we will limit our review to the purpose expressed in that subsection. As stated in our original opinion, [t]his appears to be a case of first impression in the state of Texas. This case presents the issue of whether a sister state's law enforcement officers must adhere to Texas's scheme of processing juvenile offenders for a statement taken by those officers to be admissible against the juvenile in a Texas court. *Vega, 32 S.W.3d at 900*.

On remand, however, as directed by the court of criminal appeals, we will not apply *Davidson*; we will apply Texas law--specifically, Title 3 of the Texas Family Code--but we will not apply it strictly; and we will analyze fairness to the parties focusing on the purpose of *section 51.01*.

Held: Affirmed

Opinion: In her first thirteen issues, Vega argues that, because her written statement was not procured in conformance with the Texas Family Code, it should have been excluded. The trial court denied Vega's motion to suppress her statement.

The court of criminal appeals has remanded the following issues for our review:

Issue five: Vega's written statement does not contain a certificate by a magistrate that Vega knowingly, intelligently and voluntarily waived her rights before making the statement as required by *section 51.09*;

Issue six: Vega was never advised of her rights by a magistrate before being interrogated as set out in *section 51.09*;

Issue seven: Vega was never presented before a magistrate at any time before giving her statement as provided for in *section 51.09;*

Issue nine: Vega was detained for more than six hours before the conclusion of her statement in violation of *section 52.025*;

Issue ten: Vega's statement was not signed in the presence of a magistrate with no law enforcement officer present as required by *section 51.09*;

Issue eleven: Vega's statement was signed in the presence of at least one law enforcement official who was armed in violation of *section 51.09*; and

Issue thirteen: Vega was improperly left unattended in the interview in violation of *section 52.025*.

In remanding these issues, the court of criminal appeals determined that the following circumstances violated provisions of Title 3:

> Vega arrived at the police station at about 10:45 a.m. Her written statement was signed at about 9:40 p.m. As permitted by Illinois law, the youth officer who presided at the signing was an armed police officer. Vega was left alone in the interrogation room for several periods before she was taken to the juvenile holding facility. From the record at hand, it appears that Vega was not taken before a magistrate.

The court further concluded, however, that a violation of the family code, in this particular case, did not necessarily dispose of the issue of admissibility.

a. Absence of a Magistrate

On remand, the court of criminal appeals has directed this Court to analyze the effect of the absence of a magistrate on the admissibility of the challenged statement in a context of fairness to the parties, focusing on the purpose expressed in *section 51.01 of the family code*, which is "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced."

Our analysis begins with the word, "fair." It is not defined by statute; therefore, we must give the language its plain and ordinary meaning. Black's Law Dictionary defines "fair" as "1. Impartial; just; equitable; disinterested," and "2. Free of bias or prejudice." The Supreme Court of Wyoming clarifies the definition by comparing "fair" with the following similar terms:

> FAIR, the most general of the terms, implies a disposition in a person or group *to achieve a fitting and right balance of* claims or *considerations* that is free from undue favoritism even to oneself, or implies a quality or result in an action befitting such a disposition.
> * * * * * *
>
> JUST stresses, more than FAIR, a disposition to conform with or conformity with the standard of what is right, true, or lawful, despite strong, esp. personal, influences tending to subvert that conformity . . . (a just statement of the facts) . . . .
> * * * * *
>
> IMPARTIAL stresses an absence of favor or prejudice in judgment.
> *Casteel v. News-Record, Inc., 875 P.2d 21, 24 (Wyo. 1994)* (emphasis added) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

The ordinary and obvious meaning of fair does not require that the process, which in this case is the process utilized to obtain Vega's statement, be precise or accurate. *See id*. (concluding that the meaning of fair does not require the report to be true or accurate). What is required is that the process have the qualities of impartiality and honesty. It is a process that is free from prejudice, favoritism, and self-interest. These parameters help define what is a fitting and right balance of considerations. Therefore, determining fairness to Vega and the State, we ask whether the process of taking Vega's statement in Illinois in the absence of a magistrate was exercised and enforced in a manner that achieved a fitting and right balance of

considerations such that both parties were assured a fair hearing where the parties' legal rights were recognized and enforced.

In order to identify Vega's considerations, we must review the responsibilities of the magistrate as set out in *section 51.09 of the family code*. Under *section 51.09*, the magistrate is to ascertain whether the accused juvenile wishes to waive her constitutional rights. *Section 51.09* provides that the magistrate must provide appropriate warnings to the juvenile before the making of the statement. [18] The statement must be signed in the presence of the magistrate with no law enforcement officer or prosecuting attorney present except for a bailiff or law enforcement officer who is unarmed, if the magistrate determines it necessary. Additionally, the magistrate must certify that she has determined "that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights."

18 In reviewing Vega's fourth issue, the court of criminal appeals determined that the warnings Vega received were sufficient to comply with Texas law to the extent necessary to carry out Texas's intended purpose and public policy. Therefore, we do not address the sufficiency of the *Miranda* warnings; rather, we address the absence of a magistrate during the warnings.

Therefore, under *section 51.09*, Vega's considerations involve her legal right to have her constitutional rights thoroughly explained so that any waiver of those rights is made voluntarily and uncoerced, and knowingly and intelligently. An additional consideration under *section 51.09* is to reduce the impact of armed law enforcement personnel on Vega. Also, under *section 51.01*, Vega's considerations include being assured that a fair hearing will result from the simple judicial procedure through which this statutory right is recognized, executed, and enforced.

(1) Voluntary and Uncoerced

A voluntary statement is the product of a free and deliberate choice rather than intimidation, coercion, or deception. A court must examine the totality of the circumstances surrounding the interrogation to determine if a confession was voluntary and uncoerced.

At the motion to suppress hearing, Detective Gregory Biochi testified that he issued *Miranda* warnings to Vega during her first interview with law enforcement officers at 12:45 p.m. Vega did not ask for an attorney or seek to remain silent; instead, she agreed to talk. Assistant State's Attorney Michael Falagario interviewed Vega at 3:30 p.m. ASA Falagario testified that he advised Vega of her rights and explained that he was a prosecutor, an attorney assisting the police, and not Vega's attorney. Vega said that she understood who he was. ASA Falagario testified that he spoke to Vega alone to make sure she was being treated "okay," that she did not need anything, and that she had no complaints. He explained to Vega the possibilities concerning giving a statement. Vega said that she had been treated well, and agreed to give a handwritten statement. After Vega agreed to make a statement, ASA Falagario left the interview room in order to take a statement from Nonn and did not return until 7:30 p.m. when he took Vega's statement.

Chicago Police Youth Officer Linda Paraday introduced herself to Vega at approximately 4:00 p.m. and read Vega her rights. Youth Officer Paraday also informed Vega that she would be tried as an adult. Vega replied that she had heard those warnings before. Youth Officer Paraday talked with Vega while they waited for ASA Falagario, and she explained to Vega that she was there for her if she needed anything. Youth Officer Paraday testified that she wore a weapon under her blazer, but it was not visible to Vega.

Considering all of the testimony in the record, the totality of the circumstances surrounding Vega's

interrogation suggests that her statement was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Vega's rights were explained to her. In addition, before making her statement, Vega was read the written warnings on the statement, stated that she understood the warnings, and signed on the line below the warnings. Vega never invoked her right to remain silent or to seek counsel. ASA Falagario and Youth Officer Paraday testified that they each spoke with Vega privately and asked if she was being treated okay and if she needed anything. During these discussions, Vega did not make any indication that she was treated unfairly or was coerced in any way. Vega was also allowed to speak with her mother before signing the statement. Furthermore, because Youth Officer Paraday's weapon was not visible to Vega, its presence during the making of the statement does not suggest coercion. Accordingly, we conclude that Vega's statement was voluntary and uncoerced.

(2) Knowingly and Intelligently

To knowingly and intelligently abandon a constitutional right, the accused must be aware of both the nature of the right being abandoned and the consequences of the decision to abandon it. A court must examine the totality of the circumstances surrounding the interrogation to determine if the accused had the requisite level of comprehension to knowingly and intelligently abandon a constitutional right.

Considering all of the testimony in the record, the totality of the circumstances surrounding the interrogation suggests that Vega was aware of both the nature of the rights that she abandoned and the consequences of the decision to abandon those rights. We therefore conclude that Vega made her statement knowingly and intelligently.

Accordingly, Vega's legal rights were explained to her so that her statement was made voluntarily, uncoerced, knowingly, and intelligently. We cannot conclude that Vega's considerations were affected by the absence of a magistrate. The procedures utilized were sufficient to carry out the underlying purpose of the Texas requirements. We therefore conclude that Vega's constitutional and other legal rights were recognized and enforced, and she was assured a fair hearing as directed by *section 51.01 of the family code*.

The Texas provisions are not constitutionally mandated; they were added to provide a mechanism to make sure that a juvenile's right against self-incrimination was protected when an attorney was not present during questioning. The underlying purposes of the Texas requirements were accomplished and Vega's constitutional rights upheld. The process of taking Vega's statement in Illinois in the absence of a magistrate was exercised and enforced in a manner that achieved a fitting and right balance of considerations such that both parties were assured a fair hearing where the parties' legal rights were recognized and enforced. While the process was not precise and violations of the Texas Family Code occurred, based on the record before us, the process was fair to both Vega and the State. It was impartial, honest, and free from prejudice, undue favoritism, and self-interest. *See Casteel, 875 P.2d at 24*. It achieved a fitting and right balance of considerations. *Id*.

Our evaluation of the "fairness" issue compels a conclusion that Vega's statement was properly admitted under Texas law. Accordingly, we conclude the trial court correctly determined that those actions adequately protected Vega, notwithstanding the absence of the magistrate, making the statement admissible. Thus, the trial court did not err in denying her motion to suppress. We overrule issues five, six, seven, ten, and eleven.

b. *Section 52.025* Violations

In issues nine and thirteen, Vega contends that her statement should be suppressed because the Illinois authorities violated *section 52.025 of the family code*. Specifically, she contends that she was detained more than six hours before the conclusion of her statement, and that she was improperly left unattended in the interview room. The court of criminal appeals agreed that these circumstances violated provisions of Title 3, specifically those found in *section 52.025*.

However, unlike *section 51.095(a)* discussed above, *section 52.025* is not an independent exclusionary statute. *Gonzales v. State, 67 S.W.3d 910, 912 (Tex. Crim. App. 2002)*. Therefore, as the court of criminal appeals explained in *Gonzales,* in order for a juvenile's written statement to be suppressed because of a *section 52.025* violation, there must be some exclusionary mechanism. *Id*. That mechanism is *section 51.17 of the family code* which provides that "Chapter 38, Code of Criminal Procedure, applies in a judicial proceeding under this title." *Id*. Thus, at the direction of the *Gonzales* Court, "if evidence is to be excluded because of a *section 52.025* violation, it must be excluded through the operation of *article 38.23(a)*." *Id*.

Article 38.23(a) provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence." Our decisions have established that evidence is not "obtained . . . in violation" of a provision of law if there is no causal connection between the illegal conduct and the acquisition of the evidence. *Id.* The defendant has the burden to show a causal connection between that violation and her ensuing confession.

Here, Vega had the burden to prove that the violations of *section 52.025* caused her to make her statement. Although Vega acknowledges the causal connection requirement, she has not claimed that these violations caused her to give her statement. Further, even had she raised this contention, Vega points to no evidence in the record demonstrating a causal connection between the violations and her decision to give a statement to the police, and we have found none. Accordingly, we overrule issues nine and thirteen.

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

INADMISSABLE TESTIMONY BY A THERAPIST REGARDING PREVIOUS SEXUAL ASSAULTS (ADMITTED BY RESPONDENT TO THERAPIST) WAS CONSIDERED HARMLESS WERE THE JUVENILE PROBATION DEPARTMENT'S PREDISPOSITION INVESTIGATION REPORT CONTAINED THE SAME ADMISSIONS.

¶ 07-4-3. **In the Matter of C.E.**, No. 03-05-00495-CV, 2007 Tex.App.Lexis 6367 (Tex.App.— Austin, 8/9/07) .

Facts: C.E. was detained in a juvenile-detention center after the trial court entered an order finding probable cause to believe that C.E. had engaged in delinquent conduct, that C.E. might be a danger to himself or threaten the safety of the public if released, and that C.E. resided in the same home with the victim. The court entered subsequent detention orders holding C.E. until the juvenile probation department verified that the victim was removed from the home. C.E. was later released on house arrest with electronic monitoring.

At the adjudication hearing, C.E. pleaded true to the State's petition, which alleged that he had engaged in delinquent conduct on or about September 20, 2004, by committing the offense of aggravated sexual

assault on a child younger than 14 years of age. *See Tex. Penal Code Ann. § 22.021*. The State's petition had previously been approved by a grand jury. *See Tex. Fam. Code Ann. § 53.045* (West 2002). C.E. waived reading of the allegations in the State's petition, stipulated to the State's evidence, and waived trial by jury. Based on C.E.'s plea and the evidence, the court found that C.E. had engaged in the delinquent conduct alleged in the State's petition and proceeded to conduct the disposition phase of the hearing.

During the disposition phase, the State called C.E.'s therapist, John Morris, who stated that he began counseling C.E. on December 20, 2004, after C.E. was released from the detention center. The record is unclear about who initiated these counseling sessions. Morris testified that he thought that C.E. "would be at a high risk to reoffend." When the prosecutor asked why Morris believed that, Morris began by responding, "The number of victims--"

Anticipating the therapist's testimony, defense counsel interrupted and requested to take Morris on voir dire examination "[t]o determine whether or not the statements that were made by [C.E.] were--are admissible." After questioning Morris briefly, counsel objected to the admission of "any statements" from C.E., arguing that Morris saw C.E. through the juvenile probation department, "and it was somewhat a condition--[C.E.] had to be ordered to." Counsel further argued that Morris was an arm of the State and that any statements by C.E. were made during a custodial interrogation that should have been preceded by a "*Miranda* warning." *See Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. Although he objected to C.E.'s statements "coming in," defense counsel stated twice that he did not object to Morris's opinion. The trial court overruled the objection but allowed a running objection on Morris's comments regarding his discussions with C.E.

When Morris continued with his testimony, he recalled C.E. stating that "he was there originally for committing a sexual offense against . . . a four-year-old boy" whom C.E. claimed to have assaulted two times. Morris then testified that on January 19, 2005, C.E. disclosed his sexual assaults of two additional victims: a four-year-old girl in Tennessee and a six-year-old boy in Texas. Morris opined that C.E. had a high risk to reoffend based on the number of his victims, his pattern of misbehavior, his violation of electronic monitoring, and the "cognitive distortions" that he used to justify his behavior. He stated that C.E. required long-term sex-offender treatment in a supervised, structured setting.

In addition to the witnesses' testimony, the record reflects that the court considered the juvenile probation department's predisposition investigation report, which states, "[C.E.] has since disclosed victimizing two other children, a six-year-old boy cousin and a 4-year-old girl." Defense counsel did not object to this statement.

After hearing the testimony and considering the predisposition investigation report, the trial court ordered C.E. confined for 10 years in the Texas Youth Commission and the Texas Department of Criminal Justice, Institutional Division, and ordered him to register as a sex offender for life. This appeal followed.

Held: Affirmed

Memorandum Opinion: In his sole issue, C.E. contends that the trial court violated his *Fifth Amendment* privilege against self-incrimination by admitting Morris's testimony concerning C.E.'s disclosure of two prior sexual assaults on children. C.E. asserts that he was not given a *Miranda* warning before the counseling session. *See id*. The State asserts that C.E. was not in a custodial-interrogation situation and that Morris was not acting as an agent of the State when C.E. made his disclosure. Alternatively, the State

argues that the admission of C.E.'s statements was harmless because the defense waived any objection to Morris's consideration of those statements in rendering his opinion about C.E.'s risk to reoffend.

C.E.'s disclosure of his previous sexual assaults on two other children was included in the juvenile probation department's predisposition investigation report. *Section 54.04 of the family code* authorizes the court to consider "written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses" at the disposition hearing. *See Tex. Fam. Code Ann. § 54.04(b)*; *see also In re J.A.W., 976 S.W.2d 260, 264 (Tex. App.--San Antonio 1998, no pet.)* (concluding that court could consider detention center reports that neither party offered into evidence during disposition hearing); *In re A.F., 895 S.W.2d 481, 486 (Tex. App.--Austin 1995, no writ)* (holding that court could consider social history report during disposition hearing).

In reaching its disposition, the court was entitled to consider the juvenile probation department's predisposition report, independent of Morris's testimony about what C.E. disclosed during his therapy session. Accordingly, any error in the court's ruling concerning the admissibility of Morris's testimony about C.E.'s previous sexual assaults was harmless. *See McNac v. State, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007)* (citing *Leday v. State, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998)* (holding that improper admission of evidence is not reversible error if same facts are shown by other evidence that is unchallenged)); *see also Tex. Fam. Code Ann. § 54.04(b)*. Because we have determined that any error in the admission of Morris's testimony about C.E.'s disclosure of two prior sexual assaults on children was harmless, we overrule C.E.'s sole issue.

Conclusion: Having overruled C.E.'s sole issue on appeal, we affirm the trial court's judgment.

THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN THE JUVENILE PROCESSING OFFICE, LISTENING TO STATEMENTS APPELLANT MADE TO HIS MOTHER DURING THEIR TELEPHONE CONVERSATION IN THE JPO WAS PERMISSIBLE.

¶ 07-4-6B. **Cortez v. State**, ___S.W.3d ___, No. 03-06-00359-CR, 2007 Tex.App.Lexis 6800 (Tex.App.— Austin, 8/21/07) .

Facts: On Friday afternoon, September 23, 2005, a group of Austin High School students had just gotten off the school bus when a Honda Accord pulled to the curb beside them. Witnesses to the shooting testified that the front passenger in the car said something to sixteen-year-old Christopher Briseno, who had just gotten off the bus. Then, several shots were fired from the car. Briseno was fatally shot in the head. His sixteen-year-old cousin, Adam Cantu, was shot in the legs.

As the investigation continued over the coming days and weeks, it was learned that six persons had been in the car when the shots were fired. In the front seat were Alan Ruiz, who was the driver, and appellant, who was the front passenger. In the back seat were Alan Ruiz's brother Humberto, his sister Pamela, Juan Soliz, and Victor Saramiento.

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Initially, the only occupant of the Accord identified to the police was Humberto Ruiz. The day after the shooting, Austin police officers went to the Ruiz residence, where they met Humberto, Alan, and appellant, who was sixteen years old. The three boys agreed to speak to the officers and were taken to the downtown

police station, where they arrived between 1:30 and 2:00 p.m., according to the officer's testimony at the suppression hearing. The officers also testified that they were not then aware of appellant's involvement in the shooting. Appellant was not under arrest or restraint, and he was allowed to wait in the lobby while the Ruiz brothers were being questioned.

Shortly after 4:00 p.m., appellant left the police station and walked to a nearby convenience store, where he called a friend for a ride. Meanwhile, statements by the Ruiz siblings gave investigators reason to believe that appellant was the person who had fired the shots that killed Briseno and wounded Cantu, Officers began to look for appellant and found him at the convenience store. Detective Armando Balderama testified that at 4:50 p.m., appellant was returned to the police station, advised that he was under arrest, and placed in an interview room that was designated as a juvenile processing office.

Balderama testified that he asked appellant if he wanted his parents to be notified. Appellant said that he did. Balderama tried to call appellant's mother, but he got no answer. Balderama successfully called appellant's father and told him that appellant was about to be transferred to the Gardner-Betts juvenile detention facility. Appellant was then taken to another location to await transfer.

Richard Bratton was the intake officer at Gardner-Betts on the evening of September 24, 2005. Bratton testified that upon appellant's arrival, he advised appellant of his rights while in detention and called his family. Bratton spoke to a person who he believed was appellant's brother, who was in turn speaking to appellant's mother in Spanish. Bratton told appellant's family some of the details of the offense for which appellant had been arrested, explained appellant's rights, and informed them of the visitation hours at the facility. Appellant's family was not able to visit him at Gardner-Betts that night because the intake process was not completed until after 9:00 p.m., when visitation ended.

Sunday, September 25

At 11:00 a.m. Sunday morning, Rodriguez and another officer, Hector Reveles, transported appellant from Gardner-Betts to the police station so that he could be advised of his rights by a magistrate.

After being advised of his rights by the magistrate, appellant was taken to the juvenile processing office. He refused to give the officers a statement and asked to speak to his parents. There was no telephone in the room, so Rodriguez dialed the number on his cell phone, gave the phone to appellant, and stepped outside. Through a microphone located in the room, Rodriguez heard appellant tell his mother that he had fired two shots but had not hit anyone, and that Alan Ruiz had fired the fatal shots. This is the last of the three challenged statements.

The trial

The juvenile court waived its jurisdiction and transferred appellant to district court for trial. At the trial, Cantu identified appellant as the front passenger in the Accord and as the person who shot him and Briseno. Jose Ortiz, another student who witnessed the shooting, also identified appellant as the front passenger and shooter. Both Cantu and Ortiz were certain that the driver of the car had not fired the shots. Another bystander, Esteban Zuniga, did not identify appellant, but he did testify (with some equivocation during cross-examination) that the front passenger was the person who fired the shots.

In his own testimony, appellant acknowledged being the front passenger in the Accord. He said that after he accepted a ride from Alan Ruiz, Ruiz showed him a pistol in the console and told him that "he had to kill two students who were in school because they were messing with his sister." After picking up the other passengers at the school, Ruiz followed the bus. As they drove, Ruiz handed the pistol to appellant and told him, "You're going to kill him." When appellant protested, Ruiz said, "Okay. Well, just tell him--ask him some questions, things I want to know." When Briseno got off the bus, Pamela Ruiz pointed and said, "Look, it's him." At Alan Ruiz's insistence, appellant asked Briseno if he was a Blood. Briseno denied it. Pamela Ruiz said, "He's telling lies. He's the one that was messing with me." Then she said, "Kill him. Kill him." With that, Alan Ruiz reached across appellant and began firing. According to appellant, Ruiz then handed the pistol to him and ordered him to shoot. Appellant testified that he was afraid of Ruiz, and that he fired two shots into the air.

Held: Affirmed

Opinion: In his fourth point of error, appellant contends that Rodriguez unlawfully eavesdropped on his telephone conversation with his mother on Sunday afternoon, September 25, after he had been taken before the magistrate. He argues that the use of a hidden microphone to listen to his conversation violated his reasonable expectation of privacy under the *Fourth Amendment*. He further argues that the officer's conduct constituted an unlawful, unauthorized interception of an oral communication.

Fourth Amendment

The *Fourth Amendment* serves to safeguard an individual's privacy from unreasonable governmental intrusions. A defendant may challenge the admission of evidence obtained by governmental intrusion only if he had a legitimate expectation of privacy in the place invaded. To determine whether a person had a reasonable expectation of privacy, it must be determined whether the person exhibited a subjective expectation of privacy and, if so, whether that subjective expectation is one that society is willing to recognize as reasonable. In this case, appellant exhibited a subjective expectation of privacy while speaking to his mother; the question presented is whether this expectation was reasonable.

Whether a subjective expectation of privacy is one that society recognizes as reasonable is a question of law. Among the factors to consider in answering this question are whether the accused: had a property or possessory interest in the place invaded; was legitimately in the place invaded; had complete dominion or control and the right to exclude others; took normal precautions customarily taken by those seeking privacy; put the place to some private use; and has a claim of privacy consistent with historical notions. A consideration of these factors leads us to conclude that appellant did not have a reasonable expectation of privacy in the police interview room that doubled as the juvenile processing office.[6] Appellant had no property or possessory interest in the office, no dominion or control of the office, and no right to exclude others from the office. Appellant was legitimately in the office only in the sense that he had been lawfully taken into custody by the police. Although appellant put the office to a private use, there is no evidence that he asked Rodriguez to leave the room or took any precautions to ensure his privacy. Finally, appellant's claim of privacy in a police station interview room is not consistent with historical notions of privacy.

6 There was no telephone in the interview room. Therefore, we assume that there was no sign warning that telephone calls from the room were monitored.

A similar case was recently considered by the court of criminal appeals. In *State v. Scheineman,*

Scheineman and his co-defendant were arrested and placed in separate interview rooms. *77 S.W.3d 810, 811 (Tex. Crim. App. 2002)*. The co-defendant asked a deputy if he could speak alone with Scheineman. *Id*. The deputy agreed, moved Scheineman into the room occupied by the co-defendant, and left the two of them alone. *Id*. The two men then discussed their criminal conduct while, unbeknownst to them, officers monitored and recorded their conversation. *Id*. Scheineman argued that the deputy's conduct had "lulled" him and his co-defendant into believing that their conversation was private and thereby gave them a legitimate expectation of privacy. *Id*. The court of criminal appeals disagreed. The court observed that a loss of privacy is an inherent incident of confinement, whether in a jail cell or a police station interview room. *Id. at 813*. After noting that there was no evidence that the deputy had given the two defendants any verbal assurance of privacy, the court held that society is not prepared to recognize a legitimate expectation of privacy in a conversation between two arrestees in a county law enforcement building, even if the arrestees are the only persons present and subjectively believe that they are unobserved. *Id*.

The evidence before us shows that Rodriguez dialed appellant's mother's telephone number, handed appellant the cell phone, and left the room. Appellant argues this conduct "tricked" him into believing that his telephone conversation with his mother was private. But as in *Scheineman*, there is no evidence that the officer gave appellant any express assurance that what he said to his mother would not be heard by others. The evidence supports the trial court's finding that Rodriguez did not engage in any dishonesty or deliberately mislead appellant into believing that the conversation was private. Although appellant's juvenile status may have entitled him to rights and considerations not afforded adults under the same circumstances, we do not believe that society is prepared to accept as reasonable appellant's subjective belief that he could sit in a police interview room and discuss on the telephone his role in a murder for which he had been arrested without being overheard by the police, at least in the absence of any evidence of police conduct intended to give appellant the impression that his conversation would be private.

Article 18.20

Appellant's contention that *article 18.20* was violated was not raised below. No violation of the statute is shown in any case. An "oral communication" subject to the statute is one that is "uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." *Tex. Code Crim. Proc. Ann. art. 18.20, § 1(2)*. We have held that *article 18.20* protects persons engaged in oral communications under circumstances justifying an expectation of privacy. Because appellant did not have a reasonable expectation of privacy under the circumstances shown, he was not justified in the expectation that his statements would not be intercepted. *See id*.

Harmless error

As recounted by Rodriguez in his testimony at trial, appellant's statements to his mother over the telephone were entirely consistent with appellant's own testimony. According to Rodriguez, appellant told his mother that he had fired two shots that did not hit anyone, and that Alan Ruiz had fired the shots that struck the two victims. Appellant testified to the same facts. Defense counsel argued to the jury that the statements appellant made to his mother tended to corroborate his trial testimony by showing that he had consistently told the same story. Under the circumstances, if Rodriguez violated appellant's *Fourth Amendment* or statutory rights by listening to appellant's conversation with his mother, we are satisfied beyond a reasonable doubt that the admission of appellant's statements during that conversation did not contribute to his conviction or punishment.

Conclusion: Appellant did not have a reasonable expectation of privacy in the juvenile processing office, and the officer did not violate the *Fourth Amendment* by listening to the statements appellant made to his mother during their telephone conversation. For the same reason, *article 18.20* was not violated. And because the statements appellant made to his mother during the conversation were consistent with appellant's trial testimony, any error in the admission of the statements was harmless. Point of error four is overruled.

A CHILD BEING ADMONISHED BY A MAGISTRATE NEED NOT REQUIRE THAT EVERY RIGHT BE INDIVIDUALLY WAIVED, BUT ONLY THAT THE JUVENILE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE EACH RIGHT.

¶ 08-1-1. **In the Matter of J.L.**, MEMORANDUM, No. 10-06-00246-CV, 2007 Tex.App.Lexis 8908 (Tex.App.— Waco, 11/7/07) .

Facts: On the early morning of June 19, 2005, fifteen-year-old J.L. and two other young men were approached by police officers after the officers received information that an assault and stabbing had occurred in the area. The officers noticed specks of blood on J.L.'s pants and shoes and, upon a search, found a knife in J.L.'s pocket. They arrested and transported him to the Brazos County Juvenile Detention Center.

J.L. was booked into the detention center at 6:15 a.m. on the charge of unlawfully carrying a weapon. District Judge Rick Davis was telephoned at home and was asked to come to the detention center to apprise J.L. of his rights. When Judge Davis arrived, no pre-printed warning forms were available, so he typed up a warning sheet that included his conclusions as to probable cause of the crime of aggravated assault and a list of J.L.'s rights as enumerated in *section 51.095 of the Texas Family Code*. At the detention center, Judge Davis introduced himself to J.L. as "Judge Davis" and told him that he was there to explain his rights. Judge Davis began a tape recorder, determined that J.L. spoke English, and then read to him the appropriate warnings. Judge Davis asked J.L. whether he would like to make a statement, to which he responded, "I don't know." Judge Davis reiterated that J.L. did not have to make a statement, and J.L. then circled "I DO" want to make a statement and signed the form. After signing the form, J.L. was questioned, and during the interview he admitted stabbing the complainant with the knife.

J.L. filed a pretrial motion to suppress the recorded statement. At the suppression hearing, Judge Davis testified that it was clear to him that J.L. understood the warnings and he was convinced that J.L. knowingly, intelligently and voluntarily waived his rights before giving his statement to the detective. Juvenile probation officer Angela Anders testified that J.L. had previously been adjudicated for misdemeanor offenses two times and on both occasions he was represented by an attorney. Detective Agnew testified that at no time during the interview did he threaten J.L. or make any promises, nor did J.L. request to have an attorney present or stop the interview. Dr. Saunders, a clinical psychologist, gave expert testimony for J.L. Dr. Saunders testified that after meeting with J.L., she determined that he "didn't understand his rights -- especially related to the legal implications." Specifically, she said that he did not understand the concept of "legal counsel" to mean attorney representation.

The trial court denied the motion to suppress, finding that the confession was voluntary and legally obtained. This appeal was abated so the trial court could issue findings of fact and conclusions of law supporting its denial of the motion to suppress.

J.L.'s sole issue contends that his statement was not voluntary under the *Fifth* and *Fourteenth Amendments*. Specifically, he asserts that the statement was involuntary because of (1) the circumstances related to his age and the capacity in which the warnings were given; and (2) he did not understand his right to have a lawyer present.

Held: Affirmed

Memorandum Opinion: The record does not support J.L.'s contention that he did not have a full understanding of the proceedings and of the possible consequences of confessing. The totality of the circumstances reflects that although J.L. was fifteen at the time of the offense charged, he was of normal intelligence and was familiar with the juvenile adjudication process through his two previous arrests. Furthermore, the recorded statement reveals that although the duration of the reading of rights was only three minutes and thirty-five seconds, J.L. could hear and understand his rights as read by Judge Davis. In addition, after J.L. was read his rights, he was asked by Judge Davis whether he would like to submit a statement. His initial response was "I don't know." Judge Davis reassured J.L. that he was not required to make a statement, and it was at this time J.L. agreed to give a statement. Converse to the appellant's argument, J.L.'s age, the manner and means by which the warnings were given, and his intellectual capacity (which would include his ability to understand the juvenile process because of his previous experiences) all appear to have positively aided in his decision to voluntarily make a statement.

J.L. argues that his confession was not obtained within the scope of the juvenile warning requirements articulated in *section 51.095(a)(5)(A) of the Texas Family Code*. He argues that each and *every* right must be waived individually by the juvenile. *Section 51.095(a)(5)(A)* reads:

> (a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:
> . . .
> (5) subject to Subsection (f), the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:
> (A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning.
> *TEX. FAM. CODE ANN. § 51.095(a)(5)(A)* (Vernon 2002).

The confession of a juvenile is not admissible at trial unless it is obtained in compliance with the *section 51.095* warnings. *See In re L.M., 993 S.W.2d 276, 291 (Tex. App.--Austin 1999, pet. denied)*. A magistrate is required to read the warnings listed in *section 51.095(a)(1)(A)* to the juvenile suspect before any interrogation by law enforcement. *Id. at 290-91*.

J.L. argues that although the warnings required by *51.095* were given, the waivers as detailed in *section 51.095(a)(5)(A)* were not secured in conformity with the statute. In support, J.L. points to Judge Davis's testimony regarding his self-drafted document:

> [Q]: Okay. And when you drafted this form, you created a line down here. I don't know what you'd call that. Kind of a separated thing; right?

[A]: Yes.
[Q]: And then underneath it you created this statement that says, "Have had the above-listed rights read to me and I understand them, I. Do or do not, circle one, want to make a statement at this time"; is that correct?
[A]: Yes.
[Q]: Judge, is there any reason you didn't also include, "I do or I do not want an attorney at this time," so that he would have the opportunity to waive that right as well?
[A]: I cannot recall some specific reason for not writing that there.
[Q]: And is there any reason you also did not include the right that he had the right to terminate the interview at any time and that he understood that as well, specifically?
[A]: Well, no specific reason other than, you know, it was already set forth up here.

Section 51.17 of the Family Code provides that Chapter 38 of the Texas Code of Criminal Procedure applies to judicial proceeding in juvenile cases. *TEX. FAM. CODE ANN. § 51.17* (Vernon Supp. 2005). The Fourteenth Court of Appeals has construed *section 51.095* consistently with the language of *article 38.22 Code of Criminal Procedure*. *See Marsh v. State, 140 S.W.3d 901, 912 (Tex. App.--Houston [14th Dist.] 2004, pet. ref'd)*. In *Marsh,* the juvenile defendant contended that the State failed to establish that he knowingly, intelligently, and voluntarily waived his rights, although a magistrate read the required warnings and the juvenile indicated he understood those warnings. *Id. at 905*. The court overruled that complaint, pointing out that *article 38.22* does not require an express waiver of rights. *Id.* (citing *Rocha v. State, 16 S.W.3d 1 (Tex. Crim. App. 2000)*).

Like the defendant in *Marsh,* J.L. made a written verification of his choice to give a statement and told Judge Davis that he understood the statutory warnings. *Section 51.095(a)(5)(A)* does not require that every right be individually waived either in writing or verbally, but only that the juvenile knowingly, intelligently and voluntarily waive each right. In viewing the manner in which the warnings were given to the appellant, we find that *section 51.095(a)(5)(A)* was complied with.

Conclusion: The record shows that, under the totality of the circumstances, J.L. made his statement knowingly and voluntarily, and not as the product of coercion. *See In re R.J.H., 79 S.W.3d at 6*. In addition, the requirements of *section 51.095(a)(5)(A)* were met. The trial court did not err or abuse its discretion in denying the motion to suppress. Accordingly, we overrule J.L.'s issue and affirm the trial court's judgment.

[OUT OF ILLINOIS] EVIDENCE DID NOT SHOW THAT JUVENILE KNOWINGLY WAIVED HIS MIRANDA RIGHTS AFTER BEING PHYSICALLY ABUSED WHILE IN POLICE CUSTODY.

¶ 08-1-4. **Illinois v. Richardson**, 376 Ill. App. 3d 537, 875 N.E.2d 1202, 2007 Ill. App. LEXIS 1032, 314 Ill. Dec. 915 (9/25/07) .

Facts: Defendant, a 16-year-old, was convicted following a jury trial in the Circuit Court of Cook County (Illinois) of the first degree murder of his 11-month-old daughter and was sentenced to 40 years' imprisonment.

Prior to trial, the defense filed a motion to suppress defendant's videotaped statement on the grounds that it was involuntary and that defendant was unable to knowingly waive his *Miranda* rights because he

was physically abused while in police custody.

At the hearing on the motion, Detective Edward O'Connell testified that on February 9, 2001, he was assigned to defendant's case. At approximately 8:30 that evening, Detective O'Connell arrived at Area 1 headquarters. At that time, defendant was brought upstairs to Area 1 from the 2nd District. Youth Investigator Nolan had defendant in custody. Detective O'Connell interviewed defendant at approximately 9:08 p.m. Present at the interview were youth investigator Nolan, Detective Zalatoris, defendant, and defendant's mother, Ellen Jean Brounaug h. Youth investigator Nolan read defendant his *Miranda* rights; defendant waived those rights and proceeded to make admissions. During the interview, Detective O'Connell noticed that defendant had a bump over his eye and his eye was swollen. Detective O'Connell asked defendant about the bump and defendant stated that it happened in the lockup. Detective O'Connell could not recall if he asked defendant exactly what happened in the lockup but testified that juveniles only get fingerprinted in the lockup and are not housed there. Detective O'Connell stated that he did not talk to the lockup keeper and could not remember if he reported defendant's injuries to anyone and did not include any information regarding defendant's eye injury in his reports. The interview lasted approximately one hour. Subsequently, Detective O'Connell called Assistant State's Attorney John Heil. Heil arrived at approximately 10 p.m. and continued to interview defendant. During that interview, defendant made statements admitting his participation in the crime. Assistant State's attorney Heil asked defendant about the bump on his eye and defendant told Heil that he was punched in the lockup A videotaped statement was made the following morning at approximately 9:27 a.m.

Detective John Zalatoris testified that on February 9, 2001, he and his partner, Detective O'Connell, were assigned to the murder of Diamond Clark. After going to the crime scene, he and his partner went back to Area 1. When they arrived there, defendant was in the 2nd District downstairs. When defendant was brought upstairs to Area 1, he had a swollen left eye. Defendant stated that he was hit by someone in the lockup. Detective Zalatoris did not ask for any details regarding the beating, but he did testify that juveniles are not kept in cells with adults but are housed in cells by themselves. Detective Zalatoris subsequently learned that the 2nd District had contacted the Office of Professional Standards regarding defendant's eye injury.

At approximately 9:08 p.m., Detective Zalatoris and Detective O'Connell interviewed defendant. Youth investigator Nolan first gave defendant his *Miranda* rights. Defendant waived those rights and agreed to speak to the detectives. Defendant made a statement and then Detective Zalatoris confronted him with the bite marks on the child. Defendant gave a further statement and Assistant State's Attorney Heil was called. Detective Zalatoris denied punching or physically abusing defendant. Representatives from the Office of Professional Standards were allowed to interview defendant after he made his videotaped confession.

Assistant State's Attorney John Heil testified that on February 9, 2001, he received an assignment regarding the aggravated battery of Diamond Clark. Heil testified that he arrived at Area 1 headquarters at approximately 10 p.m. and spoke with Detectives O'Connell and Zalatoris and youth investigator Nolan. Heil was informed that defendant had a swollen left eye as a result of something that happened in the lockup. Heil did not see defendant at that time but left Area 1 and went back to the hospital to check on the status of Diamond. After midnight, Heil returned to Area 1 to interview defendant. With defendant's mother present, Heil informed defendant of his *Miranda* rights and defendant agreed to speak with Heil. Defendant made a statement to Heil. Subsequently, Heil asked Detectives Zalatoris and O'Connell to leave the room. Heil then asked defendant how he had been treated since arriving in Area 1 and if what he told Heil regarding the crime had anything to do with his swollen eye. Defendant told Heil that he had been treated

fine and that what he had been telling Heil was the truth and his statement had nothing to do with what happened earlier regarding his eye. After the detectives and youth investigator came back into the room, Heil talked to defendant about his options of memorializing the statement he had previously given to Heil, youth investigator Nolan and Detectives Zalatoris and O'Connell. Defendant chose to give a videotaped statement. The videotaped statement was taken at 9:27 a.m. on February 10, 2001. Heil stated that at no time did he or any of the detectives punch defendant or otherwise coerce defendant to give a statement.

The videotaped confession was played in open court. In the video, defendant stated that he was advised of his *Miranda* rights and agreed to have his statement videotaped. Defendant's mother was present during the statement. Defendant stated that earlier he had told Assistant State's Attorney Heil that during the late morning and early afternoon of February 9, 2001, he bit Diamond three times, struck her numerous times with a coat hanger and a belt, used his hand to hit her in the face once and struck her in the ribs and shook her. Assistant State's Attorney Heil asked defendant about his swollen eye. Defendant stated that the injuries to his eye occurred in the lockup after he was taken to the 2nd District police station but before he was brought up to Area 1. Defendant further stated that the statement he was giving did not have anything to do with what happened to his eye. Defendant then proceeded to give a detailed account of the events leading to Diamond's death.

Youth investigator Michael Nolan testified that on February 9, 2001, he was assigned to defendant's case. After receiving the assignment, he met with Officer Hayes, who had arrested defendant in connection with the aggravated battery of Diamond Clark. He briefly spoke with Officer Hayes and defendant and then went to the hospital to check the condition of the victim. After arriving back at Area 1, he noticed that defendant was still downstairs in the 2nd District interview room with Officer Hayes. Investigator Nolan and Detectives Zalatoris and O'Connell walked in the interview room to speak with Officer Hayes. Investigator Nolan noticed that the left side of defendant's face, around his eye, was swollen. Defendant told Investigator Nolan that while he was being processed in the lockup, one of the lockup personnel struck him in the face. Officer Hayes informed him that the Office of Professional Standards was contacted regarding defendant's injury. Defendant was then brought to Area 1 and was placed in an interview room. Defendant's mother was called and subsequently arrived at the station. At 9:08 p.m., Investigator Nolan had a conversation with defendant while his mother was present. Defendant was "Mirandized" and agreed to give a statement. Defendant later gave another statement after being confronted with evidence of several bruises and bite marks on his daughter's body. Assistant State's Attorney Heil was then called in and defendant later gave a videotaped statement wherein he inculpated himself in the death of Diamond Clark.

After hearing all of the evidence, the trial court denied defendant's motion, stating:

> "The evidence is overwhelming that he was advised of his rights, understood his rights, was not threatened or coerced in any manner to give a statement implicating himself regarding the death of his daughter.
>
> Based on the totality of the circumstances, all of those involved with the taping of the defendant's statement, this Court finds that it was given freely and voluntarily and not in violation of any of the defendant's constitutional rights."

Defendant argues that the trial court erred in denying his motion to suppress where the State failed to prove by clear and convincing evidence that defendant's eye injury was not inflicted in order to obtain a confession.

Held: Reversed and Remanded

Opinion: When a defendant moves to suppress his confession, the State has the burden of establishing that the confession was voluntary. *People v. Woods, 184 Ill. 2d 130, 145, 703 N.E.2d 35, 234 Ill. Dec. 423 (1998).* A confession is voluntary when, based on the totality of the circumstances, the accused's will was not overborne at the time he confessed. *People v. Kincaid, 87 Ill. 2d 107, 117, 429 N.E.2d 508, 57 Ill. Dec. 610 (1981).* In determining the voluntariness of a confession, the court considers the totality of the circumstances, including the defendant's age, intelligence, background, experience, mental capacity, education, physical condition, and experience with the criminal justice system, the legality of the detention, the duration of the detention, the duration of questioning, and any promises, threats, deceit, and physical or mental abuse by police. *People v. Gilliam, 172 Ill. 2d 484, 500-01, 670 N.E.2d 606, 218 Ill. Dec. 884 (1996).* When the defendant is a juvenile, additional factors such as whether a parent or other interested adult was present are considered important in determining the voluntariness of a confession, but no one fact is dispositive. *People v. Haynie, 347 Ill. App. 3d 650, 653, 807 N.E.2d 987, 283 Ill. Dec. 146 (2004).* Because the taking of a juvenile's confession is a sensitive concern, "the 'greatest care' must be taken to assure that the confession was not coerced or suggested that "'it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." '[Citations.] *In re G.O., 191 Ill. 2d 37, 54, 727 N.E.2d 1003, 245 Ill. Dec. 269 (2000).*

If, however, a defendant establishes that he was injured while in police custody suggesting that the confession was involuntarily given, the State must show by clear and convincing evidence that the injuries were not inflicted as a means of obtaining the confession. *People v. Wilson, 116 Ill. 2d 29, 40, 506 N.E.2d 571, 106 Ill. Dec. 771 (1987).* In determining whether a confession was given voluntarily, a court of review will give great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence. *In re G.O., 191 Ill. 2d at 50.*

The only question that must be answered here is whether the State has shown by clear and convincing evidence that defendant's injury was not related in any way to his confession. The State claims that it has met it's burden because the evidence established that defendant's eye was injured while he was in the lockup in the 2nd District and not while he was being interrogated.

The facts of *People v. Woods, 184 Ill. 2d 130, 703 N.E.2d 35, 234 Ill. Dec. 423 (1998),* are similar to the facts of this case. In *Woods,* as in the case at bar, it was undisputed that the defendant had sustained injuries to his face while in police custody. From the time the defendant arrived at the police station until he was booked and photographed three days later, the defendant was either in the presence of police officers or in a single-person holding cell. The defendant moved to suppress his confession on the basis that it was involuntary. Our supreme court held that given that the defendant was in police custody, the State should have been able to prove whether the injuries he sustained occurred before or after his confession, as well as the cause of the injuries. *Woods, 184 Ill. 2d at 150.* The *Woods* court ultimately ruled that the defendant's confession should have been suppressed because the State failed to adduce clear and convincing evidence as to when or how the defendant was injured, or that the defendant's injuries were unrelated to his confession. *Woods, 184 Ill. 2d at 150.*

Likewise here, the State failed to meet its burden to show that defendant's injuries were unrelated to his confession. The State's witnesses for the motion to suppress consisted of police officers who denied that defendant's confession was coerced. The detectives and youth investigator testified that defendant had a

swollen left eye when they began their interview. When they asked defendant about the injury, they claim that defendant notified them that he had been punched in the face while in the lockup. Not one of them attempted to elicit additional information from defendant regarding his injury, nor did any notation of the injury appear in any reports. There simply was no evidence presented by the State at the hearing on the motion that explained how or why defendant was injured in police custody.

The State urges that defendant himself admitted in his videotaped statement that he was punched in the eye in the lockup. Assuming that defendant was injured while in the lockup, here, we have a somewhat unintelligent, unsophisticated juvenile who has been injured while in police custody after being arrested on suspicion of murder. After being arrested, defendant was not free to leave and was therefore at the mercy of the police personnel involved in this case. We are not convinced that, *given the facts of this case*, defendant would be able to separate the fear associated with being punched by police personnel from any subsequent interactions with police officers or detectives involved in this case. In addition, it is particularly troubling that personnel from the Office of Professional Standards were prevented from speaking with defendant regarding his injury until after defendant gave the videotaped statement. Consequently, we are not convinced that the injury defendant suffered did not ultimately result in the statement wherein he inculpated himself in the death of his daughter. *In re G.O., 191 Ill. 2d 37, 54, 727 N.E.2d 1003, 245 Ill. Dec. 269 (2000).*

Conclusion: Although the State claims that defendant was repeatedly "Mirandized", did not complain of any pain from his eye injury and did not request medical treatment, we find these facts irrelevant to the ultimate issue. Defendant's conviction must be reversed and remanded for a new trial because the use of a coerced confession is never harmless error. *Wilson, 116 Ill. 2d at 41-42.* As this issue is dispositive, we need not reach defendant's remaining claims.

Based on the foregoing, the judgment of the trial court is reversed and the cause is remanded for a new trial.

CRIMINAL PROCEEDINGS—

ONCE THE STATE ESTABLISHES A PRIMA FACIE SHOWING OF A PRIOR CONVICTION, IT BECOMES THE DEFENDANT'S BURDEN TO MAKE AN AFFIRMATIVE SHOWING OF ANY DEFECT IN THE JUDGMENT.

¶ 07-4-8. **Terrell v. State**, 228 S.W.3d 343, 2007 Tex.App.Lexis 4142 (Tex.App.— Waco, 5/23/07) .

Facts: Defendant challenged a decision from the 85th District Court Brazos County, Texas, which convicted him of indecency with a child. He also challenged the enhancement of his sentence with a prior juvenile conviction.

Issue One Omitted

In his second issue, Terrell asserts that the evidence is legally insufficient to support the trial court's "true" finding on the enhancement paragraph. At punishment, the State introduced, without objection, a penitentiary packet containing Terrell's fingerprints and a judgment for Terrell's 1982 "aggravated rape" conviction. He was sentenced to thirty years in prison for that offense. After both sides rested, Terrell's

counsel argued that Terrell was only age sixteen when the 1982 judgment was rendered and concluded that the State failed to prove a final conviction. On appeal, Terrell contends that the pen packet affirmatively shows that he was sixteen at the time that offense was committed, and thus the judgment is void because Terrell was too young to be convicted of the offense. *See Tex. Fam. Code Ann. § 51.02(2)(A)* (Vernon Supp. 2006).

Held: Affirmed

Opinion: The State establishes a prima facie showing of a prior conviction by introducing a copy of the judgment and sentence in each case used for enhancement and connecting them with the defendant. *Johnson v. State, 725 S.W.2d 245, 247 (Tex. Crim. App. 1987).* Once the State introduces a judgment and sentence and connects the defendant with them, we presume regularity in the judgment. *Id.* The burden then shifts to the defendant, who must make an affirmative showing of any defect in the judgment, whether that is to show no waiver of indictment or no transfer order. *Id.* Terrell does not argue that the pen packet was inadmissible; he contends that he was not required to do anything further because the pen packet affirmatively showed on its face that his age was sixteen. He must do more, however. The defect that he must show was that there was no order transferring him from juvenile court to district court. *See id.*; *Tex. Fam. Code Ann. §§ 51.08, 54.02* (Vernon 2002 and Supp. 2006). He did not make that showing. Because the State made a prima facie showing of Terrell's prior conviction, the evidence is legally sufficient to support the trial court's finding. We overrule Terrell's second issue.

Conclusion: Having overruled Terrell's two issues, we affirm the trial court's judgment.

TYC FELONY CONVICTIONS COMMITTED PRIOR TO JANUARY 1, 1996, CANNOT BE CONSIDERED FOR ENHANCEMENT PURPOSES IN ADULT COURT.

¶ 07-4-10. **Jackson v. State,** No. 04-07-00083-CR, 2007 Tex.App.Lexis 7550 (Tex.App.— San Antonio, 9/19/07) .

Facts: Jackson was indicted for murder, a first-degree felony with a punishment range of between five and ninety-nine years or life in prison. The indictment listed two previous felony convictions that were available for enhancement purposes: (1) a 1994 juvenile conviction for arson; and (2) a 1998 conviction for aggravated assault with a deadly weapon. During the punishment phase of trial, Jackson pleaded "not true" to both of the enhancement allegations. Pursuant to the Texas Penal Code, the trial court instructed the jury that it was to enhance Jackson's punishment range to between fifteen and ninety-nine years or life if it found that one of the enhancement allegations was true and to between twenty-five and ninety-nine years or life if it found that both enhancement allegations were true. The jury found both enhancement allegations true and assessed punishment at life in prison. This appeal followed.

Held: Affirmed

Opinion: Jackson contends that the trial court erred in including his 1994 juvenile conviction for enhancement purposes in the charge on punishment. When reviewing charge errors, we first determine whether error exists in the charge and then determine whether sufficient harm resulted from the error to require reversal. *Abdnor v. State, 871 S.W.2d 726, 731-32 (Tex. Crim. App. 1994).* Here, the State concedes that Jackson's 1994 juvenile conviction could not be used for enhancement purposes. Juvenile felony

convictions can be considered for enhancement purposes only if the offense was committed on or after January 1, 1996. *See TEX. FAM. CODE ANN. § 51.13(d)* (Vernon Supp. 2007). Because Jackson's juvenile conviction occurred in 1994, the trial court erred in including the conviction as an enhancement in the charge.

We turn now to an analysis of the harm caused by the error. If the defendant made a timely objection at trial, he need only prove that he suffered "some harm" from the error in order to obtain a reversal. *See Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).* On the other hand, if the defendant did not make a proper objection, he must prove that the error caused him to suffer "egregious harm." *See id.* Because Jackson did not object to the trial court's inclusion of his 1994 conviction in the charge on punishment, we must determine whether the error caused "egregious harm." *See id.* To demonstrate "egregious harm," a defendant must show that the trial court's error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *See Hutch v. State, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).* In determining the degree of harm caused by the error, we consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information in the record. *Almanza, 686 S.W.2d at 171.*

In reviewing the jury charge, we note that even without the erroneous enhancement paragraph, a proper enhancement paragraph still remained in the charge. That is, even without the instruction as to Jackson's 1994 arson conviction, the jury could still properly consider Jackson's 1998 felony conviction for aggravated assault with a deadly weapon, which if found true would raise the minimum prison sentence from five to fifteen years. We also note that a murder conviction by itself authorized the jury to sentence Jackson to life in prison. *See TEX. PENAL CODE ANN. § 12.32* (Vernon 2003). Regarding the state of the evidence, the record shows that the murder at issue was violent and gruesome. The victim, a twenty-six-year-old mother of three, was stabbed fifty-four times. The record also shows considerable evidence of Jackson's guilt. Shortly before the victim died of her wounds, she told a neighbor and a police officer that "Tracy" stabbed her. In addition, the victim's blood was found on a bracelet and pair of shoes that Jackson was wearing when he was detained by police two days after the murder. Jackson did not provide any evidence to contradict the evidence against him. Regarding the State's closing arguments during the punishment phase of trial, the record shows that the prosecutor began her argument by stating:

> We know how violent the murder was. We know that he struck her fifty-four times. Thirty-five deep stab wounds. Seven penetrating the lungs. We know that one of the wounds resulted in the knife staying in her body. How much time is enough time for that. Just that alone, the gruesome nature of this murder, that alone is worth life.

Although the prosecutor then added that Jackson had a prior history of crime and that twenty-five years was the minimum sentence for a habitual offender, the record shows that she did not overly emphasize the minimum sentence and that she instead focused on the "horrendous" nature of the murder and the impact of the murder on the victim's three children, one of whom witnessed the victim dying.

Considering the entire record, we hold that the trial court's error in including an instruction as to Jackson's 1994 conviction did not cause "egregious harm." *See Almanza, 686 S.W.2d at 171.* Accordingly, we overrule Jackson's sole issue.

Conclusion: We affirm the trial court's judgment.

DETERMINATE SENTENCE ACT—

TRIAL COURT LACKED JURISDICTION TO REDUCE DETERMINATE SENTENCE TERM AFTER COURT'S PLENARY POWER HAD EXPIRED.

¶ 07-4-17. **In the Matter of F.M.**, 238 S.W.3d 837, 2007 Tex.App.Lexis 8497 (Tex.App.— El Paso, 10/11/07) .

Facts: This is the State's appeal from the district court's order reducing F.M.'s twenty-year determinate sentence, being served in the Texas Department of Criminal Justice ("TDCJ"), to fourteen years.

On October 26, 1992, F.M., a juvenile, was charged with committing the offenses of aggravated kidnapping and aggravated sexual assault. The petition was filed pursuant to *Tex. Fam. Code Ann. § 54.04(d)(3)*, the determinate sentencing statute. A trial was held in which the jury found that F.M. had committed aggravated kidnapping and aggravated sexual assault and adjudicated him delinquent. F.M elected to be sentenced by the court. Judge Philip R. Martinez of the 327th District Court, a designated Juvenile Court, signed a Judgment and Disposition Order of Commitment to the Texas Youth Commission on December 8, 1992, sentencing F.M. to a determinate sentence of twenty years. On December 21, 1992, Judge Martinez signed a Judgment Nunc Pro Tunc, correcting the Penal Code sections of the two adjudicated offenses.

F.M. was to turn eighteen years of age on October 18, 1993, which subjected him to transfer to the Institutional Division of the TDCJ. Pursuant to *Tex. Fam. Code Ann. § 54.11*, the Texas Youth Commission requested that a release and transfer hearing be set before Judge Martinez. On October 1, 1993, following a hearing held on September 10, 1993, Judge Martinez ordered F.M. to be committed to the TDCJ to finish the remainder of his twenty-year determinate sentence. No appeal was ever filed from this determination.

On February 14, 2006, F.M. filed a Motion for Review Hearing which also requested that Appellant be brought to El Paso County to consult with counsel and to attend a hearing. On July 5, 2006, a hearing was held in the 65th District Court, a designated Juvenile Court, before Judge Alfredo Chavez, on a number of motions filed by F.M. All of the motions were denied, except for a Motion for Forensic DNA Testing, and a Motion To Suspend Further Execution of the Sentence/Motion To Have Sentence Reduced. The court ordered the sentence reduced to fourteen years. It is from this order that the State appeals.

In Issue Nos. One and Two, Appellant (the State) asserts that the court lacked jurisdiction to reduce F.M.'s sentence and that the plenary power of the court had expired, thereby causing the court's reduction of the sentence to be void, because no law or rule of procedure authorized the reduction.

Held: District Court order set aside.

Opinion: Subject-matter jurisdiction is an essential part of the authority of a court to decide a case, and it is never to be presumed and cannot be waived. *Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993)*. The reviewing court determines whether subject-matter jurisdiction exists as a question of law, subject to *de novo* review. *Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex.*

1998).

With regard to Issue No. One, following the release hearing required by *Section 54.11 of the Family Code*, the trial court had the authority to: (1) recommit the juvenile to TYC without a determinate sentence; (2) transfer the juvenile to TDCJ; or (3) discharge the juvenile. *Tex. Fam. Code Ann. § 54.11 (i)* and *(j).* If the juvenile is transferred to the Texas Department of Criminal Justice, as occurred in this case, he comes under the authority of the Board of Pardons and Paroles. *See In the Matter of J.G., 905 S.W.2d 676, 682 (Tex. App.--Texarkana 1995, writ denied).* The Parole Board does have the constitutional authority to provide an inmate with the opportunity for parole, pursuant to Section 498.053 of the Texas Government Code. *In the Matter of S.C., 790 S.W.2d 766, 770 (Tex. App.--Austin 1990, writ denied).* However, we are unaware of, and have been unable to find, any indication that the juvenile court remains vested with the ability to reduce the determinate sentence of an inmate incarcerated at the TDCJ.

Furthermore, with regard to Issue No. Two, an appeal may be taken from an order, entered under *Family Code Section 54.11(i)(2),* transferring the person to the custody of the Institutional Division of the TDCJ. *Tex. Fam. Code Ann. § 56.01(c)(2). Section 56.01(b) of the Family Code* states that the requirements governing an appeal are as in civil cases generally. *See Tex. Fam. Code Ann. § 56.01(b).* As noted above, the record indicates that no appeal was taken after F.M. was transferred to the TDCJ.

Judicial action taken after a trial court's plenary power has expired is a nullity. *See State ex rel. Latty v. Owens, 907 S.W.2d 484, 486 (Tex.1995)* (per curiam). Absent the filing of a motion for new trial, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed. *Tex. R. Civ. P. 329b(d)* & *(e).* No motion for new trial was filed in this case. An order entered after the trial court's plenary power has expired is outside the jurisdiction of the trial court and is void. *In re Dickason, 987 S.W.2d 570, 571 (Tex. 1998).*

F.M. cites *In the Matter of C.L., Jr., 874 S.W.2d 880, 884 (Tex. App.--Austin 1994, no writ),* and *In the Matter of H.V.R., 974 S.W.2d 213, 217 (Tex. App.--San Antonio 1998, no pet.)* as authority for the proposition that the court retained jurisdiction to modify the determinate sentence. Both cases stand for the proposition that, even though *Family Code Section 54.11(h)* provides that the transfer hearing must begin more than thirty days before the juvenile's eighteenth birthday, it is not required that it be completed in that time frame, as long as it occurs before that juvenile's eighteenth birthday. *Matter of H.V.R., 974 S.W.2d at 217*; *Matter of C.L., Jr., 874 S.W.2d at 884.* F.M. reasons that those holdings allow for the court to have continuing jurisdiction to modify the sentence, by reducing it to fourteen years. However, nothing in either of these cases leads to that conclusion. Both cases restrict the extended time limit prior to the juvenile's eighteenth birthday, and we find neither case to be applicable to the present situation. As the court was without jurisdiction to reduce F.M.'s determinate sentence, we sustain Issue Nos. One and Two.

Conclusion: We set aside the order reducing F.M.'s determinate sentence.

DETERMINATE SENTENCE TRANSFER—

TESTIMONY ABOUT APPELLANT'S CONDUCT WHILE ON PAROLE AND ABOUT HIS HIGH RISK FOR RE-OFFENDING, SUPPORTED THE TRIAL COURT'S DECISION TO

TRANSFER HIM TO TDJC.

¶ 07-3-7. **In the Matter of D.T.**, 217 S.W. 3d 741, 2007 Tex.App.Lexis 2107 (Tex.App.— Dallas[5th Dist.], 3/20/07) .

Facts: On January 23, 2001, the trial court adjudicated appellant a child engaged in delinquent conduct for committing aggravated sexual assault. The trial court committed appellant, who was fourteen-years-old, to TYC for a determinate sentence of thirty years, with possible transfer to TDCJ. Subsequently, TYC requested that appellant be transferred to TDCJ to complete his sentence. After a hearing, the trial court ordered appellant to be transferred.

In his first issue, appellant contends the trial court abused its discretion by ordering him transferred to TDCJ because he (1) achieved academic goals, (2) participated in vocational training, (3) successfully completed sex offender treatment program, the coping skills group and two victim impact panels, (4) participated in sports, (5) completed his community service, and (6) was selected student of the month. According to appellant, TYC sought his transfer to TDCJ only because of his infractions while on parole.

Held: Affirmed as Modified

Opinion: In making its decision, the trial court may consider: (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense and the manner in which the offense was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim of the offense or any member of the victim's family; (5) the recommendations of TYC and the prosecuting attorney; and (6) the best interests of the juvenile and any other relevant factors. *See TEX. FAM. CODE ANN. § 54.11(k)* (Vernon Supp. 2006); *In re R.G., 994 S.W.2d 309, 312 (Tex. App.-Houston [1st Dist.] 1999, pet. denied)*. Evidence of each factor is not required, and the trial court need not consider every factor. *In re R.G., 994 S.W.2d at 312*. Further, the trial court may assign different weights to the factors it considers, and it may consider unlisted but relevant factors. *Id*.

Here, the record shows that appellant was committed to TYC after he threatened a seven-year-old boy with a gun and penetrated his anus. During therapy at TYC, appellant explained that he chose the boy because the boy had been sexually assaulted previously and appellant believed the boy would not tell, or if he did tell, he would not be believed. Appellant also admitted that he had done the same type of sexual acts to another six-year-old boy.

Leonard Cucolo, the court liaison for TYC, testified appellant was paroled from TYC, but violated the terms of that parole by failing to attend school and by having a sexual relationship with A.R., a fifteen-year-old girl. Appellant was coming into A.R.'s bedroom through the window without her parents' knowledge. After her parents bolted A.R.'s window, appellant began coming into the house through A.R.'s brother's window. Later, A.R.'s mother discovered appellant in A.R.'s bedroom. Her mother got a telephone and called the police. A.R. knocked the telephone from her mother's hand and then ran away with appellant for several hours. When A.R. returned home, her parents allowed her to talk on the telephone with appellant in an attempt to keep her from running away. However, when she returned to school the following Monday, A.R. left with appellant for several days. Thereafter, appellant's parole was revoked for absconding.

When appellant returned to TYC, he continued to contact A.R. by "manipulating other kids into

sending [her] mail." Appellant refused to recognize this behavior as part of his offense cycle, and, according to Cucolo, this failure places him at a high risk to reoffend sexually. Further, in Cucolo's opinion, appellant's actions while on parole demonstrated that he is a risk to the community and that he is likely to reoffend.

Chris Wilson, a licensed professional counselor at TYC, testified she performed a psychological evaluation of appellant. According to Wilson, appellant was not helpful and lied to her about his relationship with A.R. In Wilson's opinion, appellant has not shown he is able to control his behavior while on parole because he "has a behavior script that applies . . . to his sexual relationships.. . . even [after] having gone through specific treatment." She considered him at a high risk to reoffend because (1) appellant had "numerous sexual assaults primarily with an age discrepancy of more than five years," (2) used a weapon in one of the offenses, (3) his initial victims were male, (4) he has been unsuccessful after treatment, and (5) he has an extensive criminal history for things for which "he was not caught," including gang affiliation, drug use and sales, robbery, and physically assaultive behavior.

Conclusion: Although the record shows appellant was behaviorally compliant while in TYC, has achieved academically, has completed sex offender therapy, and his case manager and two teachers disagreed with the recommendation to transfer appellant, we cannot conclude the trial court abused its discretion by ordering appellant transferred to TDCJ. Cucolo's and Wilson's testimony about appellant's conduct while on parole and about his high risk for reoffending, along with the TYC's recommendation for transfer, constitute evidence supportive of the trial court's decision. After considering the relevant factors, we cannot conclude the trial court abused its discretion by ordering appellant transferred to TDJC. We overrule appellant's first issue.

IN A TRANSFER TO TDCJ, A TRIAL COURT MAY ASSIGN DIFFERENT WEIGHTS TO THE FACTORS IT CONSIDERS, AND IT MAY CONSIDER OTHER UNLISTED BUT RELEVANT FACTORS.

¶ 07-3-10. **In the Matter of C.R.**, ___S.W.3d___, No. 04-06-00494-CV, 2007 Tex.App.Lexis 114 (Tex.App.— San Antonio, 1/10/07).rel. for pub. 7/7/07

Facts: In April of 2001, C.R. waived his right to a jury trial and pled true to aggravated sexual assault of a child. In accordance with the plea bargain agreement of the parties, the trial court entered its order of adjudication and sentenced C.R. to a ten-year determinate sentence at TYC with the possibility of transfer to TDCJ. After conducting a transfer hearing in May of 2006, the trial court ordered that C.R. be transferred to TDCJ for the remainder of his sentence. This appeal followed.

Held: C.R. contends that the trial court abused its discretion in ordering his transfer to TDCJ because the record does not support a transfer. In making a determination regarding transfer of a juvenile offender to TDCJ, a trial court may consider: (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense and the manner in which it was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim or the victim's family; (5) the recommendations of TYC and the prosecuting attorney; (6) the best interests of the person; and (7) any other factor relevant to the issue to be decided. *TEX. FAM. CODE ANN. § 54.11(k)* (Vernon Supp. 2006); *In re J.L.C., 160 S.W.3d 312, 313 (Tex. App.-Dallas 2005, no pet.)*. Evidence of each factor is not required, and the trial court need not consider every factor in making its decision. *J.L.C., 160 S.W.3d at 313-14*; *In re*

R.G., 994 S.W.2d 309, 312 (Tex. App.-Houston [1st Dist.] 1999, pet. denied). The trial court may assign different weights to the factors it considers, and it may consider other unlisted but relevant factors. *J.L.C., 160 S.W.3d at 314*; *R.G., 994 S.W.2d at 312*.

At the transfer hearing, the trial court heard testimony from Leonard Cucolo, a TYC representative, and C.R.'s mother. The court also took judicial notice of a TYC summary report, TYC's complete file on C.R., and the evidence and judgment from C.R.'s underlying aggravated sexual assault case. The record shows that the victim of the underlying aggravated sexual assault was C.R.'s nine-year-old female cousin. During C.R.'s confinement in TYC for the offense, he had fifty-eight documented incidents of misconduct. However, he also successfully completed three specialized treatment programs and went nine months without any incidents of misconduct. As a result, he was placed on parole and released to a halfway house in June of 2004. Once on parole, he secured a job and completed sex offender and chemical dependency treatment. He was transferred to his mother's home in March of 2005.

In November of 2005, C.R. was arrested for possession of marihuana. He also tested positive for the use of marihuana that same month. C.R.'s mother testified that C.R. was driving her car when he was arrested for possession of marihuana and that the marihuana inside the car belonged to her nephew, not C.R. Nevertheless, as a result of his arrest and marihuana use, C.R. was required to complete further chemical dependency counseling. He did not complete the counseling, and he did not report to his parole officer at the next three reporting dates. C.R.'s mother testified that C.R. failed to report to his parole officer because he was at work. She stated that she called C.R.'s parole officer to tell him C.R. was working, and the parole officer said it was okay. In January of 2006, C.R. was arrested for possession of marihuana, cocaine, and heroine with the intent to deliver. C.R.'s mother testified that the drugs were discovered at C.R.'s friend's house and that C.R. went to the house only to pick up his girlfriend. Late in January of 2006, C.R.'s parole was revoked for failure to report to his parole officer.

Cucolo testified that he and TYC recommended that C.R. be transferred to TDCJ based on C.R.'s behavior in the community and the revocation of his parole. Cucolo stated that C.R.'s continued poor judgment made him a risk to the community. Considering TYC's recommendation, C.R.'s previous offense, his failure to comply with parole requirements, and his continued drug use and association with people engaged in criminal activity, we conclude that the trial court did not abuse its discretion in transferring C.R. to TDCJ for the remainder of his determinate ten-year sentence.

Conclusion: We affirm the trial court's order.

DISPOSITION PROCEEDINGS—

TO ADMIT THE JUVENILE PO'S REPORT AT A DISPOSITION HEARING, OVER A CRAWFORD OBJECTION, THE COURT MUST USE BALANCING TEST.

¶ 07-1-14. **In the Matter of M.P.**, 220 S.W.3d 99, 2007 Tex.App.Lexis 924 (Tex.App.— Waco, 2/7/07) .

Facts: During the disposition phase, the State offered a Juvenile Court Investigation Report prepared by M.P.'s juvenile probation officer, Sha'Vonne Brown-Lewis. The report contains general background information, M.P.'s referral history, the history of services provided by the juvenile department, a narrative

of "impressions" reviewing M.P.'s history and briefly stating the probation officer's recommendation that M.P. be committed to TYC, and a concluding section reviewing the dispositional alternatives and providing a list of reasons TYC is the appropriate disposition.

The report is supported by a collection of "over thirty" disciplinary referrals M.P. has received at different schools. n1 These referrals largely consist of brief narratives prepared by the teachers who made the referrals describing the conduct and the actions taken. Some referrals include witness statements. Others include documentary evidence.

> n1 The report itself is nine pages, excluding the cover page. There are about ninety pages of supporting documentation appended to the report. "Over thirty" referrals appears to be a significant understatement. "Over sixty" would be more accurate.

M.P. objected when the State offered the report in evidence on the basis that "information both contained in the report and, frankly, the totality of Ms. Brown's testimony" violate *Crawford v. Washington* and the *confrontation clauses of the federal* and *state constitutions*. Counsel specifically identified Brown-Lewis's references to M.P.'s various referrals as a matter of concern.

After taking the matter under advisement, the court advised the parties that it would overrule the objection based on the reasoning of Indiana's Fourth District Court of Appeals in *C.C. v. State. 826 N.E.2d 106 (Ind. Ct. App. 2005)*. The court followed the recommendation of Brown-Lewis and committed M.P. to TYC.

Held: Affirmed

Lead Opinion: Juvenile delinquency proceedings must provide constitutionally mandated due process of law. However, the process due a juvenile offender does not equate to that due an adult offender in every instance.

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

In adopting this balancing test this Court also announced a desire to "dispel the antiquated and unrealistic resistance to procedural safeguards" in the juvenile court system. We observed that due to the scarcity of treatment programs, professional training, and financial resources the juvenile system had become more punitive than rehabilitative. Rather than ignore these realities we chose to balance the "aspirations of the juvenile court and the grim realities of the system."

Sixth Amendment Summary

There is an indisputable Sixth Amendment right to counsel during the punishment phase and an indisputable right to be present during the punishment phase, the latter of which is a part of the Sixth Amendment right of confrontation. However, there is only a limited Sixth Amendment right to a jury

during the punishment phase under *Apprendi* at its progeny. And most state and federal courts which have directly addressed the issue have concluded that there is no Sixth Amendment right of confrontation at sentencing.

Nevertheless, the Court of Criminal Appeals and a significant number of the intermediate appellate courts in Texas have at least implicitly concluded that a defendant has a Sixth Amendment right of confrontation at sentencing by addressing the merits of such claims or concluding that such claims were waived.

Here, because this is a juvenile proceeding, we need not determine the precise parameters of the Sixth Amendment right of confrontation during the punishment phase of an adult criminal trial. We do conclude, however, that at a minimum an adult criminal defendant has a constitutional right of confrontation at sentencing: (1) in cases in which the State seeks imposition of a sentence on the basis of findings beyond those "reflected in the jury verdict or admitted by the defendant"; *see Booker, 543 U.S. at 232, 125 S. Ct. at 749*; *McGill, 140 P.3d at 942*; and (2) whenever the State calls a witness to testify at punishment.

Impact on Juvenile Proceedings

Having determined that there is at least a limited Sixth Amendment right of confrontation during the punishment phase of an adult criminal trial, we now examine the impact the application of that right would have on the juvenile justice system.

The Texas juvenile justice system requires courts to balance the need for public safety and punishment for criminal conduct with the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent, while simultaneously ensuring that his "constitutional and other legal rights" are protected. Among other purposes, the juvenile justice system is supposed to:

> . provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
>
> . provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions; and
>
> . achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents.
> *Id. § 51.01(2)(C), (3), (5).*

Because there are no findings to be made in the disposition phase which would invoke the Sixth Amendment right to jury trial recognized by *Apprendi* and its progeny and because of the importance of effectively addressing the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent as recognized by the Juvenile Justice Code, we conclude that a juvenile has no Sixth Amendment right of confrontation during the disposition phase. Such a conclusion preserves the flexibility inherent in the design of the juvenile justice system for ensuring that the needs of each child are adequately addressed in the disposition phase.

Nevertheless, the Juvenile Justice Code expressly recognizes that a juvenile must be provided a "fair hearing" and his or her "constitutional and other legal rights" must be "recognized and enforced." Therefore, we hold that a juvenile has a limited right of confrontation under the *Due Process Clause of the Fourteenth Amendment* rather than under the *Sixth Amendment*.

Due Process Right of Confrontation

The Supreme Court in *Morrissey* explained that this "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." The Court discussed this due process right of confrontation in more detail in *Gagnon*.

An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

Therefore, the Supreme Court's jurisprudence regarding the Sixth Amendment right of confrontation, and particularly *Crawford*, has no application to the disposition phase of a juvenile delinquency proceeding. Instead, the due process right of confrontation described in *Gagnon* applies.

Under the due process right of confrontation described in *Morrissey* and *Gagnon*, a defendant has "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Thus, the trial court must weigh the defendant's interest in confronting and cross-examining an adverse witness against the State's interest in not having to produce that witness, "particularly focusing on the indicia of reliability of the hearsay offered." This determination must be made on a case-by-case basis.

Here, the juvenile probation officer's report was admissible in the disposition phase under a statutory exception to the hearsay rule. *See TEX. FAM. CODE ANN. § 54.04(b)* (Vernon Supp. 2006). Thus, the Legislature has determined that such reports have some degree of reliability for purposes of determining the appropriate disposition in a particular case. In fact, such reports have been required for the disposition phase of juvenile delinquency proceedings since at least 1973. Our research has disclosed at least one appellate decision which has addressed the reliability of such reports. There, the court concluded that the juvenile court did not abuse its discretion by accepting (1) hearsay statements regarding extraneous offenses contained in the juvenile probation report and (2) the juvenile's admissions to a clinician that he had committed these extraneous offenses contained in the clinician's report "as reliable sources of dispositional fact."

The report required by *section 54.04(b)* is very similar to the presentence investigation report required in most felony cases. Courts have long held that such reports have sufficient indicia of reliability to aid a court in determining the appropriate sentence.

Finally, we note that numerous courts have found no due process violation arising from a trial

court's consideration of a PSI report so long as the defendant is given a reasonable opportunity to review the report before the hearing and the opportunity to dispute the accuracy of information in the report and present controverting evidence.

Section 54.04(b) requires a juvenile court to provide counsel for the child with access to any reports the court will consider before the disposition hearing. To exercise the limited right of confrontation we have recognized herein, a juvenile may subpoena any necessary witnesses to challenge the accuracy of any information contained in any reports to be offered under *section 54.04(b).*

Conclusion: The juvenile probation officer's report admitted during the disposition phase of M.P.'s trial contains sufficient indicia of reliability to allow us to conclude that the court's failure to conduct the balancing test required for the admission of hearsay evidence without violating the limited due process right of confrontation described in *Morrissey* and *Gagnon* did not "probably cause the rendition of an improper judgment."

Therefore, we overrule M.P.'s sole issue and affirm the judgment.

DISSENT BY: BILL VANCE

DISSENT: I agree with Justice Reyna's preservation determination and his application of the due process right of confrontation, but I respectfully disagree with the blanket conclusion that a juvenile has no Sixth Amendment right of confrontation during the disposition phase.

In *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004),* the Supreme Court resuscitated the *Sixth Amendment's Confrontation Clause*. As Justice Reyna recognizes, Texas courts have applied it in the punishment phase. And at least one other state's highest court has expressly applied *Crawford* to the punishment phase.

I would extend those holdings to a juvenile adjudication's disposition phase. The juvenile system has "become more punitive than rehabilitative." Juveniles now face consequences similar to adults; for example, they can be subject to a forty-year term of imprisonment. As a result, I believe that the balancing test employed to determine the constitutional protection afforded to a juvenile in a disposition hearing should tilt toward providing constitutional protections such as the Sixth Amendment confrontation right articulated in *Crawford*:

Because I believe that a juvenile should be afforded the Sixth Amendment confrontation right in the disposition phase and that the disciplinary referrals containing teachers' narratives are testimonial statements (and thus indistinguishable from the incident and disciplinary reports in *Russeau*), I would find a Confrontation Clause violation by the trial court's admission of the disciplinary referrals and then proceed to a Confrontation-Clause error harm analysis.

I respectfully dissent.

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), *20 U.S.C.S. § 1400* ET SEQ., DOES NOT LIMIT THE JUVENILE COURT'S AUTHORITY TO MODIFY A

JUVENILE'S DISPOSITION.

¶ 07-2-2. **In the Matter of P.E.C.**, No. 04-05-00859-CV, 2006 Tex.App.Lexis 6161, Tex.App.— San Antonio, 7/19/06) rel. for pub. 2/2/07 .

Facts: On January 28, 2005, the State filed an original petition alleging that P.E.C., a 14 year old special education student, engaged in delinquent conduct by committing burglary of a habitation. An adjudication and disposition hearing was held February 17, 2005, at which P.E.C. pled true to two counts of burglary of a habitation pursuant to a plea bargain. P.E.C. was adjudicated as having engaged in delinquent conduct and was placed in the custody of his parent under the supervision of the Bexar County Juvenile Probation Department for 12 months. On May 12, 2005, the State filed a motion to modify his disposition alleging that P.E.C. had violated Condition No. 7 of his probation requiring him to adhere to a 7:00 p.m. curfew, Condition No. 16 requiring him to attend school every day and follow all school rules, and Condition No. 26 requiring him to pay restitution. At the June 2, 2005 hearing, P.E.C. pled true to the alleged violations of his probation pursuant to a plea bargain. The judge modified P.E.C.'s disposition by extending the term of his probation to 18 months from the date of the hearing, and requiring three months to be served under intensive supervision with electronic monitoring, along with other modified conditions.

In September 2005, the State filed another motion to modify P.E.C.'s disposition alleging that he had committed the following violations of his probation: (1) he failed to attend school and follow school rules on or about June 27 and 29, July 8, 12 and 13, 2005; (2) on or about July 14, 2005, he failed to participate in and cooperate fully with the 60-day electronic monitoring program; (3) on or about July 14, 2005, he failed to participate in and cooperate fully with his day treatment; and (4) on or about July 14, 2005, he failed to pay restitution in monthly payments as ordered. P.E.C. pled "not true" to each alleged violation and a contested modification hearing was held on September 22, 2005. At the conclusion of the hearing, the trial judge found that P.E.C. had committed each of the alleged violations of his probation. After a psychological evaluation was completed, a disposition hearing was held on October 20, 2005, at which the judge entered orders adjudicating P.E.C. delinquent and modifying his disposition to commit him to TYC for an indeterminate period. The court found that it was in P.E.C.'s best interest to be placed outside the home, that reasonable efforts were made to prevent the need for removal from the home, that in the home he could not be provided the quality of care and level of support and supervision needed to meet the conditions of probation, and that commitment to TYC was in his best interest. The court further found that the juvenile probation department had extended numerous programs to P.E.C., including day treatment, but that he had continued to violate the law. Finally, the court found that P.E.C.'s educational needs "are being met and will continue to be met" at the Texas Youth Commission. The written orders were signed on October 26, 2005. P.E.C. timely appealed.

Held: Affirmed

Opinion: In his first and second issues, P.E.C. asserts that he retained special educational rights under the IDEA while he was on juvenile probation, and therefore, the juvenile court lacked authority to modify his disposition and commit him to TYC before his administrative remedies under the IDEA were exhausted. We review questions of law *de novo* in the context of a juvenile commitment. *In re K.T., 107 S.W.3d at 74*.

The IDEA is a federal act that seeks "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *20*

U.S.C.A. § 1400(d)(1)(A); *Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 531, 163 L. Ed. 2d 387 (U.S. 2005)*. The IDEA gives the States the primary responsibility for developing and executing educational programs for disabled children, but "imposes significant requirements to be followed in the discharge of that responsibility." *Schaffer, 126 S. Ct. at 531*. Under the IDEA, a state or local educational agency must create an "individualized education program" (IEP) for each disabled child. *20 U.S.C.A. § 1414(d)*. If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." *20 U.S.C.A. § 1415(f)*. At an administrative hearing challenging an IEP, the parents bear the burden of proving the IEP is inappropriate. *Schaffer, 126 S. Ct. at 537*. The IDEA authorizes any party aggrieved by the results of an administrative hearing to bring a civil action in a federal district court or state court of competent jurisdiction. *20 U.S.C.A. 1415(i)(2)(A)*.

The record shows that prior to being adjudicated delinquent, P.E.C. was receiving special education services in the Emotional Disturbance Program through the San Antonio Independent School District. After adjudication, as a condition of his juvenile probation, P.E.C. attended and received day treatment at the Por Vida Academy, a charter school that contracts with the Bexar County Juvenile Probation Department. P.E.C. has been diagnosed with emotional disturbance, attention deficit disorder, appositional defiant disorder, dysthymic disorder, R/O mathematics and reading disorder, and cannabis abuse.

At the disposition hearing, P.E.C. objected that he could not be committed to TYC without first being afforded his administrative rights under the IDEA because TYC commitment would change his educational placement. He argued that his inappropriate behavior which formed the basis of the alleged probation violations was a "manifestation" of his disability, and that under the IDEA's "stay put" provision he could not be committed to TYC without first exhausting his rights under the IDEA. *See 20 U.S.C.A. 1415(j)*; *see Schaffer, 126 S. Ct. at 536* (the IDEA's "stay-put" provision in 1415(j) requires a child to remain in his "then-current educational placement" during the pendency of an IDEA hearing). However, P.E.C. presented no evidence that his conduct in violation of his probation was due to his disability. Instead, P.E.C. asserted that the State bore the burden of proving that his alleged probation violations were *not* caused by his disability before it could change his educational placement by committing him to TYC. The juvenile court rejected P.E.C.'s arguments under the IDEA as illogical and "mixing apples and oranges." On appeal, P.E.C. raises the same issue and argues there is "implied conflict preemption" between the state and federal law; however, he cites no authority for the proposition that the IDEA restricts a state juvenile court's authority to modify a juvenile's disposition.

We conclude that P.E.C.'s argument based on the IDEA is flawed. The authority of the juvenile court to modify P.E.C.'s disposition by removing him from probation and committing him to TYC is not limited by the IDEA. *Honig v. Doe, 484 U.S. 305, 327, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)* (holding the "stay-put" provision "in no way purports to limit or pre-empt the authority conferred on courts" to exercise their equitable powers to enjoin a dangerous disabled child from attending school). In *Honig*, the Supreme Court noted that the legislative history of a predecessor statute to the IDEA makes clear that "one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of [the "stay-put" provision], therefore, was 'to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings.'" *Id.* (emphasis added) (quoting *Burlington School Committee v. Massachusetts Dept. of Education, 471 U.S. 359, 373, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)*). Indeed, by its own terms, the "stay-put" provision of IDEA applies only to state or local school authorities during the administrative proceedings contemplated by the statute; it has no application to state court proceedings involving a juvenile who has been adjudicated delinquent. *See 20 U.S.C.A. 1415(j)*; *Honig, 484 U.S. at 327*. The proper

avenue through which to challenge P.E.C.'s educational placement is by invoking the administrative procedures set forth in the IDEA, and by instituting a civil action in federal district court once the administrative remedies have been exhausted. *20 U.S.C.A. 1415(f),(i)*. Moreover, P.E.C. would bear the burden of proving that his educational placement, or IEP, is inappropriate in such a proceeding. *See Schaffer, 126 S. Ct. at 536-37* (rejecting the argument that under the IDEA, every IEP is presumed invalid until the school district demonstrates that it is valid, but noting that some states have enacted laws placing the burden on the school district under some circumstances). Here, the State had the burden to prove by a preponderance of the evidence that P.E.C. violated a condition of his probation before he could be committed to TYC, but had no burden to disprove that P.E.C.'s violations were caused by his disability. We overrule P.E.C.'s first and second issues.

Conclusion: Based on the record before us, we hold that the trial court did not abuse its discretion in modifying P.E.C.'s juvenile disposition and committing him to the Texas Youth Commission. Accordingly, the judgment of the trial court is affirmed.

THE LENGTH OF TIME A CHILD CAN BE PLACED ON PROBATION MAY BE A FACTOR IN COURT'S DECISION TO COMMIT CHILD TO TYC.

¶ 07-2-3. **In the Matter of B.R.**, No. 04-06-00018-CV, 2006 Tex.App.Lexis 5964, Tex.App.— San Antonio, 7/12/06) rel. for pub. 2/2/07 .

Facts: On January 8, 2005, B.R., along with seven other individuals, went "car jacking." They managed to break into several vehicles and take several items. Eventually, B.R. was apprehended and charged with: 1) theft of a firearm; 2) theft $ 1500-$ 20,000; and 3) burglary of a vehicle. The State waived count one and proceeded at trial on counts two and three. B.R. was found to have engaged in delinquent conduct pursuant to his plea of true on both counts. The trial court held that commitment to TYC was necessary. On appeal, B.R. argues that the trial court abused its discretion when it ordered commitment to TYC because the record indicates that probation was the appropriate disposition.

Held: Affirmed

Disposition: A juvenile judge has broad discretion to determine the proper disposition of a child who has been adjudicated as engaging in delinquent behavior. *In re K.L.C., 972 S.W.2d 203, 206 (Tex. App.-Beaumont 1998, no pet.)*. "We review a trial court's disposition order under the criminal abuse of discretion standard divorced from evidentiary standards of legal and factual sufficiency." *In re E.T., No. 04-03-00796-CV, 2004 Tex. App. LEXIS 9929, 2004 WL 2533552, at *1 (Tex. App.-San Antonio Nov. 10, 2004, no pet.)* (mem. op.) (citing *In re K.T., 107 S.W.3d 65, 74 (Tex. App.-San Antonio 2003, no pet.)*). This standard requires that we view the evidence in a light most favorable to the trial court's judgment. *Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)*. Thus, we will afford almost total deference to the trial court's findings of fact which are supported by the record. *In re K.T., 107 S.W.3d at 74*. On the other hand, when the trial court's resolution of a factual issue is not dependant upon an evaluation of credibility or demeanor, "we review the trial court's determination of the applicable law, as well as its application of the appropriate law to the facts it has found, *de novo*. *Id*.

The guiding rules and principles in juvenile cases involving commitment outside the child's home are found in the Family Code. The Family Code permits a trial judge to commit a child to TYC if: 1) it is in

the child's best interest to be placed outside the home; 2) reasonable efforts have been taken to prevent or eliminate the need for the child's removal from home; and 3) while in the home, the child cannot receive the quality of care and level of support and supervision needed to meet the conditions of probation. *TEX. FAM. CODE ANN. § 54.04(i)* (Vernon Supp. 2006).

Here, the facts illustrate that B.R. was considered a fugitive from the law. In fact, it took law enforcement months to locate B.R. The evidence suggests that people were helping to hide B.R. and that his parents were also non-cooperative. Eventually law enforcement found B.R. hiding in a closet at a friend's house. Additionally, B.R. had not been living with his parents for nearly nine months, he was not attending school, and he admitted to previous alcohol and marijuana abuse. B.R.'s pre-disposition report stated that B.R. had previously been charged with assault for slapping and punching his mother.

Another concern at trial was that B.R.'s eighteenth birthday was just over two months from the hearing, thus allowing only two possible months of probation. The judge expressed that this was not enough time for rehabilitation to occur and that it was too short a probation period for a felony conviction. The trial court concluded that commitment to TYC was in the best interest of B.R. The trial court was required to include reasons for the juvenile's commitment in the court's order n1; thus, the order reads:

> THE CHILD HAS TWO MONTHS AND A FEW DAYS FROM TURNING 18 YEARS OLD, ADJUDICATED ON A FELONY OFFENSE, NOT CURRENTLY IN SCHOOL, NOT LIVING AT HOME, THE COURT FOLLOWED THE RECOMMENDATION OF THE PROBATION DEPARTMENT AND THE DISTRICT ATTORNEY AND THE PROBATION DEPARTMENT WOULD NOT HAVE SUFFICIENT TIME TO REHABILITATE.
>
> n1 *See TEX. FAM. CODE ANN. § 54.04(i)* (Vernon Supp. 2006).

Conclusion: The record supports the trial court's conclusion that commitment is in B.R.'s best interest, and that B.R. could not receive the needed level of care, support, and supervision in the home, despite prior efforts to keep B.R. in his family's home. Because the trial court did not abuse its discretion when it ordered B.R.'s commitment to TYC, we will not disturb this determination. *See In the Matter of K.L.C., 972 S.W.2d at 206*. B.R.'s sole issue is overruled and the judgment of the trial court is affirmed.

THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN COMMITTING RESPONDENT TO TYC EVEN THOUGH THE COURT BASED ITS DECISION TO COMMIT, AT LEAST IN PART, ON A LACK OF AVAILABLE COUNTY FUNDS.

¶ 07-2-12. **In the Matter of L.D.**, MEMORANDUM, ___S.W.3d ___, No. 12-06-00193-CV, 2007 Tex.App.Lexis 1714 (Tex.App.— Tyler, 3/7/07), rel. for pub. 5/8/07 .

Facts: On November 29, 2005, L.D., a sixteen year old female, assaulted Tanikqua Bolton. This was but one of a number of acts of bad conduct committed by L.D. between February 20, 2004 and her commitment to TYC on April 24, 2006. L.D.'s bad acts included assaulting a school teacher (February 20, 2004), a police officer (August 18, 2004), a mentally disabled juvenile (January 27, 2005), an aunt (July 27, 2005), and another individual (January 20, 2006); attempting to escape detention by kicking out the window of a police car (August 18, 2004); trespassing in an apartment complex (July 13, 2005); violating a municipal curfew law (January 20, 2006); verbally abusing a law enforcement officer (March 6, 2006); stating to a

law enforcement officer that she planned to resist any effort to detain her (March 6, 2006); and announcing to her schoolmates that she planned to assault a teacher's aide for confiscating her lip gloss (March 29, 2006). During much of this period, L.D. was on probation for delinquent conduct. She repeatedly violated the conditions of her probation, often ignoring the juvenile court's condition that she remain at home unless authorized to leave. She also repeatedly failed to comply with the juvenile court's condition that she attend school regularly.

On April 11, 2006, a jury found that L.D. had engaged in delinquent conduct by committing the assault on Tanikqua Bolton. The juvenile court held a disposition hearing at which it took into consideration L.D.'s other bad acts as well as her direct failures to comply with authority, including her repeated failures to comply with orders of the juvenile court. The court also heard testimony from Tom Streetman, L.D.'s probation officer during the time she had been on probation. Streetman testified that it was in L.D.'s best interest that she be placed outside the home. He stated that L.D.'s parents or relatives would not provide suitable supervision and that probation was not in her best interest.

The court questioned Streetman regarding the application of the Juvenile Justice Code's Progressive Sanction Guidelines. Streetman acknowledged that commitment to TYC was technically a deviation from the guidelines. He stated, however, that the Code allowed commitment to TYC based upon L.D.'s criminal history and that a deviation from the guidelines was permitted. The court also questioned Streetman regarding other placement options besides TYC, ordering him to investigate available placement options and then report his findings to the court. Following his investigation, Streetman testified that there were not sufficient available county funds to place L.D. in a facility other than TYC.

Following the disposition hearing, the juvenile court committed L.D. to TYC for an indeterminate period of time. This appeal followed.

Held: Affirmed

Memorandum Opinion: A juvenile court may commit a juvenile to TYC without a determinate sentence for

> delinquent conduct that violates a penal law of the grade of misdemeanor if: (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony on at least one previous occasion; and (2) the conduct that is the basis of the current adjudication occurred after the date of that previous adjudication.
> *TEX. FAM. CODE ANN. § 54.04(t).*

Even then, commitment is not required, but is merely an option for consideration by the juvenile court. *See **id.*** If a juvenile court "arbitrarily removes a child from home for a trivial infraction, nothing . . . prohibits the appellate judges of Texas from doing something about it." ***In re J.P.**, 136 S.W.3d at 632.* As Justice Schneider observed, the legislature has expressed its intent that commitment to TYC be reserved for serious juvenile offenders. ***Id.** at 634* (Schneider, J., concurring).

The primary concern of the Juvenile Justice Code is that of public safety. *See **id.** at 632*. In other parts of the Texas Family Code, the best interests of children are often paramount; but in the Juvenile Justice Code, the best interests of children who engage in serious and repeated delinquent conduct are superseded to the extent they conflict with public safety. ***Id.** at 633*. Generally, a commitment to TYC is

not an abuse of discretion when the delinquent juvenile has engaged in some type of violent activity that makes the juvenile potentially dangerous to the public or when the juvenile has been given a negative recommendation for probation. *See* ***In re L.G.****, 728 S.W.2d 939, 945 (Tex. App.-Austin 1987, writ ref'd n.r.e.).*

L.D. was a serious offender with a significant history of bad acts, including repeated, and often violent, delinquent conduct. She was not committed for a trivial offense; she was committed for assault after her probation officer testified that probation was not in her best interest. The juvenile court did not abuse its discretion in committing L.D. to TYC. Nonetheless, L.D. argues that the juvenile court's order must be reversed because the court based its decision to commit, at least in part, on a lack of available county funds.

In support of this argument, L.D. cites ***In re S.G.****, No. 04-04-00475-CV, 2005 Tex. App. LEXIS 2560 (Tex. App.-San Antonio April 6, 2005, no pet.)* (mem. op.). L.D. argues that ***In re S.G.*** stands for the proposition that a commitment based, in part, upon a lack of available funds automatically warrants reversal. In that case, the court of appeals stated that the fact that a TYC committal utilizes state rather than county resources was an improper reason for the committal of a juvenile to TYC. ***Id.****, 2005 Tex. App. LEXIS 2560 at *11*. Because there was no other evidence in the record to support the trial court's order, the appellate court reversed the order and remanded the cause for a new disposition hearing. ***Id.****, 2005 Tex. App. LEXIS 2560 at *11-13*. However, the record in the instant case includes sufficient evidence to support the juvenile court's order. Moreover, even where a juvenile court gives an incorrect reason for its decision, it does not abuse its discretion if it reaches the right result. *See* ***Hawthorne****, 917 S.W.2d at 931*.

Conclusion: We overrule L.D.'s sole issue.

PURPOSES PROVISION OF THE JUVENILE JUSTICE CODE MAY BE CONSIDERED IN WHETHER OR NOT TRIAL COURT ABUSED ITS DISCRETION IN COMMITTING CHILD TO TYC.

¶ 07-2-13. **In the Matter of S.A.G.**, ___S.W.3d.___, MEMORANDUM, No. 04-06-00503-CV, 2007 Tex.App.Lexis 1929 (Tex.App.— San Antonio, 3/14/07), rel. for pub. 7/26/07 .

Facts: In the Original Petition Alleging Delinquent Conduct filed on August 4, 2000, S.A.G., who was eleven years old at the time, was alleged to have committed the offense of burglary. S.A.G. pled true and was placed on probation for one year in her mother's custody. The conditions of probation included a requirement that restitution be paid to the complainant.

On November 7, 2001, based on S.A.G.'s failure to pay restitution, the State filed its first Motion to Modify Disposition. After hearing the motion, on December 6, 2001, the trial court extended S.A.G.'s probation for one year. On November 20, 2002, the State filed a second Motion to Modify Disposition, alleging that S.A.G. had been expelled from school and had failed to pay restitution. As a result of this motion, on December 10, 2002, the trial court again extended S.A.G.'s probation for another year. On December 10, 2003, the State filed its third Motion to Modify Disposition, again alleging a failure to pay restitution. Once again, on January 27, 2004, the trial court extended S.A.G.'s probation for another nine months. On April 26, 2004, the State filed a fourth Motion to Modify Disposition, alleging that S.A.G. had

failed to cooperate with the electronic monitoring program and with day treatment. Thus, on May 4, 2004, the trial court revoked S.A.G.'s probation and committed her to TYC.

S.A.G. appealed from this order, and her TYC commitment was reversed by this Court. On remand, the trial court placed S.A.G. on probation in the custody of the Chief Juvenile Probation Officer of Bexar County. As a result, S.A.G. was placed in the Krier Center, a residential treatment facility. However, on April 26, 2006, the State filed a fifth Motion to Modify Disposition, alleging that S.A.G. had failed to follow the rules of placement by attempting to escape and had failed to pay restitution and fees.

On May 25th and 30th of 2006, the trial court conducted a hearing on the State's fifth motion to modify. The State's evidence consisted of testimony from five employees of the Krier Center, the facility S.A.G. had been placed in for residential treatment. According to the State's witnesses, S.A.G. had been in the cafeteria waiting to be served a meal when she and two other residents were sent to Security to get haircuts. When S.A.G. arrived at Security, she was told that her hair could not be cut that day because it was already short. S.A.G. was then told to return to the cafeteria. S.A.G. did not return to the cafeteria and could not be located immediately. One of the teachers reported having seen her behind the gym. A Code Green was then called out on the radio, indicating a possible escape attempt. For about twenty minutes, S.A.G. and another resident could not be located. They were then seen running into the cafeteria. One of the officers grabbed S.A.G., who told the officer that she would not run again. When she was released, however, she did try to run away again, running from the cafeteria to the tip of the chapel grass, about fifty feet. As S.A.G. continued to try to get away, one of the officers struggled with her. After they both fell to the ground, another officer handcuffed S.A.G. and escorted her to Security. Following this incident, S.A.G. received an ice pack and Tylenol; however she continued to be oppositional and non-compliant with the officers.

After hearing all the evidence, the trial court found the violation of the placement rules to be "true," but found the failure to pay restitution "not true" due to indigency. The trial court then committed S.A.G. to TYC, stating her reasons on the record: (1) S.A.G. violated a condition of her probation by failing to follow the rules of placement by attempting to escape from the placement facility; (2) although the probation office has provided S.A.G. with numerous services, S.A.G. has continued to return to court for various reasons other than the failure to pay fees, including possession of a dangerous drug and not complying with electronic monitoring and day treatment; n1 (3) it is in S.A.G.'s best interest to be placed outside the home; and (4) reasonable efforts have been made to prevent removal from the home, but S.A.G.'s home cannot provide the quality of care and level of support and supervision she needs to meet the conditions of probation. It is this commitment order from which S.A.G. appeals.

Held: Affirmed

Memorandum Opinion: The purpose of the Juvenile Justice Code is "to provide for the protection of the public and public safety." *TEX. FAM. CODE ANN. § 51.01(1)* (Vernon 2002). Further, if consistent with the protection of the public and public safety, the purpose of the Code is to promote the concept of punishment for criminal acts; to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct. *Id. § 51.01 (2)(A-C).* Also, according to the Juvenile Justice Code, its purpose is to provide for the care, protection and development of children; to protect the welfare of the community and to control the commission of unlawful acts by children; and to achieve these purposes in a family environment whenever possible and

through the use of a simple and fair judicial procedure. *Id. § 51.01(3) - (6).*

In one issue on appeal, S.A.G. argues that her commitment to TYC was not justified in light of the purposes of the Juvenile Justice Code. Specifically, S.A.G. emphasizes that she has spent more than one-third of her life in the juvenile justice system; that her underlying offense was non-violent; that her probation has been extended, in large part, because her mother could not pay restitution; that she has deteriorated into "a very sad, sometimes-suicidal, wreck"; that she suffers from major depressive disorder and attention deficit hyperactivity for which she is taking medication; that her prior drug violation involved an asthma inhaler; that her prior failure to comply with day treatment and electronic monitoring arises from a single incident in which she, instead of attending day treatment, went with her boyfriend to the mall; and that, although she tried to run away from the Krier Center, she could not have gotten very far because of the fence topped with razor wire.

S.A.G. urges that the "public safety" issue in this case concerns only the Longoria family, the victims of the burglary, who, in a letter to the court, requested that she be placed on probation. And, with regard to "the concept of punishment" set forth in the Juvenile Justice Code, S.A.G. emphasizes that, based on her last commitment to TYC, if she is sent back to TYC, she will not be provided with treatment, training, or rehabilitation.

We do not find S.A.G.'s arguments persuasive. The record shows that S.A.G. committed the offense of burglary at age eleven. Her probation was extended numerous times, not only for her mother's inability to make full restitution, but also, in part, due to her own actions in violating the terms of her probation. Her most recent violation involved an attempted escape from a residential treatment facility. Although she presented evidence that, during the escape attempt, she was not thinking and did not "mean to do it," and that an escape would have been difficult because of the fence topped with razor wire, she nevertheless did try to run away. Furthermore, when she was apprehended, she continued to try to run away and was oppositional and non-compliant.

Conclusion: Thus, because S.A.G. violated a condition of her probation in trying to escape from the Krier Center, we cannot say the trial court abused its discretion in committing her to TYC.

Concurring Opinion (by Steve Hilbig): I concur in the result reached by the majority; however, I write separately to address the propriety of using *section 51.01* of the Juvenile Justice Code, which is entitled "Purpose and Interpretation," as a standard for determining whether a trial court has abused its discretion in placing a juvenile on probation outside the home or in the Texas Youth Commission.

On appeal, S.A.G. raises only one issue:

> The trial court abused its discretion when it committed Appellant to the Texas Youth Commission, *because the commitment was not justified in light of the purposes of the Texas Juvenile Justice Code.*
> (emphasis added).

Notably, she does not challenge the findings made by the trial court pursuant to *section 54.05(m).* So the question is, does the purposes section of the Juvenile Justice Code afford a juvenile offender substantive rights upon which appellate relief can be sought? According to the majority opinion, as well as other opinions from this court, it does. This is where I must differ with the majority in this case and the court generally. I believe a complaint that the trial court "violated" the purposes section of the Juvenile

Justice Code does not, in either a modification or an original disposition, create a viable ground for appellate review because that section does nothing more than state the goals the Juvenile Justice Code was enacted to achieve. *See TEX. FAM. CODE ANN. § 51.01* (Vernon 2002). While the goals expressed in *section 51.01* are laudable, it is axiomatic that no relief should be available for an alleged violation of a mere goal.

I concur with the result reached by the majority because, using the standard found in *J.P.*, I do not believe the trial court abused its discretion in committing S.A.G. to TYC. However, because I believe this court has created a purported standard of review that is based on what are no more than legislative goals, a standard the supreme court declined to adopt, and a standard that is simply unnecessary, I cannot join its opinion. I urge the court to reconsider the continued viability of reviewing a trial court's decision based on purported violations of *section 51.01* in light of the supreme court's opinion in *J.P.*.

Dissent (by Catherine Stone): The essence of this case has been succinctly stated by S.A.G.'s attorney: "If Appellant's mother had had the ability [in] 2001 to pay the restitution that the trial court ordered, this case would have been closed then." The record shows, however, that S.A.G.'s mother was financially destitute and could not pay the thousands of dollars of restitution ordered by the court. Had S.A.G. been the child of a more financially stable parent -- perhaps the child of a lawyer or a judge - she would have completed her probation in 2001 without incident. Instead, she has remained in a juvenile justice system that has failed her. By all accounts, S.A.G. was not well served by her prior commitment to TYC; a commitment which was overturned by this court. There is no evidence in the record that S.A.G. will be any better served by a second commitment. If anything, the record reveals that S.A.G. is more emotionally fragile now than ever before. When reviewing the trial court's order of commitment in light of the entire record and in light of the purposes of the Juvenile Justice Code, I remain convinced that the trial court abused its discretion. Accordingly, I dissent.

A RESTITUTION AMOUNT, WHICH EXCEEDED THE "BLUE BOOK" VALUE, WAS (BASED ON THE EVIDENCE) NOT ARBITRARY NOR UNJUSTLY ENRICHING THE RECIPIENTS.

¶ 07-3-16. **In the Matter of R.M.,** MEMORANDUM, No. 05-06-00519-CV, 2007 Tex.App.Lexis 5785 [Tex.App.— Dallas (5th Dist.), 7/24/07], rel for pub. 8/16/07 .

Facts: In this case, R.M. appeals the order adjudicating him delinquent and ordering him to pay $ 6,386.20 in restitution. R.M. contends the State failed to prove the restitution damages arose as a result of the offense for which he was adjudicated delinquent, the restitution amount was awarded arbitrarily and unjustly enriched the recipients, and the court abused its discretion in failing to weigh his family's ability to pay when ordering the rate of restitution payment. We affirm the trial court's order. The background of the case and the evidence adduced at trial are well known to the parties, and therefore we limit recitation of the facts. We issue this memorandum opinion pursuant to *Texas Rule of Appellate Procedure 47.1* because the law to be applied in the case is well settled.

Appellant pleaded true to unauthorized use of a motor vehicle. Testimony at trial showed he and his cohorts jumped out of the car they had taken while it was still moving. When the car was recovered, it had to be towed to a repair facility. The owners of the car offered testimony and evidence showing a car dealership's estimates for repairing the car. According to the owners, the car was in "perfect" condition before the offense.

R.M. offered evidence showing an independent mechanic's estimates for the same repairs using rebuilt parts. R.M. also offered into evidence a document showing the "blue book" value for a vehicle of the same make, model, and year, in fair condition. R.M.'s father testified the family income was approximately $ 1,200 per month and the family could afford to pay no more than $ 50 in restitution per month.

In making its ruling, the trial judge stated the following about how she determined the restitution amount:

> The Court is also ordering that the family be responsible for the amount of $ 6,386.20 in restitution to Socorro Lopez. That's payable at $ 277.66 per month beginning January the 21st, the year 2006.
>
> What I did was I took the Blue Book value of $ 3,830.00 and, in looking at this assessment, it makes some specific notes about the condition of the car that we could not verify that is the condition of this particular car. For that reason I then took the difference between the two estimates and divided it and added the difference to - [Coughing in the gallery] - that made the difference being $ 6,386.
>
> Now, the testimony seemed to be consistent that the damages to the car were the same. The only difference being you're saying that there was no damage to the ignition, but I remember, specifically, the police officer testifying that the car had to be towed away because there was no key and there was damage to the ignition. So for that reason I found all of the damages to be consistent. The only issue was as to how much it would cost to repair this particular vehicle.
>
> I don't think that the victim should be forced to take inferior parts in order that the Respondent have to pay less, but I also don't think that, for a five-year-old car, that the victim should be compensated with a new - with new parts, necessarily, either. So for that reason I divided the two - divided the difference in the estimates.

Held: Affirmed

Memorandum Opinion: In all three of his issues on appeal, R.M. complains about the trial court's restitution order. A juvenile court has broad discretion to determine the proper disposition of a child who has been adjudicated as engaging in delinquent behavior. *In re C.G., 162 S.W.3d 448, 452 (Tex. App.-Dallas 2005, no pet.).* Absent an abuse of discretion, we will not disturb the juvenile court's findings. *Id*.

Here, R.M. first complains the State failed to prove by a preponderance of the evidence that the damages alleged arose as a result of R.M.'s unauthorized use of a motor vehicle offense. The State offered testimony showing the car was in perfect condition before the offense. Police testimony showed the car was damaged after appellant and his companions abandoned it, and the parties essentially agreed about what damage was caused by the offense. We conclude the court did not abuse its discretion and resolve appellant's first issue against him.

R.M. next argues the restitution amount, which exceeded the "blue book" value for the car, was awarded arbitrarily and unjustly enriched the recipients. Here, the trial judge noted the "blue book" estimate in evidence was based on a car in "fair" condition, but there was no evidence to suggest the car had been only in fair condition before the crime. The judge specifically chose a restitution amount, based on the

evidence before her, that would provide the owners of the car with repairs that would be reasonable both to them and to R.M.'s family. We resolve appellant's second issue against him.

In his third issue, R.M. contends the court abused its discretion in not weighing his family's ability to pay when ordering the rate of restitution payment. In fact, the record shows the court carefully considered the family's ability to pay and heard evidence on the matter. We resolve appellant's third issue against him as well.

Conclusion: We affirm the trial court's order adjudicating R.M. as a juvenile engaged in delinquent conduct.

ALIEN RESIDENCE STATUS DOES NOT EFFECT A TYC COMMITMENT IF THE CHILD'S HOME DOES NOT PROVIDE THE QUALITY OF CARE AND LEVEL OF SUPPORT AND SUPERVISION THAT IS NEEDED TO MEET THE CONDITIONS OF PROBATION.

¶ 07-4-18. **In the Matter of J.M.L.**, No. 08-06-00015-CV, 2007 Tex.App.Lexis 8433 (Tex.App.— El Paso, 10/25/07) .

Facts: On November 8, 2005, sixteen-year-old Appellant waived his right to a jury trial and entered a plea of true to an allegation that he possessed less than fifty pounds but more than five pounds of marihuana. The juvenile court set the disposition hearing for December 8, 2005 and ordered the juvenile probation department to complete a pre-disposition report. A juvenile probation officer, Kim Schumate, conducted an investigation and prepared the pre-disposition report. Schumate recommended that Appellant be removed from the home and committed to TYC because Appellant was not a U.S. citizen, his mother had not established his resident status in the United States, and INS had placed a detainer on him. Schumate testified at the disposition hearing that Appellant's mother is a U.S. citizen but Appellant was born in Mexico. INS advised Schumate that Appellant has a potential claim of derivative U.S. citizenship but it required that his mother initiate the documentation process. If Appellant were a U.S. citizen, Schumate would have considered recommending supervised juvenile probation. The juvenile court questioned Appellant's mother during the disposition hearing regarding her failure to file the appropriate documents with INS to establish derivative citizenship. She claimed that she had filed an application in 1994 but it was lost and she had not re-filed it. She went to INS before the disposition hearing but she had not returned the form they had given her. The juvenile court found that placement outside of the home was in Appellant's best interests, that Appellant's home did not provide the quality of care and level of support and supervision needed to meet the conditions of probation, and that no efforts could be made to prevent or eliminate removal because Appellant is a foreign national and there are no programs or alternatives to prevent removal. Based on these findings, the juvenile court committed Appellant to TYC.

In his sole issue for review, Appellant contends the juvenile court abused its discretion by committing him to TYC based solely on his citizenship status. He argues that there is an issue of fact regarding his citizenship status and the juvenile court should have resolved the issue before committing Appellant to TYC, even if it required continuing the disposition hearing to a later date.

Held: Affirmed

Opinion: Appellant restricts his argument to the juvenile court's determination that no efforts could be

made to prevent or eliminate removal from the home because Appellant is a foreign national.

The evidence at the disposition hearing established that Appellant's mother is a United States citizen. No specific evidence was offered regarding the citizenship of Appellant's father. He presently lives in Mexico and Appellant has not seen him since 1994. Appellant was born in Mexico but he has resided with his mother in the United States since 1994. Appellant elicited testimony from Schumate that Appellant is not a United States citizen and he is undocumented. Schumate testified, based on her conversations with INS, that Appellant has a potential claim for derivative citizenship but it requires that his mother initiate the process and offer proof related to residence. It is undisputed that Appellant's mother has not taken steps to establish Appellant's residency or his dual citizenship. When the trial court informed Appellant that he was committing him to TYC and suggested that his mother should in the meantime establish his status in the United States so that he would not be deported when released, Appellant responded that his mother could not do that because she was not living in the United States prior to his birth.

Schumate testified that INS advised her that Appellant has a claim for derivative U.S. citizenship and she agreed with Appellant's counsel that Appellant has a "very good claim." But she acknowledged that his claim required his mother to file an application and provide evidence to support it. Appellant's mother had not taken these steps even though Appellant had been living in the United States for more than ten years at the time of the disposition hearing. She had picked up an application some time prior to the disposition hearing but she had not returned it. We find that the evidence is factually sufficient to support the juvenile court's finding that no steps could be taken to prevent removal from the home because Appellant is an undocumented foreign national.

We next consider whether the juvenile court abused its discretion in committing Appellant to TYC. Appellant contends that there is an abuse of discretion because the juvenile court committed him to TYC without giving him an opportunity to pursue his derivative citizenship claim. Appellant did not move for a continuance. Nevertheless, he complains that the juvenile court should have continued the disposition hearing on its own motion because the citizenship issue was unresolved. Appellant cites no authority for the proposition that the juvenile court had a duty to continue the disposition hearing on its own motion and we are aware of none.

Conclusion: Even assuming the juvenile court had such a duty and Appellant has a valid claim for derivative citizenship, the juvenile court found that it was in Appellant's best interest that he be removed from the home and that his home did not provide him the quality of care and level of support and supervision that he needed to meet the conditions of probation. Appellant has not challenged these findings on appeal. Consequently, juvenile probation was not an available alternative disposition. We overrule the sole point and affirm the disposition order.

EVIDENCE—

THE VALUE OF STOLEN PROPERTY MAY BE SHOWN BY THE FAIR MARKET VALUE, OR, IF THAT CANNOT BE ASCERTAINED, BY SHOWING THE COST OF REPLACING THE PROPERTY (NOT NECESSARILY THE COST OF THE PROPERTY THAT REPLACED IT).

¶ 07-3-18. **In the Matter of D.L.**, ___S.W.3d___, MEMORANDUM, No. 12-06-00431-CV, 2007

Tex.App.Lexis 6059, (Tex.App.— Tyler, 7/31/07) .

Facts: Kenneth Carrell is a coach and teacher at John Tyler High School. He also supervises and manages the athletic department's information technology equipment including computers, servers, and camcorders. Part of the inventory he maintained in a locked storage room included two Sony mini-DVD camcorders. The camcorders were "top of the line" with special lenses of French manufacture, according to Carrell, as well as a number of input and output ports that were useful to him in his duties. The camcorders also had remote sensors that linked them to a tripod remote, which allowed them to be used together and synchronized to provide a wide angle as well as a tight angle view of the same sequence of events. One of Carrell's duties was to make recordings of the school's athletes to provide to college recruiters. Because of the flexible array of outputs available on the camcorders, Carrell used these devices to edit the final recordings to be sent out in support of the school's athletes.

Around the beginning of May 2006, Carrell noticed that the camcorders were missing from the locked storage room. A large number of students had been in an adjoining classroom immediately before for the screening of a movie. D.L. was one of the students present that day. Carrell engaged in some informal investigation in an attempt to recover the camcorders and eventually turned the matter over to the police affiliated with the school. D.L. was identified as a suspect, and juvenile proceedings were begun against him alleging that he stole the camcorders and that they were worth more than $ 1,500. D.L. did not admit the allegations, and an adjudication hearing was held. The jury found the allegations to be true, and the trial court ordered that D.L. be committed to Texas Youth Commission. This appeal followed.

D.L. contends that the evidence is factually insufficient to support the decision of the jury. Specifically, he contends that the evidence does not show that the value of the stolen camcorders was equal to or greater than $ 1,500.

Held: Affirmed

Memorandum Opinion: The State may prove the value of stolen property by showing the fair market value of the property at the time and place of the offense, or, if that cannot be ascertained, by showing the cost of replacing the property within a reasonable time after the theft. *TEX. PENAL CODE ANN. § 31.08(a)(1), (2)* (Vernon 2006). D.L. argues that the State did not prove that the value of the stolen camcorders was more than $ 1,500 because there was no testimony about the fair market value of the camcorders and the replacement cost was less than $ 1,500.

From the evidence, the relevant data points regarding the value of these camcorders are as follows:

1) $ 1,500 to 1,600 - original purchase price, four or five years prior to the theft
2) $ 2,998 - replacement cost for new camcorders with the same features as those stolen
3) $ 1,600 - replacement cost of the camcorders actually purchased including tax and accessories

Fair market value is "the dollar amount the property would sell for in cash, given a reasonable time for selling it." *See **Simmons v. State**, 109 S.W.3d 469, 473 (Tex. Crim. App. 2003).* There was no testimony about the fair market value of the stolen camcorders. The original purchase price can be an approximation of the fair market value if the item has been purchased recently. *See **Nitcholas v. State**, 524 S.W.2d 689, 690-91 (Tex. Crim. App. 1975)*; ***Anderson v. State**, 871 S.W.2d 900, 903 (Tex. App.-Houston [1st Dist.] 1994, no writ).* However, as D.L. notes, these camcorders had not been purchased recently.

In cases where the fair market value cannot be ascertained, [2] *section 31.08(a)(2)* provides that the cost of replacing the property a reasonable time after the theft is the measure of value. There were two prices offered as a replacement cost. Carrell testified that exact replacements of the stolen camcorders cost $ 1,499 each, for a total of $ 2,998. Carrell also testified that he purchased inferior camcorders, without all of the features he needed, along with accessories to give the functionality he required, and that the total cost was $ 1,600.

2 Other than Carrell's assertion that the camcorders were worth more than $ 1,500 to him, the State did not establish the fair market value of the camcorders. D.L. does not argue that the fair market value can be ascertained.

As D.L. points out, there are arithmetic computations that can bring the second amount, $ 1,600, under the $ 1,500 threshold. Specifically, D.L. argues that accessories purchased with the camcorders, as well as the sales tax paid, should not be included. There is a basis for this argument. For example, the replacement value of a compact disc player does not include the cost of installation and "other intangibles necessary to compete replacement," ***Drost v. State****, 47 S.W.3d 41, 46 (Tex. App.-El Paso 2001, pet. ref'd)*, and replacement value does not include the cost to replace other items that might have been stolen along with the item alleged to have been stolen. *See* ***Ballinger v. State****, 481 S.W.2d 421, 422 (Tex. Crim. App. 1972)*.

We need not resolve this issue, however, because the jury was entitled to rely on Carrell's statement that direct, one for one, replacements of the two stolen camcorders would cost nearly $ 3,000. The fact that Carrell elected to cobble together another replacement, the value of which was closer to the $ 1,500 floor, is of no moment. The level of offense committed by a thief who takes a Rolex timepiece is not determined by the price of the replacement the victim purchases.

Conclusion: Even though he testified that he could not afford to purchase them, Carrell testified that the replacement cost of camcorders with the same functionality as those stolen was well in excess of $ 1,500. Therefore, we hold that there was sufficient evidence that the replacement cost, the appropriate measure of the value of the stolen property, was more than $ 1,500. Furthermore, the evidence supporting this conclusion is not so weak or so outweighed by contrary evidence that we conclude the verdict is clearly wrong or is a manifest injustice. We overrule D.L.'s sole issue.

MODIFICATION OF DISPOSITION—

NEITHER THE RULES OF CIVIL PROCEDURE NOR THE FAMILY CODE REQUIRE A PLEA TO BE ENTERED IN A JUVENILE MODIFICATION HEARING.

¶ 07-3-4. **In the Matter of T.J.H.T.**, ___S.W.3d.___, No. 04-06-00805-CV, 2007 Tex.App.Lexis 3727 (Tex.App— San Antonio, 5/16/07), rel. for pub. 8/24/07 .

Facts: T.J.H.-T. was placed on juvenile probation on June 20, 2006 resulting from the misdemeanor offense of possession of a prohibited weapon. T.J.H.-T. plead true to this charge and was placed on probation in the custody of his mother until his eighteenth birthday. Among the conditions of his probation was that he was to have no contact with Mary Rumage.

On September 19, 2006, the State filed a motion to modify disposition alleging that T.J.H.-T. violated three conditions of his probation: (1) he violated the laws of Texas by committing the offense of terroristic threat against Mary Rumage; (2) he failed to avoid the use of illegal drugs; and (3) he violated the condition ordering him to have no contact with Mary Rumage.

At the hearing on the motion to modify, T.J.H.-T. was not asked to enter a plea to the charges, and therefore he did not enter a plea. The case proceeded as if a "not true" plea had been entered. Mary Rumage, the State's first witness, testified that she was outside her home between 10:30 and 11:00 p.m. on August 27, 2006, and T.J.H.-T., who resided across the street from her home, called her a "bitch" and said "I'll get you, bitch." Rumage stated that she was afraid of T.J.H.-T. and that the confrontation occurred on the day before a hearing on T.J.H.-T.'s brother's case regarding an incident in which Rumage's grandson was stabbed.

Juvenile Probation Officer Scott Pool also testified for the State and the court admitted business records from T.J.H.-T.'s file into evidence. The records indicated that T.J.H.-T.'s probation officer discussed his probation conditions with him, but that T.J.H.-T. nonetheless failed a random drug test and admitted to his probation officer that he smoked marihuana.

T.J.H.-T.'s mother, Charlotte Rangel, testified on his behalf and said that she was home with T.J.H.-T. on the evening of August 27, 2006. Rangel stated that T.J.H.-T. was not in the front yard of their house that evening unsupervised and that the outfit she recalled T.J.H.-T. wearing that evening was different from the clothing described by Ramage. Rangel did admit, however, that she was not home that evening between 6:00 and 10:25 p.m. T.J.H.-T. testified on his own behalf and denied threatening Rumage or going to her home, but he admitted to using marihuana after being placed on probation.

T.J.H.-T.'s cousin and aunt both testified that they were willing to take custody of T.J.H.-T. and supervise him. Both T.J.H.-T. and his mother testified that they would agree to this arrangement. He stated that he had stopped using marihuana and had been focusing on his school work and testified that he would not return to his mother's home if he remained on probation.

Following the testimony, the trial judge expressed her concern regarding T.J.H.-T.'s potential threat of harm to the community. The court concluded that based on his probation violations and past assault charges, T.J.H.-T. should be committed to TYC based on his need for rehabilitation and for the public's protection.

On appeal, T.J.H.-T. argues that the trial court committed fundamental error when it failed to require him to enter a plea to the allegations in the motion to modify disposition. T.J.H.-T. also contends the trial court abused its discretion when it committed him to TYC because the record indicates that the continuation of probation would have been a more appropriate disposition.

Held: Affirmed

Memorandum Opinion: In his first issue, T.J.H.-T. contends that the trial court committed fundamental error when it failed to require him to enter a plea to the allegations in the motion to modify disposition. In order to properly preserve a complaint for appeal, a party must make the complaint to the trial court by a timely request, objection, or motion. *See TEX. R. APP. P. 33.1(a)*. Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties. *In the Interest of B.L.D., 113*

S.W.3d 340, 350-52 (Tex. 2003). Fundamental error occurs when error directly and adversely affects the interest of the public generally or when the record conclusively shows that the court rendering the judgment was without jurisdiction. *Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 577 (Tex. 2006).*

T.J.H.-T. admits that his defense counsel did not object to the trial judge's failure to ask him to enter a plea to the charges in the motion to modify and T.J.H.-T. does not argue that the court was without jurisdiction. Instead, T.J.H.-T. argues that the failure to require him to enter his plea to the charges against him adversely affects the public interest as defined by the laws of Texas and argues that this court should look to the Code of Criminal Procedure when deciding this issue.

T.J.H.-T. is correct in stating that the Code of Criminal Procedure requires a plea to be entered in every criminal case and if one is not entered, the trial is a nullity. *See TEX. CODE CRIM. PROC. ANN. art. 26.12, 26.13* (Vernon Supp. 2006); *Lumsden v. State, 384 S.W.2d 143, 144 (Tex. Crim. App. 1964).* However, except for discovery and evidentiary matters, the trial of a juvenile case is governed by the Texas Rules of Civil Procedure. *See TEX. FAM. CODE ANN. § 51.17* (Vernon Supp. 2006); *In re D.I.B., 988 S.W.2d 753, 756 (Tex. 1999).* Neither the Rules of Civil Procedure nor the Family Code require a plea to be entered. We therefore conclude that T.J.H.-T.'s argument that his failure to enter a plea at the modification hearing rendered the proceedings a nullity lacks merit and we thus overrule T.J.H.-T.'s first issue. *See In the Matter of C.C., No. 05-01-01882-CV, 2002 Tex. App. LEXIS 4384, 2002 WL 1340319 (Tex. App.-Dallas June 20, 2002, no pet.)* (concluding that neither the Family Code nor the Rules of Civil Procedure require a plea to be entered and therefore appellant's argument that his failure to enter a plea at the adjudication and modification hearings rendered the proceedings a nullity lacks merit.)

Conclusion: Based on the foregoing, the judgment of the trial court is affirmed.

BY FAILING TO OBJECT TO CONDITIONS OF PROBATION, RESPONDENT WAIVED THAT THEY WERE "SO DEFECTIVE, DEFICIENT AND UNCERTAIN" THAT THEY FAILED TO PUT HIM ON NOTICE OF WHAT HIS OBLIGATIONS WERE.

¶ 07-4-4. **In the Matter of J.B.**, No. 2-06-396-CV, 2007 Tex.App.Lexis 6607 (Tex.App.— Fort Worth, 8/16/07) .

Facts: Appellant J.B., a juvenile, appeals the trial court's judgment revoking his probation and committing him to the Texas Youth Commission. Because we hold that the trial court did not abuse its discretion in making this decision, we affirm.

J.B. was adjudicated delinquent for aggravated sexual assault of a child on December 1, 2005, and the trial court placed him on two years' probation. The trial court's order required that J.B. participate in the Specialized Treatment of Offenders Program ("STOP"), a long-term residential treatment program for juveniles who have committed sexual offenses, beginning on January 13, 2006. J.B. did not make satisfactory progress in the program's course of sex offender treatment, so he was unsuccessfully discharged from STOP on August 23, 2006.

The State then filed a Motion to Modify Disposition, alleging that J.B. had violated the terms of his probation and requesting the trial court to commit him to TYC. After a hearing, the trial court found that J.B. had violated the terms and conditions of his probation by causing his unsuccessful discharge from

STOP and sex offender treatment, revoked his probation, and committed him to TYC for an indeterminate sentence. J.B. now appeals.

Held: Affirmed

Opinion: In his first point, J.B. complains that the trial court abused its discretion by committing him to TYC because he did not knowingly or willingly violate any valid condition of his probation. The terms of probation imposed by the trial court are contained in an exhibit to the trial court's order of probation, including a list of "Special Conditions" that J.B. was "to participate in and successfully complete." These conditions included the directive, "You will attend counseling for sex offender counseling." In addition, under the heading "Additional Conditions Ordered" is written, "STOP ordered."

J.B. first argues that the language of the probation order imposing the conditions of his probation was "so defective, deficient and uncertain" that the order failed to put him on notice of what his obligations were. However, J.B. admits that the record does not show that he objected to the conditions of probation in the trial court when they were imposed. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a). If a party fails to do this, error is not preserved, and the complaint is waived. *Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991)* (op. on reh'g). Because J.B. does not show that he objected to the conditions of probation when they were imposed, J.B. has waived any complaint about the content of the conditions of probation. *See In re R.P., 37 S.W.3d 76, 80 (Tex. App.--San Antonio 2000, no pet.)* (holding that juvenile waived complaint about the constitutionality of a condition of probation by failing to object to the condition in the trial court when it was imposed).

J.B. also complains that his bipolar condition and the STOP professionals' failure to properly medicate and stabilize his mental health problems show that he did not have the capacity to understand the probation order or to violate its conditions knowingly or willfully. While there was evidence that J.B. had been diagnosed with bipolar disorder and that his doctors changed his medication doses several times while he was in STOP, there was no evidence that these circumstances caused J.B. to be unable to comprehend the order or how his conduct would violate it. There was, however, evidence showing the opposite--that J.B. did understand what was expected of him: Juan Lajara, J.B.'s intake probation officer, testified that when he reviewed the terms and conditions of probation with J.B. and J.B.'s mother, J.B. did not appear to have any problems understanding what Lajara was talking about because J.B. was able to explain the terms and conditions back to Lajara after Lajara initially presented them. Accordingly, we hold that the trial court did not abuse its discretion by committing J.B. to TYC based on its finding that J.B. had violated the terms and conditions of his probation. We overrule J.B.'s first point.

After reviewing the evidence, we conclude that the trial court's decision to modify J.B.'s disposition by committing him to the custody of TYC was not an abuse of discretion.[3] We overrule J.B.'s second point.

Conclusion: Having overruled both of J.B.'s points on appeal, we affirm the trial court's judgment.
PER CURIAM

TRIAL COURT RECITING THE NECESSARY STATUTORY LANGUAGE WAS SUFFICIENT FOR A COMMITMENT TO TYC.

¶ 07-4-9. **In the Matter of L.T.H.**, No. 03-06-00433-CV, 2007 Tex.App.Lexis 7340 (Tex.App.— Austin, 9/6/07) .

Facts: On April 21, 2005, the juvenile court, after finding that L.T.H. had engaged in delinquent conduct by committing the offense of assault, placed L.T.H. on probation for nine months. On September 7, 2005, the State moved to modify the disposition, alleging that L.T.H. had violated a condition of his probation by failing to report to his probation officer. On October 6, after hearing evidence on the State's motion, the juvenile court modified the disposition, extending the probation until May 2006.

As a term and condition of his probation, L.T.H. was required to be inside the residence of his grandparents between the hours of 9:00 p.m. and 6:00 a.m. On February 28, 2006, the State moved to modify the disposition, alleging that L.T.H. failed to comply with this condition from November 1, 2005 to the date of the motion. At the July 6, 2006 modification hearing, L.T.H. pleaded true to the State's allegation.

Following L.T.H.'s plea, the juvenile court heard evidence from Cathy McClaugherty, a caseworker with the Travis County Juvenile Probation Department. McClaugherty testified that the department's recommendation was commitment to TYC. McClaugherty explained the department's reasoning to the juvenile court. After L.T.H. was placed on probation, L.T.H. had first spent 90 days in the department's "Impact Program," which is a "brief behavior modification program." Upon completion of that program, L.T.H. was allowed to return home. However, according to McClaugherty, L.T.H. "has absconded at least twice for a period of time." Additionally, the "family has a history of moving without notifying the Probation Department."

McClaugherty also testified that she believed commitment to TYC would be in the child's best interest because L.T.H. "has difficulty functioning in the community. We have not been able to get him to engage in probation." McClaugherty also believed that commitment to TYC was in "the community's best interest" because L.T.H.'s "offenses speak to the fact that he appears to be a danger to other people in the community."

At the conclusion of the hearing, the juvenile court committed L.T.H. to TYC. This appeal followed.

Held: Affirmed

Memorandum Opinion: In his first point of error, L.T.H. asserts that the juvenile court's order was deficient because it failed to specifically state the reasons for the modification of the prior disposition. *Section 54.05(i) of the family code* provides, "The court shall specifically state in the order its reasons for modifying the disposition and shall furnish a copy of the order to the child." *Tex. Fam. Code Ann. § 54.05(i)* (West Supp. 2006). *Section 54.05(m)* requires that the juvenile court's order committing a child to the TYC include a 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 child's home and to make it possible for the child to return 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.
Id. § 54.05(m) (West Supp. 2006).

In this case, the juvenile court's order specified that L.T.H. violated the condition of probation requiring him to "be inside the residence of [his] grandparents each day between 9:00 p.m. and 6:00 a.m., unless accompanied by [his] parent or guardian." The order further specified that L.T.H. "failed to be inside the residence of his [grandparents] on November 1, 2005 to present." Additionally, the order specified that L.T.H. "will not accept parental supervision and has demonstrated a disregard for all authority." The order then recited the necessary statutory language:

> [L.T.H.], in [L.T.H.]'s home, cannot be provided the quality of care and level of support and supervision that [L.T.H.] needs to meet the conditions of probation. All reasonable efforts were made to prevent or eliminate the need for [L.T.H.]'s removal from home and to make it possible for [L.T.H.] to return home. The Court further finds that [L.T.H.] has been removed from his home and the Court approves of the removal. The Court further finds that the local resources of this Court are not adequate to meet such needs or accomplish the necessary protection of the public.

It therefore appears to the Court that the best interest of [L.T.H.] and of society will be served by committing [L.T.H.] to the care, custody, and control of the Texas Youth Commission.

Conclusion: In addition to reciting the necessary statutory language provided for in *section 54.05(m), see id.,* the order complies with *section 54.05(i)* by specifically stating the reasons for modifying the disposition. L.T.H. "failed to be inside the residence of his [grandparents] on November 1, 2005 to present," which was a direct violation of one of the conditions of his probation. Additionally, the order specified that L.T.H. "will not accept parental supervision and has demonstrated a disregard for all authority." Finally, the juvenile court specified that the best interest "of society" would also be served by committing L.T.H. to TYC. *See J.T.H., 779 S.W.2d at 959* (holding that juvenile court's "listing of protection of the public as a factor" in committing juvenile to TYC, when combined with other reasons, satisfied specificity requirement). We hold that the order satisfies the specificity requirement of *section 54.05(i).* We overrule L.T.H.'s first point of error.

ORDERS AND JUDGEMENTS—

FAILURE OF TRIAL COURT TO LIST FINDINGS FOR TYC COMMITMENT DOES NOT WARRANT REVERSAL.

¶ 07-3-9. **In the Matter of S.J.F.**, No. 04-06-00619-CV, 2007 Tex.App.Lexis 4742 (Tex.App.— San Antonio, 6/20/07) rel. for pub. 9/14/07 .

Facts: S.J.F. pled true to the offense of burglary of a building, the trial court found the charge to be true and committed S.J.F. to TYC. At the conclusion of the disposition hearing, the trial court made the statutory findings required by *subsection 54.04(I)* and then with respect to the findings required by *subsection 54.04(f)* stated the following on the record: "I will order the child committed to the Texas Youth Commission in light of his record regarding his education and complying with conditions of probation."

The trial court's Order of Disposition also includes the statutory findings required by *subsection 54.04(I)*. However, the order does not list any findings required by *subsection 54.04(f)*. The order only states the following: "The Court finds that this is the appropriate disposition for the following reason(s):" No reasons, however, are listed.

In one issue on appeal, S.J.F. contends the trial court abused its discretion when it committed him to TYC because the trial court failed to clearly state its reasons for the commitment as required by *subsection 54.04(f) of the Texas Family Code*.

Held: Abated and Remanded

Opinion: *Subsection 54.04(f)* provides that "[t]he court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child." *TEX. FAM. CODE ANN. § 54.04(f)* (Vernon Supp. 2006). This subsection of the Family Code requires the court to articulate "clear, specific reasons for the disposition." *In re A.G.G., 860 S.W.2d 160, 162 (Tex. App.--Dallas 1993, no writ).* The trial court is required to specifically state its reasons for the disposition to allow "an appellate court, on review, to determine whether the reasons given in the order are supported by the evidence or whether they are insufficient to justify the disposition made." *In re A.N.M., 542 S.W.2d 916, 919 (Tex. Civ. App.--Dallas 1976, no writ).*

In this case, the trial court did not include any reasons in its order of disposition. Further, the trial court's statement at the conclusion of the hearing that S.J.F. would be committed to TYC "in light of his record regarding his education and complying with conditions of probation" is simply too unclear and ambiguous to allow meaningful review on appeal.

When a juvenile court does not comply with *subsection 54.04(f)*, we do not reverse for a new trial, but instead remand with instructions for the juvenile court to render a proper disposition order specifically stating the reasons for such disposition. *See TEX. R. APP. P. 44.4*; *In re S.S., No. 04-99-00806-CV, 2001 Tex. App. LEXIS 2315, 2001 WL 356963, at *3 (Tex. App.--San Antonio 2001, order)*; *In re K.K.H., 612 S.W.2d 657, 658 (Tex. Civ. App.--Dallas 1981, no writ).*

Conclusion: We, therefore, abate this appeal and remand the cause to the trial court with instructions for the trial court to render a proper disposition order specifically stating the reasons for such disposition in compliance with *subsection 54.04(f).*

A TRIAL COURT'S PLENARY POWER ENDS THIRTY DAYS AFTER THE FIRST FILED MOTION FOR NEW TRIAL IS OVERRULED.

¶ 07-4-5. **In the Matter of A.M.**, MEMORANDUM, No. 04-06-00483-CV, 2007 Tex.App.Lexis 6676 (Tex.App— San Antonio, 8/22/07) .

Facts: A.M., a juvenile, was charged with aggravated sexual assault of a child. The State sought determinate sentencing and, following a jury trial, the trial court entered an Order of Adjudication finding that A.M. did engage in delinquent conduct, specifically, aggravated sexual assault of a child. After holding a disposition hearing, the trial court signed an order sentencing A.M. to a determinate sentence of forty years. A.M. contends on appeal that (1) the trial court erred in refusing his request for an evidentiary

hearing on his motion for new trial; and (2) he received ineffective assistance of counsel under the United States and Texas Constitutions. The Order of Disposition was signed on March 31, 2006. On April 19, 2006, A.M.'s trial counsel, Gloria Early, filed a "Motion to Withdraw as Counsel, a Motion for New Trial, and a Notice of Appeal." Early's motion to withdraw as counsel was granted on April 19, 2006, and the motion for new trial was overruled on April 20, 2006. An order substituting new counsel, Kenneth Baker, was entered on April 27, 2006. Before the order substituting Baker was even entered, however, on April 21, 2006, Baker apparently filed an "Amended Motion for New Trial" containing the wrong cause number. Because of this error, the motion was filed in the wrong cause number. [1] And, because it was not filed in the cause number which is now on appeal, the "Amended Motion for New Trial" is not contained in the appellate record.

1 Baker has provided a copy of the amended motion for new trial, which he contends was filed on April 21, 2006, under the wrong cause number, in an appendix to his brief.

On June 27, 2006, A.M.'s new counsel, Baker, filed a second "Amended Motion for New Trial," which was overruled on July 3, 2006. Also on June 27, 2006, Baker filed "Defendant's Motion to Set Aside Order Denying Motion for a New Trial, Striking the First Filed Motion for New Trial and Deeming Respondent's Motion for a New Trial Timely Filed." This motion was likewise denied on July 3, 2006. Now, on appeal, A.M. contends the trial court was required to hold a hearing on his amended motion for new trial and that he received ineffective assistance of counsel.

Held: Affirmed

Memorandum Opinion: In his first issue, A.M. argues that the trial court should have granted his request for an evidentiary hearing on his motion for new trial. He contends that the "Amended Motion for New Trial," which he filed on April 21, 2006, under the wrong cause number, was timely and, therefore, the trial court was required to consider it.

As a general rule, juvenile appeals proceed under the rules governing civil cases. *TEX. FAM. CODE ANN. § 56.01(b)* (Vernon 2002)("The requirements governing an appeal are as in civil cases generally."); *In re J.C.H., 12 S.W.3d 561, 562 (Tex. App.--San Antonio 1999, no pet.)*(applying Rules of Appellate Procedure governing civil cases in juvenile case); *J.E.S. v. State, No. 05-95-00834-CV, 1995 Tex. App. LEXIS 2638, 1995 WL 634154, at *1 (Tex. App.--Dallas 1995, no writ)*(applying in juvenile case motion for new trial rules set forth in *Texas Rule of Civil Procedure 329b*). In a juvenile case, the rules require that a motion for new trial be filed within thirty days after the order of disposition is signed. *See In re J.C.H., 12 S.W.3d at 562*; *see TEX. R. CIV. P. 329b(a). Texas Rule of Civil Procedure 329b(b)* allows a party to file an amended motion for new trial without leave of the trial court as long as the trial court has not yet overruled an earlier new trial motion, and the amended motion is filed within thirty days after the trial court signs the judgment. *Moritz v. Preiss, 121 S.W.3d 715, 719-20 (Tex. 2003)*; *see TEX. R. CIV. P. 329b(b).*

In this case, A.M.'s trial attorney, Early, filed a motion for new trial within thirty days of the disposition order, and the trial court overruled it the following day. The subsequently filed amended motion for new trial, filed on April 21, 2006, by Baker, was timely in the sense that it was filed within thirty days of the disposition order. But, regardless of whether the amended motion was filed in the correct cause, the trial court was not required to consider it because the trial court had already overruled a previously filed motion for new trial. *See TEX. R. CIV. P. 329b(b)*; *Moritz, 121 S.W.3d at 719-20*. Once the first motion for new trial was overruled, the rules do not allow the filing of an amended motion without leave of court.

TEX. R. CIV. P. 329b(b). Furthermore, the amended motion for new trial filed by Baker on April 21, 2006, is not properly before us because it is not contained in the record on appeal.

A.M. emphasizes that he eventually filed a "Second Amended Motion for New Trial" in the correct cause number on June 27, 2006. Also on June 27, 2006, he filed "Defendant's Motion to Set Aside Order Denying Motion for a New Trial; Striking the First Filed Motion for a New Trial and Deeming Respondent's Motion for a New Trial Timely Filed." In that motion, he contended that Early had not been authorized to file a motion for new trial.

Conclusion: Because the trial court's plenary power ended thirty days after the first filed motion for new trial was overruled, none of these motions filed on June 27, 2006, were timely. *See TEX. R. CIV. P. 329b(e)*. The first filed motion for new trial was overruled on April 20, 2006, and, therefore, the trial court's plenary power expired on May 22, 2006. Thus, any motions filed after May 22, 2006, were of no effect. A.M.'s first issue on appeal is overruled.
Other Issues Omitted.

A JUVENILE REFEREE'S ORDER IS ENFORCEABLE UNTIL THE JUVENILE COURT JUDGE ADOPTS, MODIFIES, OR REJECTS IT OR UNTIL IT IS ALTERED BY OPERATION OF LAW.

¶ 07-4-14. **In the Matter of S.G.**, No. 11-05-00360-CV, 2007 Tex.App.Lexis 7807 (Tex.App.—Eastland, 9/27/07) .

Facts: In October 2004, the juvenile court found that S.G. had engaged in delinquent conduct. The court entered a judgment of delinquency and ordered that S.G. be placed on probation at Settlement Home in Austin. However, S.G. was unsuccessfully discharged from Settlement Home. Consequently, the court modified the terms of S.G.'s probation and placed her in the Rockdale Juvenile Facility. Pursuant to the court's order, S.G. was to remain at Rockdale until successfully discharged, and the period of probation was to expire "June 31, [sic] 2005." On June 9, 2005, S.G. successfully completed the treatment program at Rockdale and was discharged. On that same date, an agreed motion and order modifying the terms of S.G.'s probation -- to the custody of her grandmother until June 30, 2005 -- was signed by S.G., her attorney, the assistant district attorney, and an associate judge/referee. The juvenile court judge signed the agreed motion and order on June 24, 2005. The terms and conditions of probation that were attached to the agreed motion and order required S.G. to be in her grandmother's residence between the hours of 8:00 p.m. and 6:00 a.m. This curfew requirement was new; the previous order placing S.G. at Rockdale did not contain such a provision. The State filed a motion to modify on June 28, 2005, alleging that S.G. had violated the terms of her probation by breaking curfew on June 21, 2005. This allegation was found to be true, and the terms of S.G.'s probation were again modified -- this time committing her to TYC. It is from this final modification order that S.G. appeals.

S.G. contends in her sole issue that the court erred in finding that she violated the terms of her probation because there was no valid court order in effect at the time of her June 21 violation. S.G. asserts that the order was not enforceable until June 24 when it was signed by the juvenile court judge. While we agree with S.G. that associate judges, referees, and masters are not vested with the authority to act as judges, *In re D.G., No. 05-01-00208-CV, 2002 Tex. App. LEXIS 1628, 2002 WL 338875 (Tex. App.-Dallas Mar. 5, 2002, pet. denied)* (mem. op., not designated for publication), we cannot conclude that the order did

not take effect until it was signed by the juvenile court judge. [1]

1 We note that, in a suit affecting the parent-child relationship, an order signed only by an associate judge constitutes a final order of the referring court if the order is an agreed order, a default order, or a temporary order. *TEX. FAM. CODE ANN. §§ 201.007(a)(14), (c)*; *201.016(c)* (Vernon Supp. 2006). The Family Code, however, contains no such provision for an agreed order signed by a referee in a juvenile case.

Held: Affirmed.

Opinion: The Texas Family Code provides that a county juvenile board may appoint a referee to make detention determinations and conduct hearings under the Juvenile Justice Code. *TEX. FAM. CODE ANN. § 51.04(g)* (Vernon 2002). When a referee conducts a hearing on a petition to modify the disposition in a juvenile case, the referee must, at the conclusion of the hearing, transmit written findings and recommendations to the juvenile court judge, who "shall adopt, modify, or reject the referee's recommendations not later than the next working day after the day that the judge receives the recommendations. Failure to act within that time results in release of the child by operation of law." *TEX. FAM. CODE ANN. § 54.10(d)* (Vernon Supp. 2006); *see also TEX. FAM. CODE ANN. § 54.05* (Vernon Supp. 2006). *Section 54.10(d)* also provides that a referee's "recommendation that the child be released operates to secure the child's immediate release subject to the power of the juvenile court judge to modify or reject that recommendation." In this case, the agreed order operated to release S.G. into the custody of her grandmother. Therefore, we are of the opinion that it took effect immediately upon being signed by the referee.

Even if the agreed order did not operate as a "release," various provisions in the Family Code provide that orders of referees are enforceable when made. In addition to providing that a referee's recommendation of release "operates to secure the child's immediate release subject to the power of the juvenile court judge to modify or reject that recommendation," *Section 54.10(d)* also provides that other recommendations made by a referee remain in effect unless altered by the juvenile court judge or by operation of law. Similar to *Section 54.10(d), TEX. FAM. CODE ANN. § 54.01(l)* (Vernon Supp. 2006) provides for a referee's order at a detention hearing to take immediate effect and states that the "effect of an order detaining a child shall be computed from the time of the hearing before the referee." If the agreed order had not taken effect at the time it was signed by the referee, S.G. would still have been subject to the disposition order previously entered by the juvenile court judge, which placed responsibility for S.G.'s care and placement with the Travis Juvenile Probation Department instead of the release of S.G. to her grandmother.

We hold that the order took effect when the referee signed it because the orders of referees are effective immediately if they recommend that the juvenile be released and because, even though they may not be final judgments, the orders of referees are otherwise enforceable until the juvenile court judge adopts, modifies, or rejects them or until they are altered by operation of law.

Conclusion: Since the order was in effect at the time that S.G. violated its terms, the trial court did not err in revoking S.G.'s probation and committing her to TYC. S.G.'s sole issue on appeal is overruled.

The order of the trial court is affirmed.

SEARCHES AND SEIZURE—

TERRY STOP PROPER WHERE JUVENILES APPEARED TO BE UNDERAGE, OUT AFTER THE CITY'S CURFEW, AND IN POSSESSION OF A STALLED CAR.

¶ 07-4-2. **Macias v. State**, MEMORANDUM, No. 13-04-00027-CR, 2007 Tex.App.Lexis 6307 (Tex.App.— Corpus Christi – Edinburgh, 8/9/07) .

Facts: Francisco Macias, Megan Adams, and Christopher Lozano ("the defendants") were convicted for the murder of Jan Barnum, Adams's maternal grandmother. The defendants were fifteen years old when the murder occurred, but were tried together as adults. A jury convicted all three and sentenced Macias to life in prison. The trial court entered a judgment of conviction and punishment effectuating the jury's verdict and sentence. By two points of error, Macias appeals the trial court's judgment.

Held: Affirmed.

Memorandum Opinion: By his second point of error, Macias argues that the trial court erred in denying his motion to suppress a written statement he made during his detention after Barnum's murder was discovered by authorities. He argues that the officers (1) had no reasonable suspicion that he engaged in delinquent conduct to detain him at the convenience store, (2) had no probable cause to take him into custody at the convenience store, and (3) lacked probable cause to take him back into custody after he had been dropped off at his parents' house. He also argues that his statements were taken without the benefit of statutory and constitutional rights and that family code violations occurred. The State contends that both reasonable suspicion and probable cause existed in each instance, that he was given appropriate warnings, and that no family code violations occurred.

Presumably Macias's reasonable suspicion argument refers to his initial detention at the convenience store. He argues that at the time Officer Javier Gallegos approached him there were no reasonable and articulable facts to warrant an intrusion and thus his detention was unjustified. Macias also articulates an argument regarding lack of probable cause to take him into custody and return him to his parents' house.

A police officer may detain a person for a brief time for questioning when the officer has reasonable suspicion to believe that criminal activity may be afoot. To justify an investigative detention, the officer must have a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime." The officer must have specific and articulable facts which, in light of his experience and personal knowledge, together with inferences from those facts, would reasonably warrant the intrusion on the freedom of the person detained for investigation.

Macias's detention argument fails because the circumstances surrounding his detention provided for reasonable suspicion. Juvenile Investigator Santiago Solis and Officer Gallegos testified at the suppression hearing regarding the events surrounding Macias's detention. On the evening of March 5, 2003, Officer Gallegos, the detaining officer, was dispatched to the convenience store after Officer John Vargas, an off-duty officer, requested an on-duty officer. When Officer Gallegos arrived, Macias, Adams, and Lozano

appeared to be underage, out after the city's curfew, and in possession of a stalled car; none had a driver's license, much less formal identification. From what Officer Gallegos encountered, there was reasonable suspicion to believe that criminal activity might be afoot -- namely a violation of the city's curfew.

The probable cause argument against taking Macias into custody at the convenience store also fails. The family code provides that a child may be taken into custody by a law enforcement officer if there is probable cause to believe that the child has engaged in (1) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state, or (2) delinquent conduct or conduct indicating a need for supervision. Officers have probable cause when "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

Upon detaining the teens, Officer Gallegos ascertained that their car had stalled at the gas pump and that they were planning to go to Louisiana. He also noticed that they had clothes, a backpack, and a hamster in a cage inside of the car. From this first-hand knowledge, a person of reasonable caution could have believed that the teens were planning on running away. Therefore, the teens had not only violated the city's curfew, but they were engaged in conduct indicating a need for supervision -- running away from home. Probable cause existed at the convenience store to take Macias into custody and return him to his parents.

In light of the facts before it, we find no error with the trial court's denial of Macias's suppression motion based on his detention at the convenience store.

We hold that the trial court did not err in denying Macias's motion to suppress. Macias's second point of error is overruled.

Conclusion: The judgment of the trial court is affirmed.

A PASSENGER IN A CAR MAY CHALLENGE THE CONSTITUTIONALITY OF A TRAFFIC STOP.

¶ 07-4-7. **Brendlin v. California**, 127 S. Ct. 2400, 168 L. Ed. 2d 132, 2007 U.S. Lexis 7897 (U.S. Sup. Ct., 6/18/07) .

Note: While this is not a “per se” juvenile case, it is a Supreme Court holding, and its ramifications will extend to stops made of juveniles in similar situations. As a result, I have elected to include it as part of our cases at this time.

Facts: After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized defendant, a passenger in the car. Upon verifying that defendant was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. The State conceded that the police had no adequate justification to pull the car over. Defendant was charged with various methamphetamine offenses and moved to suppress the evidence obtained in searches of his person and the car in which he was a passenger as fruits of an unconstitutional seizure. The trial court denied the motion to suppress.

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which they held unlawful. By a narrow majority, the Supreme Court of

California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority," The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, that a passenger cannot submit to an officer's show of authority while the driver controls the car, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present,"

Held: Vacated and Remanded

Opinion: The State concedes that the police had no adequate justification to pull the car over, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and himself. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland* v. *Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id*., at 414-415, 117 S. Ct. 882, 137 L. Ed. 2d 41; cf. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) *(per curiam)* (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that "'[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.'" *Wilson*, *supra*, at 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (quoting *Michigan* v. *Summers*, 452 U.S. 692, 702-703, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)). What we have said in these opinions probably reflects a societal expectation of "'unquestioned [police] command'" at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson*, *supra*, at 414, 117 S. Ct. 882, 137 L. Ed. 2d 41.

Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, *e.g.*, 6 W. LaFave, Search and Seizure § 11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007) ("If either the

stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 11:20, p. 11-98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").

Conclusion: Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

A PARENT MAY GIVE VICARIOUS-CONSENT TO RECORD A CHILD'S TELEPHONE CONVERSATIONS (WITHOUT THE CHILD'S KNOWLEDGE).

¶ 07-4-19. **Alameda v. State,** No. PD-0231-06, 2007 Tex.Crim.App. Lexis 868, (Tex.Crim.App., 6/27/07) .

Background: Appellant was convicted of two counts of aggravated sexual assault of a child under fourteen. The jury assessed punishment at thirty years' confinement for each count, and the trial judge ordered that the sentences be served consecutively. Appellant appealed the stacking order, as well as the trial court's decision to admit an audio tape of his conversations with the victim and a transcription of the audio tape. The court of appeals held that the trial court did not err in stacking Appellant's sentences or in admitting the audio tape and the transcript.

Facts: While Appellant was going through a divorce, he moved in with the 12-year-old victim, J.H., and her mother, Deborah, whom Appellant had known for eight or nine years. He lived in an extra bedroom in Deborah's home for close to a year. After Appellant moved out, Deborah became suspicious that Appellant and J.H. were communicating without her knowledge, so she attached to the phone jack in her garage a recording device that would record all incoming and outgoing calls on her home telephone. Over two weeks, Deborah recorded almost twenty hours of conversation between Appellant and J.H., neither of whom knew that they were being recorded. Deborah did not suspect that Appellant and J.H were having a sexual relationship until she heard the recording of their conversations. Deborah took the audiotape to the police, and Appellant was charged with aggravated sexual assault of a child.

Prior to his trial, Appellant filed a motion to suppress the audiotapes. He claimed that it was an offense under Penal Code section 16.02 to intentionally intercept a wire communication without consent, so the audiotape was inadmissible under Code of Criminal Procedure article 38.23. The trial judge found that Deborah could vicariously consent to the recording of J.H.'s phone conversations, so the audiotape was admissible.

After Appellant was convicted, he appealed the trial court's decision to admit the audiotape and a transcript of the recording. He also appealed the trial court's cumulation of the two 30-year sentences imposed by the jury, arguing that the jury should decide whether the sentences were cumulated rather than the trial judge. Because there are no Texas cases on this issue, the court of appeals looked at other state courts, as well as at how federal courts have interpreted the federal wiretap law, which is similar to the

Texas law. The court of appeals considered the factors outlined in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), which held that a parent may give vicarious-consent to record a child's telephone conversations if the parent has a good-faith basis for believing that recording is in the best interest of the child. Although vicarious-consent is not listed as an exception to the Texas wiretap law, the court of appeals held that, in order to protect a child, a parent may record her child's telephone conversations if the recording meets the standards in *Pollock*. *Alameda*, 181 S.W.3d at 778. The court of appeals agreed with the trial court's determination that Deborah had a good-faith, objectively reasonable belief that recording the phone conversations was in the best interest of J.H. and therefore upheld the trial court's denial of Appellant's motion to suppress. *Id*. at 780. Because the court held that the audiotape was properly admitted, and Appellant conceded that the transcript was admissible if the audiotape was admissible, the court of appeals did not address the admissibility of the transcript. *Id*. The court of appeals also rejected Appellant's claim regarding the cumulation of his sentences, stating that it was not improper for the trial judge, rather than the jury, to determine whether the sentences would be cumulated. *Id*. at 781. Because the cumulating of the sentences does not exceed the statutory maximum for the offense, the court held that the cumulated sentence does not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Alameda*, 181 S.W.3d at 781.

Appellant filed a petition for discretionary review, asking us to consider whether the court of appeals erred in grafting an exception into the relevant statute in order to conclude that the audiotape was properly admitted. Appellant argues that because the court of appeals improperly held that the audiotape was admissible, the court erred in failing to address the merits of his claim that the transcript of the audiotape was improperly admitted. Finally, Appellant asks us to consider whether the court of appeals erred in holding that the trial court's cumulation of his sentences does not violate *Apprendi*.

Held: The court affirmed the appellate court's decision.

Opinion: Article 38.23(a) of the Texas Code of Criminal Procedure states, "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Therefore, because section 16.02(b) [4] states that a person commits an offense if he intentionally intercepts a wire communication, the audiotapes are inadmissible unless the vicarious-consent given by Deborah meets the consent exception to this statute [5] or the interception was legal for some other reason. Appellant argues that the vicarious-consent exception does not apply to the wiretap laws. He bases this argument on *Duffy v. State*, 33 S.W.3d 17, 25 (Tex. App.--El Paso 2000, no pet.), and *Kent v. State*, 809 S.W.2d 664, 668 (Tex. App.--Amarillo 1991, pet. ref'd), in which both courts stated that section 16.02 must be applied in all circumstances that are not specifically excepted. However, as the court of appeals noted, *Duffy* and *Kent* are distinguishable from Appellant's case because those cases addressed whether one spouse can vicariously consent to the recording of the other spouse's conversation, rather than the issue of whether a parent can vicariously consent to the recording of her child's conversations. *Alameda*, 181 S.W.3d at 775 n. 1. The fact that there is no interspousal consent exception to the wiretap statute does not preclude us from recognizing a parent-child vicarious-consent exception.

Texas Penal Code Section 16.02(b) states that a person commits an offense if the person:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;

(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through

the interception of a wire, oral, or electronic communication in violation of this subsection;
(3) intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if the person knows or is reckless about whether the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

Under section 16.02(c), it is an affirmative defense to prosecution under Subsection (b) that:

(4) a person not acting under color of law intercepts a wire, oral, or electronic communication, if:
(A) the person is a party to the communication; or
(B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

Appellant also cites cases related to a minor child's right to seek an abortion or to purchase contraceptives without parental consent for the proposition that a child has the right to privacy, and this general right to privacy should not be taken from the child unless there is a significant state interest. Appellant further argues that, because the Texas Family Code [6] lists the circumstances under which a parent has the right to consent on behalf of a child and does not mention the right to consent to the recording of a child's conversations, we should assume that the legislature intended that no such right exist.

Texas Family Code section 151.001 lists the rights and duties of a parent:
(a) A parent of a child has the following rights and duties: (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment; (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

We disagree. We dealt with both the right to privacy and a mother's ability to consent for her child in *Sorensen v. State*, 478 S.W.2d 532 (Tex. Crim. App. 1972). Even though the child in *Sorensen* was not a minor, we held that a child has no reasonable expectation of privacy in his room when the parent routinely enters the room, and that a parent can vicariously consent to a search of her child's room. *Id*. at 534. Therefore, we reject Appellant's contentions that the vicarious-consent exception unlawfully violates a minor's right to privacy and that a parent has the right to consent only in the circumstances listed in the family code.

Because no Texas cases have addressed a parent's ability to vicariously consent to the recording of a child's telephone conversations, and the federal wiretap statute is substantively the same as the Texas statute, we look to the Sixth Circuit's decision in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), which is the leading case regarding the vicarious-consent doctrine in the context of the federal wiretap statute. [7] In *Pollock*, the plaintiff was the child's stepmother and the defendant was the child's mother. The stepmother appealed the trial court's determination that the mother had not violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511 when she recorded conversations between her daughter and the plaintiff. In upholding the trial court's decision, the court of appeals looked to federal and state case law in which the vicarious-consent doctrine had been applied to both federal and state wiretap statutes. [8] *Pollock*, 154 F.3d at 608-610. The court adopted the rule set out in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993), and held that:

as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the

taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. *Pollock* 154 F.3d at 608-610.

Unlike adults, minors do not have the legal ability to consent in most situations. As the *Thompson* court noted, the vicarious-consent doctrine was necessary because children lack both "the capacity to consent and the ability to give actual consent." 838 F. Supp. at 1543.

We agree with the court of appeals that Deborah had an objectively reasonable, good-faith basis for believing that recording the conversations was in J.H.'s best interest. Because the recording of the conversations meets the standards set out in *Pollock*, the vicarious-consent given by Deborah satisfies the exception to the Texas wiretap statute. And, since it is not a violation of Penal Code section 16.02 to intentionally intercept an oral communication if one party consented, no law was broken, and article 38.23 does not render the evidence inadmissible.

Appellant states that this case may illustrate why a vicarious-consent exception should be added to the statute, but he argues that it should be added by the legislature and not the courts. However, by holding that a parent can give vicarious-consent for a child, we are not adding a new exception to the wiretap statute. Rather, we are saying that vicarious-consent, which is a type of consent is recognized in many contexts in the law regarding the parent-child relationship, also applies to the existing consent exception to the wiretap statute.

Conclusion: We hold that the doctrine of vicarious-consent applies to the consent exception of the wiretapping statute. Because the victim's mother provided the consent necessary for the affirmative defense to the statute prohibiting wire tapping, it was not a violation of Penal Code section 16.02 to record the conversations. Therefore, the audiotape was legally obtained and was not rendered inadmissible by article 38.23. Since the audiotape was properly admitted, the admissibility of the transcript of the recorded conversations is not at issue, and the court of appeals did not err in failing to consider the merits of this claim. Although the jury imposed the two 30-year sentences, it was within the trial judge's discretion to decide whether to order that the sentences be served consecutively. The court of appeals properly rejected Appellant's arguments regarding the cumulation of his sentences and upheld the trial court's cumulation order. The decision of the court of appeals is affirmed.

CONCUR BY: KELLER

Three salient facts bear on the admissibility of the tape recording in this case: (1) one of the parties to the recorded conversations was the minor child of a parent conducting the recording, (2) the recording was conducted by the parent as part of caring for the child's welfare, and (3) the recording occurred through a telephone jack located in the parent's home. Because of these three facts, I would hold that the recording did not constitute "interception" under the Texas wiretap statute.

For a crime to occur under the wiretap statute, there must be an *interception* or an intended interception of a wire, oral or electronic communication. The statute provides that "intercept" has the same meaning as defined under Article 18.20 of the Code of Criminal Procedure, governing law-enforcement-related wiretaps. Under Article 18.20, "intercept" means "the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device." This definition in turn relies upon the definition of "electronic, mechanical, or other device," which explicitly excludes certain types of instruments or equipment. Among other things, the wiretap statute

excludes from its reach "a telephone or telegraph instrument, [or] equipment . . . used for the transmission of electronic communications, . . . if the . . . instrument [or] equipment . . . is . . . furnished to the subscriber or user by a provider of wire or electronic communications service in the ordinary course of the provider's business and *being used by the subscriber or user in the ordinary course of its business*."

All of this language is virtually identical to language in the federal wiretap statute. In reviewing the legislative history of the federal counterpart to this provision (what has become known as the "extension phone" exception), the Second Circuit explained that the exception originally contained no "ordinary course of business" limitation. This limitation was added after Professor Herman Schwartz, testifying on behalf of the A.C.L.U., complained that the unqualified language would allow policemen and private intruders to enter others' homes and listen in on extension phones without penalty. But, declining to recommend that the entire exception be deleted, Professor Schwartz commented, "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem."

Several federal appeals courts have applied the extension phone exception to in-home recording by a parent of a minor child's conversations because the recording was done within the ordinary course of the parent's business of caring for the child. The Supreme Court of New Hampshire followed suit in interpreting the same language in its own wiretap statute. I would follow these cases and hold that a parent's recording of a minor child's conversations from a telephone jack within the home for the purpose of caring for the child constitutes a use that is exempt from the wiretap statute.

SUFFICIENCY OF THE EVIDENCE—

IN AN ASSAULT ON A PUBLIC SERVANT, EVIDENCE THAT COMPLAINANT WAS A TEACHER'S AID WAS SUFFICIENT TO ESTABLISH THE ELEMENT OF PUBLIC SERVANT.

¶ 07-3-13. **In the Matter of S.C.,** 229 S.W.3d 837, 2007 Tex.App.Lexis 5194 (Tex.App.— Texarkana, 7/5/07), rehearing overruled by In re S.C., 2007 Tex. App. Lexis 6628 (Tex. App. Texarkana, Aug. 14, 2007) .

Facts: Who started the pushing that morning at Paris High School was disputed. All agreed that S.C. and Cleda Brownfield were at cross purposes before normal school hours began. S.C., then a fourteen-year-old high school freshman, wanted into the school building. Brownfield, a "special services aide, teacher's assistant," was tasked to keep out all students except those having business which specifically authorized early entry. S.C. thought her business justified her early entry; Brownfield ruled to the contrary. The ensuing altercation resulted in S.C. being charged with, tried for, and found guilty by a six-person jury as having engaged in, delinquent conduct by assaulting a public servant. *See TEX. FAM. CODE ANN. § 54.03* (Vernon Supp. 2006).

On appeal, S.C. contends that the evidence is insufficient because the State did not prove that S.C. was under seventeen years of age; that Brownfield was a school teacher as alleged in the State's petition; or that Paris High School is a governmental entity, a requirement to establish that Brownfield was a public servant. S.C. also argues that she had ineffective assistance of counsel at trial.

Held: Affirmed

Opinion: S.C.'s next contention is that the evidence is insufficient because the State did not prove that Brownfield was a "school teacher," but instead proved only that she was a "teacher's aide." Thus, she argues, the petition's allegations were not met, and we should find the evidence insufficient.

The jury was charged to determine whether S.C. had committed delinquent conduct by committing assault on a public servant. Among other things, as presented to the jury, that includes "an officer, employee, or agent of government."

The petition alleges that S.C. caused bodily injury to Cleda Brownfield, a school teacher, and a person said defendant knew was a public servant, while Cleda Brownfield was lawfully discharging an official duty, or in retaliation or on account of exercise of official power or performance of an official duty as a public servant, by pushing Cleda Brownfield.

On appeal, S.C. focuses on a single portion of the petition, the language describing Brownfield as a school teacher. S.C. argues that the evidence does not support a finding that Brownfield was a school teacher, and cites a series of criminal cases involving fatal variances between the allegation and the proof.

In this instance, the statute criminalizes assault on a public servant. It is not limited to assault on a school teacher. It is undisputed that Brownfield was a teacher's aide employed by the Paris Independent School District at the time of the altercation. A "public servant" is "a person elected, selected, appointed, employed, or otherwise designated as . . . an officer, employee, or agent of government." Thus, the evidence shows that Brownfield was a public servant.

The petition clearly provides sufficient information for the defendant to prepare an adequate defense at trial. The State was not required to prove the more specific allegation, but only what was required by the hypothetically correct jury charge: that Brownfield was a public servant.

A number of courts have expressly answered the question by concluding that public school teachers fall within the broad definition of "public servant" provided by the current version of *Section 1.07(a)(41)(A) of the Texas Penal Code*.

Other Issues Omitted.

Conclusion: Accordingly, we conclude that Brownfield's undisputed testimony that she was a "teacher's aide" employed by the Paris Independent School District at Paris High School provided legally and factually sufficient evidence to establish this element of the offense. *See In re L.M., 993 S.W.2d 276, 284 (Tex. App.--Austin 1999, pet. denied)*; *In re P.N., No. 03-04-00751-CV, 2006 Tex. App. LEXIS 6878 (Tex. App.--Austin Aug. 4, 2006, no pet.)* (mem. op., not designated for publication).

TRIAL PROCEDURE—

WHERE THE RECORD DOES NOT SHOW THAT THE JUVENILE HIMSELF WAIVED HIS RIGHT TO JURY, WAIVER BY THE CHILD'S ATTORNEY ALONE IS INSUFFICIENT.

¶ 07-3-5. **In the Matter of A.G.P.**, MEMORANDUM, No. 09-06-396CV, 2007 Tex.App.Lexis 4079 (Tex.App.— Beaumont, 5/24/07) .

Facts: A.G.P., a juvenile, was charged with four counts of aggravated sexual assault of a child and two counts of indecency with a child. A jury returned a verdict of "true" on all six allegations, and the trial court adjudicated A.G.P. as having engaged in delinquent conduct. The trial court ordered A.G.P. "committed to the Texas Youth Commission for a fifteen (15) year determinate sentence with possible transfer to the Texas Department of Criminal Justice Institutional Division pursuant to *§53.045 of the Texas Family Code*."

Abandoning issues one and three, A.G.P. relies solely on issue two on appeal. He contends the record does not establish he waived his right to have a jury decide disposition of his sentence, and asks that the case be remanded for further proceedings. The State concedes error on issue two, and states the case should be remanded to the trial court "for disposition purposes only."

Held: Affirmed in Part, Reversed in Part, and Remanded for a New Disposition Hearing.

Memorandum Opinion: *Section 54.04(a) of the Family Code* provides that "[t]he disposition hearing" "shall be separate, distinct, and subsequent to the [juvenile's] adjudication hearing." *Tex. Fam. Code Ann. § 54.04(a)* (Vernon Supp. 2006). The statute further provides that "[t]here is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence." *Id*. Here, the juvenile was in jeopardy of a determinate sentence and was entitled to a jury at the disposition hearing. *See Tex. Fam. Code Ann. § 54.04(d)(3)* (Vernon Supp. 2006); *Tex. Fam. Code Ann. § 53.045(a)(5)* (Vernon 2002).

Section 51.09 of the Family Code governs waiver of rights under the Juvenile Justice Code and provides as follows:

§ 51.09. Waiver of Rights

Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:

(1) the waiver is made by the child and the attorney for the child;

(2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;

(3) the waiver is voluntary; and

(4) the waiver is made in writing or in court proceedings that are recorded.
Tex. Fam. Code Ann. § 51.09 (Vernon 2002).

At the beginning of the disposition hearing, the following occurred:
(Open court, juvenile-respondent present, no jury)

[THE COURT]: The Juvenile-Respondent's attorney has approached the Court and indicated that he wished to waive the jury in deciding disposition and the State has indicated that they have no objection to that election.

For the purposes of the record, is that correct, Mr. [Attorney for A.G.P.]?

[A.G.P's ATTORNEY]: It is, Judge.

[THE COURT]: And, [Prosecutor], does the State agree with that decision?

[PROSECUTOR]: State agrees.

[THE COURT]: All right. Thank you. Ask the jury in.

The Clerk's Record does not contain a written waiver by A.G.P. of jury disposition of the sentence, and although the colloquy before the trial court reveals the juvenile's attorney waived jury disposition, there is no record the juvenile himself did. The statute requires that both the child and the attorney for the child waive the right. *See id*. The State concedes the trial court erred by not complying with *section 51.09*. Where there is no record showing that the juvenile himself waived jury disposition, and understood his right, waiver by the child's attorney alone is insufficient under the statute. *See id.*

Conclusion: Here, the trial court was required to implement A.G.P.'s right to a jury disposition of his sentence unless he affirmatively waived that right. *See §§ 51.09, 54.04(a).* When error occurs, a harm analysis would normally be required. *See Tex. R. App. P.44.1, 44.2*. Given the circumstances of this case, the nature of the error, the insufficiency of the record for harmless error analysis, the State's concession of error, and both the juvenile's and the State's requests for remand, we resolve any doubt concerning harm in the juvenile's favor. We reverse the disposition only and remand for a new disposition hearing. *See In re D.I.B., 988 S.W.2d 753*; *In re J.H., 150 S.W.3d 477, 485-86 (Tex. App.--Austin 2004, pet. denied).* We sustain issue two.

Note: Be aware of House Bill 2884, which went into effect September 1, 2007. It requires that a juvenile (in a determinate sentencing case), in order to have a jury determine disposition, elect a jury for the disposition hearing in writing prior to voir dire of the jury panel. Once a finding of delinquent conduct is returned, the child may, with the consent of the attorney for the state, change the child's election of one who assesses the disposition.

ONCE A TRIAL COURT ACCEPTS A PLEA BARGAIN, IT HAS A MANDATORY DUTY TO MAKE A DISPOSITION IN ACCORDANCE WITH THE TERMS OF THE PLEAS BARGAIN.

¶ 07-3-6. **In re J.H.**, Mandamus Proceeding, ___S.W.3d.___, No. 04-07-00208-CV 2007 Tex.App.Lexis 3927 (Tex.App.— San Antonio, 5/23/07), rel. for pub. 8/24/07 .

Facts: J.H., a juvenile alleged to have engaged in delinquent conduct, negotiated a plea bargain agreement with the State. Pursuant to this agreement, J.H. pled "true" to committing the offense of aggravated sexual assault in two cases. n2 The trial court accepted the plea bargain agreement and placed J.H. on probation. Days later, the trial court rescinded its approval of the plea bargain agreement in open court, allowed J.H.

to withdraw his pleas, and reinstated the cases on the court's jury trial docket. J.H. then filed a pleading entitled "Respondent's Plea in Bar," arguing his retrial for the same delinquent conduct would violate his constitutional right to be free from double jeopardy. The trial court denied the plea in bar.

n2 The State filed two petitions arising from the same incident.

J.H. now seeks a writ of mandamus compelling the trial court to follow the plea bargain agreement. J.H. alleges the trial court lacked the authority to rescind its approval of the plea agreement and that it clearly abused its discretion by overruling his plea in bar. This court provided the State and the trial court an opportunity to respond to the mandamus petition; however, only the trial court has filed a brief in this original proceeding.

Held: Petition for Writ of Mandamus Conditionally Granted.

Memorandum Opinion: Although juvenile delinquency proceedings are civil proceedings, they are quasi-criminal in nature. *State v. C.J.F., 183 S.W.3d 841, 847 (Tex. App.--Houston [1st Dist.] 2005, pet. denied)*; *In re J.F.R., 907 S.W.2d 107, 109 (Tex. App.--Austin 1995, no writ).* The Texas Rules of Civil Procedure govern juvenile proceedings, except when in conflict with Title 3 of the Texas Family Code. *See TEX. FAM. CODE ANN. § 51.17(a)* (Vernon Supp. 2006). Additionally, because a juvenile delinquency proceeding seeks to deprive a juvenile of his liberty, a juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding. *In the Matter of J.R.R., 696 S.W.2d 382, 383 (Tex. 1985)* ("A juvenile is entitled to due process and is thus given double jeopardy protection..."); *C.J.F., 183 S.W.3d at 848.*

The Texas Code of Criminal Procedure provides that before the trial court accepts a plea of guilty from a defendant it shall inquire as to the existence of any plea bargain agreement. *TEX. CRIM. PROC. CODE ANN. art. 26.13(a)(2)* (Vernon Supp. 2006). *Article 26.13(a)(2)* further mandates that "the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea." *Id.* After the trial court accepts a plea bargain agreement, however, a criminal defendant may insist on the benefit of his plea agreement with the State and is entitled to enforce the agreement by specific performance. *Wright v. State, 158 S.W.3d 590, 595 (Tex. App.--San Antonio 2005, pet. ref'd)* (citing *Perkins v. Court of Appeals for the Third Supreme Judicial Dist. of Tex., 738 S.W.2d 276, 283-284 (Tex. Crim. App. 1987)* (en banc)). Thus, in a criminal proceeding "[t]he trial court has a 'ministerial, mandatory, and non-discretionary duty' to follow the plea bargain agreement once it has been approved by the court." *Id.* (quoting *Perkins, 738 S.W.2d at 285*). When the trial court has a ministerial duty to enforce a plea agreement, but instead withdraws its approval of the agreement, mandamus may issue to correct the error. *See Perkins, 738 S.W.2d at 284-285* (when the trial court rescinded its approval of a plea agreement and the law did not authorize such action, the court of appeals properly granted mandamus relief); *In re Gooch, 153 S.W.3d 690, 694 (Tex. App.--Tyler 2005, orig. proceeding)* (granting mandamus relief when the trial court violated its mandatory duty to enforce a plea bargain agreement).

Like the Texas Code of Criminal Procedure, Title 3 of the Texas Family Code gives the trial court broad discretion in accepting or rejecting plea bargain agreements in juvenile proceedings. *See TEX. FAM. CODE ANN. § 54.03(j)* (Vernon Supp. 2006). However, after a trial court accepts a plea bargain agreement in a juvenile case, the law imposes a duty on the trial court to make a disposition in accordance with the terms of the agreement. *See id.* Specifically, *section 54.03(j)* provides:

> When the state and the child agree to the disposition of the case, in whole or in part, the prosecuting attorney shall inform the court of the agreement between the state and the child. The court shall

> inform the child that the court is not required to accept the agreement. The court may delay a decision on whether to accept the agreement until after reviewing a report filed under Section 54.04(b). If the court decides not to accept the agreement, the court shall inform the child of the court's decision and give the child an opportunity to withdraw the plea or stipulation of evidence. If the court rejects the agreement, no document, testimony, or other evidence placed before the court that relates to the rejected agreement may be considered by the court in a subsequent hearing in the case. A statement made by the child before the court's rejection of the agreement to a person writing a report to be filed under Section 54.04(b) may not be admitted into evidence in a subsequent hearing in the case. *If the court accepts the agreement, the court **shall** make a disposition in accordance with the terms of the agreement between the state and the child. Id.* (emphasis supplied).

Section 54.03(j) controls in this case. It is undisputed that the trial court accepted the plea bargain agreement and J.H. started serving his term of probation. By rescinding approval of the plea agreement and returning J.H.'s cases to the trial docket, the trial court violated its mandatory duty to make a disposition in accordance with the terms of the plea bargain agreement as required by *section 54.03(j) of the Texas Family Code*.

The trial court argues its action was authorized by *Texas Rule of Civil Procedure 329b(d)* n3 and *section 54.05(d) of the Texas Family Code*. We disagree. First, the Texas Family Code is clear that to the extent there is a conflict, *Texas Rule of Civil Procedure 329b(d)* must yield to the express requirements of *section 54.03(j). See TEX. FAM. CODE ANN. § 51.17(a)* (Vernon Supp. 2006). Second, *section 54.05(d) of the Texas Family Code*, which allows a trial court to modify a disposition in a juvenile matter, does not apply here. The challenged action simply did not occur in the context of a disposition modification proceeding, which requires the filing of a petition, reasonable notice to all parties, and a hearing. *See TEX. FAM. CODE ANN. § 54.05(d)* (Vernon Supp. 2006).

> n3 *RULE 329B(D)* PROVIDES: "THE TRIAL COURT, REGARDLESS OF WHETHER AN APPEAL HAS BEEN PERFECTED, HAS PLENARY POWER TO GRANT A NEW TRIAL OR TO VACATE, MODIFY, CORRECT, OR REFORM THE JUDGMENT WITHIN THIRTY DAYS AFTER THE JUDGMENT IS SIGNED." *TEX. R. CIV. P. 329b(d).*

Conclusion: When a trial court has a duty to follow a plea bargain agreement and fails to do so, mandamus is the appropriate remedy. *See Perkins, 738 S.W.2d at 284-85*; *In re Gooch, 153 S.W.3d at 694*. Accordingly, we conditionally grant the writ. The trial court is ordered to: (1) reinstate the December 4, 2006 order placing J.H. on probation; (2) remove the underlying cases from the trial docket; and (3) vacate the order denying J.H.'s plea in bar. The writ will issue only if we are notified that the trial court has not done so within ten days of the date of this opinion.

JURY FINDING THAT THE JUVENILE, IN THE JUVENILE'S HOME, COULD BE PROVIDED WITH THE QUALITY OF CARE AND LEVEL OF SUPPORT AND SUPERVISION TO MEET THE CONDITIONS OF PROBATION, DOES NOT PRECLUDE COMMITMENT TO TYC.

¶ 08-1-3. **In the Matter of T.A.W.**, 234 S.W.3d 704; *2007 Tex. App. LEXIS 6333* No. 14-05-00554-CV., 2007 Tex.App.Lexis 1047, Tex.App.— Houston [14th], 8/9/07).

Facts: T.A.W. was born on August 22, 1986. On April 15, 2001, the date of the alleged offense, T.A.W. was fourteen years old. The State filed its petition alleging delinquent conduct on May 21, 2004, when T.A.W. was seventeen. T.A.W.'s delinquency trial began in March 2005, when he was eighteen years old.

Held: Motion for Rehearing Overruled; Opinion of February 13, 2007, Withdrawn. Affirmed.

Opinion: T.A.W.'s second issue contends that the jury's finding in answer to question 2 constitutes a finding in favor of probation:

> Question No. 2: Do you find by a preponderance of the evidence that the Juvenile Respondent, [T.A.W.], in the Juvenile Respondent's home, cannot be provided the quality of care and level of support and supervision that the Juvenile Respondent needs to meet the conditions of probation? Answer: We do not.

T.A.W. argues that this finding thereby supercedes, as a matter of law, the jury's finding of commitment to TYC for fourteen years because it was a finding that T.A.W.'s home was an appropriate place to meet the conditions of probation.

However, the court's charge on disposition authorized the jury to either sentence T.A.W. to commitment in the TYC or to place him on probation. An affirmative response to question 2 would have been required in order for the jury to place T.A.W. on probation outside his home, but was not a decision whether to place him on probation.

In support of his position, appellant relies on *section 54.04(i)(1)(C)*, requiring a trial court to include in its order of determination an affirmative finding on the issue set forth in question 2 in order to place a child on probation outside the home or to commit the child to the TYC. Although the court included an affirmative finding on this issue in its commitment order (contrary to the jury's negative finding in response to question 2), this finding, regardless of by whom it is made, bears only on the choice between probation inside the home versus probation outside the home, and not on the choice between probation and TYC commitment. In other words, it does not logically follow from the fact that a defendant's home would be a suitable place for conducting probation that probation must be selected. If, as in this case, probation is found to be wholly inappropriate, even outside the home, the fact that it could have been provided in appellant's home, if it had been appropriate, is immaterial.

Conclusion: Because T.A.W.'s second issue does not, therefore, demonstrate that the jury's answer to question 2 precludes its sentence of commitment to the TYC, it is overruled, and the judgment of the trial court is affirmed.