# WAIVER OF JURISDICTION AND DISCRETIONARY TRANSFER TO CRIMINAL COURT

## INTRODUCTION

Discretionary transfer, also known as certification, enables a juvenile court to waive its exclusive jurisdiction and transfer offenses committed by juveniles to criminal district court under certain circumstances. The juvenile court has exclusive jurisdiction over criminal offenses committed by juveniles, with some exceptions set forth in Texas Penal Code (TPC) 8.07(a)(1)-(5), unless jurisdiction is waived and the case is transferred to criminal court for prosecution. Tex.Fam.Code Ann. 51.04(a)(Vernon Supp.2001); *In the Matter of N.J.A.,* 997 S.W.2d 554 (Tex.1999). Although common vernacular describes a "child" as being certified or transferred, a criminal transaction actually is transferred to criminal court and not the child.

The number of certification proceedings has dropped significantly in the last few years, reflecting not only a decrease in serious juvenile crime but also a trend toward handling serious juvenile offenders in the juvenile system through the use of determinate sentencing rather than in the criminal system. See *"The Decline of Certification" and "The (Further) Decline of Certification," Robert O. Dawson*, Juvenile Law Section Reports Sept. 2000 and Sept. 2001. Texas Juvenile Probation Commission statistics show 596 actual certifications in 1994 compared to 198 certifications in 2000.

## ELIGIBILITY

Texas Family Code (TFC) section 54.02 sets forth two types of transfer proceedings: those that begin when a person is under the age of 18 and those that begin when a person is 18 or older. The criteria differs for each type of proceeding. The age at the time of the conduct controls whether the child is eligible for transfer, and the age at the time of the proceeding determines what requirements must be met for transfer.

### UNDER AGE 18

If the respondent is under 18 when the transfer proceeding begins, the requirements are:

1. the child allegedly violated a penal law of the grade of felony;
2. the child was:
   a. 14* or older at the time he or she allegedly committed
      - a capital felony,
      - an aggravated controlled substance felony (a felony that carries a higher minimum term or higher possible fine than a first degree felony), or
      - a first degree felony; or

      ** Effective 1-1-96, the minimum age was reduced to 14 for these felonies*

   b. 15 or older at the time he or she allegedly committed
      - a second degree felony,
      - a third degree felony, or
      - a state jail felony;
3. no adjudication hearing has been conducted concerning that offense; and
4. after a full investigation and a hearing, the juvenile court finds that:
   a. there is probable cause to believe that the child committed the offense, and
   b. because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings.

TFC 54.02(a).

**18 OR OLDER**

In certain circumstances, TFC 54.02(j) – (l) allows the State to file a certification petition for conduct allegedly committed between the ages of 14 and 17 (or 10 and 17 for murder), although the person is 18 or older at the time the proceeding is initiated. Certifications in these situations are appropriate for cases that may be solved years later through DNA or fingerprints, provided that the State did not cause the delay in prosecution. The State has the burden to justify the delay in filing because the respondent loses the opportunity for the juvenile court to retain jurisdiction over the conduct and keep the case in the juvenile system once he or she becomes 18. The requirements to seek certification in this circumstance are:

1. the person is 18 or older;
2. the person was:
   a. 10 or older and under 17 at the time he or she allegedly committed a capital felony or murder;
   b. 14 or older and under 17 at the time he or she allegedly committed an aggravated controlled substance felony or a first degree felony other than murder, or
   c. 15 or older and under 17 at the time he or she allegedly committed a second or third degree felony or a state jail felony;
3. no adjudication hearing has been conducted concerning that offense;
4. the juvenile court finds from a preponderance of the evidence that:
   a. for a reason beyond the control of the State, it was not practicable to proceed before the person's 18th birthday, or
   b. after due diligence of the State, it was not practicable to proceed before the person's 18th birthday because:
      - the State did not have probable cause to proceed and new evidence has been found since the person's 18th birthday;
      - the person could not be found; or
      - a previous transfer order was reversed on appeal or set aside by a district court; and
5. there is probable cause to believe that the person before the court committed the offense alleged.

TFC 54.02(j). If the State's proof meets these requirements, the juvenile court may waive its jurisdiction over the criminal conduct and transfer it to criminal court. If the juvenile court declines to do so, then the case must be dismissed. The juvenile court has no jurisdiction to take any other action other than certify or dismiss in an action filed against a person older than 18 years of age.

If the State cannot justify the delay in proceeding prior to the person's 18th birthday, the juvenile court has no jurisdiction to transfer. In *Webb v. State,* unpublished, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter 01-4-46 (Tex.App. – El Paso 10/25/01), the appellate court vacated a murder conviction following certification and dismissed the juvenile proceedings for want of jurisdiction. The State did not establish that the delay in proceeding in juvenile court before the defendant's eighteenth birthday was not beyond its control. The defect was jurisdictional and no harm analysis was necessary.

The juvenile court does not lose jurisdiction over a case that is reversed on appeal, certification or otherwise, because the respondent turns 18 during the process. TFC 51.041 creates an exception to the rule that the juvenile court's jurisdiction ends once a person becomes 18. It provides that the juvenile court "retains jurisdiction over a person, without regard to the age of the person, for conduct engaged in by the person before becoming 17 years of age if, as a result of an appeal by the person under Chapter 56 or under Article 44.47, Code of Criminal Procedure, of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court." See also *R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App. – Waco 1978, writ ref'd n.r.e.).

**SPECIAL RULE FOR MURDER**

An 1999 amendment in TFC 54.02(j)(2)(A) allows the State to request the discretionary transfer of a person 18 or older for a capital felony or murder allegedly committed at age 10 or older but under age 17. This provision authorizes a delayed certification proceeding for these most serious offenses without any statute of limitations. Motions seeking discretionary transfer in this circumstance are likely to be filed as information in DNA banks helps to solve old cases.

Prior to this amendment, the offense would not have been eligible for certification if the person was under 14 at the time the offense allegedly was committed, even though a determinate sentence proceeding would have been available had the petition been filed before the child's 18th birthday. If the State, however, was unable to proceed before then, the juvenile system could not handle the case because the person was over 18, and the criminal system could not handle it because the person was under 14 at the time of the offense. See TPC 8.07.

TPC 8.07(a)(7) was added in 2001 to eliminate a potential defense to prosecution under TFC 54.02(j)(2)(A).

**DETENTION OF A PERSON 18 OR OLDER**

The juvenile court may detain a person 18 or older in the juvenile detention facility or the county jail pending a certification hearing. TFC 54.02(o) - (r) and 51.041(b). A detention hearing must be conducted and the court must release the respondent unless certain findings are made. TFC 54.02(o)(1) – (3). If the person is detained in the juvenile detention facility, he or she must be kept separate from the juvenile population. If the juvenile court orders detention in a county jail, the juvenile court must set or deny bond as required by the Code of Criminal Procedure (CCP). An example of an Order of Detention in the County Jail Pending Discretionary Transfer is included in the attachments at the end of this paper.

**PETITION OR MOTION FOR DISCRETIONARY TRANSFER**

TFC 54.02(b) provides: "The petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court." See also TFC 54.02(k) and *McBride v. State*, 655 S.W.2d 280 (Tex.App. – Houston [14th Dist.] 1983, no writ).

The State initially may file a Motion for Discretionary Transfer and if it is denied by the juvenile court, it may then file a delinquency petition. Alternative pleadings and summons requesting that the respondent be transferred to criminal court or remain in juvenile court and be adjudicated are not defective. *In the Matter of G.B.B.*, 572 S.W.2d 751 (Tex.Civ.App. – El Paso 1978, writ ref'd n.r.e.). The State may also file a delinquency petition first, and later seek certification without violating due process. *In the Matter of B.V.*, 645 S.W.2d 334 (Tex.App. – Corpus Christi 1982, no writ).

TFC 54.01(p) requires the juvenile court to release a child from detention if a petition has not been filed under TFC 53.04 within 30 working days after the initial detention hearing if the alleged offense is a capital felony, an aggravated controlled substance felony, or a first degree felony, or within 15 working days after the initial detention hearing for any other offense.

Pursuant to TFC 53.04, the petition must state:

1. with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts;
2. the name, age, and residence address, if known, of the child who is the subject of the petition;
3. the names and residence addresses, if known, of the parent, guardian, or custodian of the child and of the child's spouse, if any; and

4. if the child's parent, guardian, or custodian does not reside or cannot be found in the state, or if their places of residence are unknown, the name and residence address of any known adult relative residing in the county, or, if there is none, the name and residence address of the known adult relative residing nearest to the location of the court.

The petition for waiver of juvenile court jurisdiction need not be sworn to by the prosecutor [*R.E.M. v. State*, 569 S.W.2d 613 (Tex.Civ.App. – Waco 1978, writ ref'd n.r.e.)], but the prosecutor must have knowledge of the facts alleged or be informed of and believe that they are true. TFC 53.04(a).

All felony offenses pending against the child for which there is probable cause should be alleged in the petition. If the petition alleges multiple offenses that constitute more than one criminal transaction, TFC 54.02(g) authorizes the juvenile court to either retain or transfer all offenses relating to a single transaction. The juvenile court waives jurisdiction over a transaction, not a specific statutory offense, so the court may transfer or retain different criminal transactions. The prosecutor in criminal court may charge any offense or offenses supported by probable cause as long as the offense arose out of a criminal transaction that was transferred by the juvenile court. *Ex parte Allen,* 618 S.W.2d 357 (Tex.Crim.App. 1981).

Each count in the petition must state with reasonable particularity the time, place, and manner of acts alleged and the penal law or standard of conduct allegedly violated. *S.C.B. v. State*, 578 S.W.2d 833 (Tex.Civ.App. – Houston [1st Dist.] 1979, writ ref'd n.r.e.). Due process does not require that the language be as certain as that required in an indictment or information [*In the Matter of Edwards*, 644 S.W.2d 815 (Tex.App. – Corpus Christi 1982, writ ref'd n.r.e.)], but it must be reasonable and definite. *M.A.V. Jr. v. Webb County Court at Law*, 842 S.W.2d 739 (Tex.App. – San Antonio 1992, writ den.).

The law of parties need not be alleged in the petition even if the State presents evidence at the hearing that the respondent is liable only as a party for the alleged offense. *In the Matter of A.A.,* 929 S.W.2d 649 (Tex.App. – San Antonio 1996, no writ).

The petition may be amended if necessary. For example, a change in the petition to reflect the juvenile's correct date of birth was held not to be a material change and did not deprive the trial court of jurisdiction to consider discretionary transfer. *In the Matter of J.E.*, 800 S.W.2d 958 (Tex.App. – Corpus Christi 1990, no writ). The strict prohibition against the amendment of pleadings in criminal cases does not apply to juvenile proceedings, but due process requires that the amendment must be made so as to be basically fair to the respondent. *Carillo v. State*, 480 S.W.2d 612 (Tex. 1972). An amended certification petition supersedes the original petition. *Bailey v. State,* unpublished, No. 01-95-00859-CR, 1997 WL 198133, 1997 Tex.App.Lexis 2200, Juvenile Law Newsletter 97-2-24 (Tex.App. – Houston [1st Dist.] 4/24/97).

After the petition has been filed, the juvenile court must schedule a hearing not later than ten working days after filing if the child is in detention or will be taken into custody pursuant to an order of immediate custody. TFC 53.05(b). The hearing need not occur within ten working days; the court may continue the case if necessary. *In the Matter of R.G.S.*, 575 S.W.2d 113 (Tex.Civ.App. – Eastland 1979, writ ref'd n.r.e.), cert. denied, 445 U.S. 956 (1980). If the court fails to set the hearing within ten working days, the court does not lose its jurisdiction or authority to transfer. *Williams v. State*, 833 S.W.2d 613 (Tex.App. – San Antonio 1992, no writ); *In the Matter of S.D.,* 667 S.W.2d 820 (Tex.App. – Texarkana 1983, writ ref'd n.r.e.).

**SUMMONS**

The summons gives notice of the date, time, and place of hearing, and must be directed to the respondent as well as the parent, guardian, or custodian, the guardian ad litem, and "any other person who appears to the court to be a proper or necessary party to the proceeding." TFC 53.06(a). It "must require the persons served to appear before the court at the time set to answer the allegations of the petition." TFC 53.06(b).

In a discretionary transfer proceeding, the summons must also "state that the hearing is for the purpose of considering discretionary transfer to criminal court." TFC 54.02(b). This "magic language" is mandatory in the summons. Without it, the juvenile court does not have jurisdiction to hear the transfer proceeding. Because the requirement is jurisdictional, any failure to comply with it may be raised for the first time on appeal, and any transfer or later conviction is void. *Johnson v. State*, 594 S.W.2d 83 (Tex.Crim.App. 1980). The requirement may be satisfied, however, if the summons contains the necessary information although not in the exact words of the statute. *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App. – Texarkana 1977, writ ref'd n.r.e.). If the summons does not contain the required language but expressly refers to a petition that does contain the required language, it has been held that is sufficient compliance with 54.02(b). *Hardesty v. State*, 659 S.W.2d 823 (Tex.Crim.App. 1983). Since the abolition in 1995 of the right to take an immediate appeal from a certification order, any claim of defect in the summons language may be appealed only following a criminal conviction.

If the respondent is 18 years of age or older, the summons must state that "the hearing is for the purpose of considering waiver of jurisdiction under Subsection (j) of this section." TFC 54.02(k).

A different standard applies to a summons in a mandatory transfer proceeding under TFC 54.02(m). It is sufficient if the summons provides "fair notice" that the purpose of the hearing is to consider mandatory transfer to criminal court. TFC 54.02(n).

**SERVICE**

Personal service of the petition and the summons on the respondent in a certification proceeding is mandatory, jurisdictional, and may be raised for the first time on appeal. *In the Matter of C.C.G.*, 805 S.W.2d 10 (Tex.App. – Tyler 1991, writ denied). Appearance by the respondent at the hearing does not confer jurisdiction on the juvenile court without personal service. *In the Matter of T.T.W.*, 532 S.W.2d 418 (Tex.Civ.App. – Texarkana 1976, no writ). Any party other than the child may waive service of summons by written stipulation or voluntary appearance at the hearing. TFC 53.06(e).

Personal service on the respondent must affirmatively appear in the record. *In the Matter of D.W.M.,* 562 S.W.2d 851 (Tex. 1978). In *Johnson v. State*, 551 S.W.2d 379 (Tex.Crim.App. 1977), the Court of Criminal Appeals reversed a murder conviction because the record did not show that the juvenile had been served with the petition for transfer and summons. Because the juvenile court never acquired jurisdiction to waive and transfer, the criminal court likewise did not have jurisdiction to hear the criminal case.

Personal service on the respondent's attorney, attorney's secretary, or parent is insufficient to confer jurisdiction on the court in the absence of personal service on the respondent, as is service by certified mail. Service cannot be waived by the respondent or the respondent's attorney by filing a written answer or by failure to object to lack of personal service. Adjudications and criminal convictions have been reversed in each of the following cases for lack of personal service on the juvenile respondent: *In the Matter of M.W.*, 523 S.W.2d 513 (Tex.Civ.App. – El Paso 1975, no writ), *In the Matter of A.B.,* 938 S.W.2d 537 (Tex.App. – Texarkana 1997, writ denied), *Alaniz v. State*, 2 S.W.3d 451 (Tex.App. – San Antonio 1999, no writ), *Light v. State*, 993 S.W.2d 740 (Tex.App. – Austin 1999), *vacated on other grounds,* 15 S.W.3d 104 (Tex.Crim.App. 2000), *In the Matter of H.R.A.*, 790 S.W.2d 102 (Tex.App. – Beaumont 1990, no writ), *In the Matter of D.W.M.*, 562 S.W.2d 851 (Tex. 1978).

The prosecutor, therefore, should always ensure that the respondent has been personally served by checking the court jacket for the return of service of summons. A recitation in the return that the petition and the summons were personally served on the respondent is proof of personal service in the absence of rebutting evidence. *In the Matter of M.E.B.,* unpublished, No. 01-95-01534-CV, 1997 WL 103746, 1997 Tex.App. Lexis 1208, Juvenile Law Newsletter 97-2-03 (Tex.App. – Houston [1st Dist.] 3/6/97); *In the Matter of S.D.H.,* unpublished, No. 01-96-00732-CV, 1997 WL 81173, 1997 Tex.App.Lexis 981, Juvenile Law Newsletter 97-2-07 (Tex.App. – Houston [1st Dist.] 2/27/97).

In *Grayless v. State*, 567 S.W.2d 216 (Tex.Crim.App. 1978), the appellant was served with an adjudication petition and summons, but not with the subsequently filed petition requesting waiver of jurisdiction and transfer to criminal court. All parties appeared at the hearing and no objection was made to the failure to serve appellant with the transfer petition. The Court of Criminal Appeals wrote: "The record shows that the juvenile court did not have jurisdiction over the appellant. Since it did not have jurisdiction, its order waiving jurisdiction and certifying appellant for criminal prosecution was a nullity…." *Grayless,* 567 S.W.2d at 220.

The respondent must be personally served with the summons at least two days before the day of the hearing, and service may be made by any suitable person under the direction of the court. TFC 53.07. TFC 53.07(c) does not require an express order of the juvenile court directing service of summons. *In the Matter of D.B.C.,* 695 S.W.2d 248 (Tex.App. – Austin 1985, no writ). The defense attorney is entitled to ten days to prepare for a transfer hearing. TFC 51.10(h).

If the respondent is served with an amended petition within two days of the hearing, TFC 53.07(a) is not violated as long as the original petition was served at least two days prior to the hearing. *R.X.F. v. State,* 921 S.W.2d 888 (Tex.App. – Waco 1996, no writ). Further service is unnecessary if the hearing is postponed or reset. *In the Matter of B.Y.*, 585 S.W.2d 349 (Tex.Civ.App. – El Paso 1979, no writ); *In the Matter of C.C.G.,* 805 S.W.2d 10 (Tex.App. – Tyler 1991, writ denied).

In *Turner v. State,* 796 S.W.2d 492 (Tex.App. – Dallas 1990, no writ), a transfer order was reversed and almost fifteen months after the first hearing, a second transfer hearing was held on the original petition without the respondent having been served again with the petition and summons. When the second transfer order was appealed, the Court of Appeals held that the juvenile court acquired jurisdiction when the petition was first served on the respondent and a new summons was not required.

In *Mosby v. State,* unpublished, No. 05-99-01355-CR, 2000 WL 1618466, 2000 Tex.App.Lexis 7314, Juvenile Law Newsletter 00-4-16 (Tex.App. - Dallas 10/31/00), the summons was served on the respondent two hours after the initial hearing was set, but because the hearing was reset to a date three weeks later and the juvenile appeared for that hearing, the appellate court held that the juvenile court validly acquired jurisdiction.

**REQUIRED STUDY, EVALUATION, AND INVESTIGATION**

TFC 54.02(d) provides: "Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." The purpose of this diagnostic study is to assist the juvenile court in exercising its discretion in making the decision of whether to waive its jurisdiction or not. Accordingly, it is mandatory in a discretionary transfer proceeding, whether the respondent is under 18 or older, but is not required in a mandatory transfer proceeding under 54.02(m). TFC 54.02(n).

The diagnostic study may be considered by the juvenile court in making the transfer decision, as well as written reports of probation officers, professional court employees, or professional consultants, and witness testimony. All of the written material that the court will consider must be made available to the respondent's attorney at least one day before the transfer hearing. TFC. 54.02(e). In *Alexander v. State,* unpublished, No. 05-97-02022-CR, 1999 WL 225852, 1999 Tex.App.Lexis 2919, Juvenile Law Newsletter 99-2-21 (Tex.App. - Dallas 4/20/99), the appellate court held that providing the defense attorney with the report on the morning of the transfer hearing was harmless error when the state did not act in bad faith, the report had been filed three days earlier, and no continuance was requested.

The contents of the "complete diagnostic study, social evaluation, and investigation" is not specified in the statute. The completeness of the study is determined by the juvenile court that orders its preparation. The report commonly includes information obtained by an interview with the respondent and from the prosecutor's file, a social study prepared by the probation department, and a psychological or psychiatric evaluation. For a discussion of what information should be included in the report, see Hays &

Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults,* 9 Hous.L.Rev. 709 (1972).

An initial issue for the defense attorney is whether to allow the respondent to answer factual questions posed by a psychiatrist, psychologist, or probation officer during the preparation of the report or whether to allow the interview at all. This decision, of course, depends on the particular case and client. A form letter to the probation department disallowing interviewing and testing is included at the end of this paper.

The respondent cannot complain on appeal that the study was incomplete because of his or her own actions. If a bona fide effort is made to comply with the statute, filing an incomplete study will suffice. In *R.E.M. v. State,* 541 S.W.2d 841 (Tex.Civ.App. – San Antonio 1976, writ ref'd n.r.e.), the respondent refused to cooperate with the professionals who tried to interview him, then claimed on appeal that the report was incomplete. The court stated: "We are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant's attitude." *R.E.M.,* 541 S.W.2d at 845.

The court in *R.E.M.* held that TFC 51.09 precluded a waiver of the diagnostic study where the child asserted his right to remain silent, but did not waive his right to the study. Later cases hold that the respondent's failure to cooperate does not waive the right to the study, but will prevent the child from arguing on appeal that the study was incomplete. See *In the Matter of J.S.C.,* 875 S.W.2d 325 (Tex.App. – Corpus Christi 1994, writ dism'd) and *In the Matter of C.C.,* 930 S.W.2d 929 (Tex.App. – Austin 1996, no writ).

The person who conducts the diagnostic study does not need to be a licensed psychologist, but can be a professional with a M.S. degree. *In the Matter of R.L.M.,* unpublished, No. 04-95-00190-CV, 1995 WL 752762, Juvenile Law Newsletter 96-1-07 (Tex.App. – San Antonio 12/20/95, writ den.). In another case, the respondent refused to be interviewed by the court-appointed psychiatrist and then requested that the court appoint one of his own selection. The appellate court stated that the respondent has no constitutional right to his own chosen psychiatrist at the state's expense. Even if the respondent had not asked for the state to pay for the evaluation, the court selects the psychiatrist or psychologist to do the evaluation, not the respondent. *In the Matter of L.K.F.,* unpublished, No. 01-94-00673-CV, 1995 WL 582244, 1995 Tex.App. Lexis 2398, Juvenile Law Newsletter 95-4-05 (Tex.App. – Houston [1st Dist.] 1995).

The meaning of "full investigation of the child, his circumstances, and the circumstances of the alleged offense" is discussed in *In the Matter of I.B.,* 619 S.W.2d 584 (Tex.Civ.App. – Amarillo 1981, no writ) in which it was argued that a "full investigation" was not done. The court stated:

> "Of necessity, any inquiry into the circumstances of the offense must be one of degree…. The primary function of the investigation is to discover evidence of probative force, whether for or against the juvenile, for presentation at the hearing. The juvenile can, of course, test the fullness of the investigation made. If tested, the matter of the completeness of the investigation is one for initial determination by the trial court which ordered it."

*In the Matter of I.B.* at 586.

Cases have held that because the certification hearing is not a determination of guilt or innocence, a respondent's Fifth Amendment privilege against self-incrimination is not at issue. *In the Matter of J.C.J.,* 900 S.W.2d 753 (Tex.App. – Tyler 1995, no writ); *In the Matter of N.B.,* unpublished, No. 03-97-00766-CV, 1999 WL 214881, 1999 Tex.App.Lexis 2775, Juvenile Law Newsletter 99-2-18 (Tex.App. – Austin 4/15/99). In *K.W.M. v. State,* 598 S.W.2d 660 (Tex.Civ.App. – Houston [14th Dist.] 1980, no writ), the court stated that TFC 54.02(d) does not require a court to order that the child discuss his or her involvement in the offense, no self-incriminatory statements are required, and if any custodial statement will be used in a later criminal trial, then the Family Code protections must be provided.

*Miranda* warnings are not required to be given to a respondent when he or she is being interviewed for the diagnostic study as long as the report is used only in the certification hearing. *Mena v. State,* 633 S.W.2d 564 (Tex.App. – Houston [14th Dist.] 1982, no writ); *In the Matter of J.C.J.,* 900 S.W.2d 753 (Tex.App. – Tyler 1995, no writ); *In the Matter of R.L.M.,* unpublished, No. 04-95-00190-CV, 1995 WL 752762, Juvenile Law Newsletter 96-1-07 (Tex.App. – San Antonio 12/20/95, writ den.).

If the report is to be used in any subsequent adjudication hearing or criminal trial, then *Miranda* warnings must be given for the report to be admissible. In *Cantu v. State,* 994 S.W.2d 721 (Tex.App. – Austin 1999, writ dism.), the appellant was convicted of murder in criminal court following certification. At punishment, the psychiatrist who conducted the juvenile certification examination testified and the jury subsequently assessed 40 years. The Court of Appeals held that the Fifth and Sixth Amendments required the psychiatrist to warn the appellant of his privilege against self-incrimination and further, that any statements he made could be used against him in later criminal proceedings. If these warnings are not given, the results of the examination are admissible in the certification proceeding, but inadmissible in the criminal trial.

An objection to the use of the report in the criminal trial must be made in the district court or else any error is waived. In *Walton v. State,* unpublished, No. 01-95-01334-CR, 1996 WL 682430, 1996 Tex.App.Lexis 5191, Juvenile Law Newsletter 97-1-03 (Tex.App. – Houston [1st Dist.] 11/21/96), use of the juvenile psychiatric report in the criminal presentence investigation report was waived by the failure to object at trial.

In *Rushing v. State,* 50 S.W.3d 715 (Tex.App. – Waco 2001), the court held that incriminating oral statements made by a juvenile while in detention to a probation officer were admissible in the criminal trial conducted after certification because the probation officer was not interrogating the juvenile. A defense attorney representing a juvenile in a certification proceeding should advise the client accordingly.

A respondent has no Sixth Amendment right to counsel at the examination. *Hidalgo v. State,* 983 S.W.2d 746 (Tex.Crim.App. 1999); *In the Matter of N.B.,* unpublished, No. 03-97-00766-CV, 1999 WL 214881, 1999 Tex.App.Lexis 2775, Juvenile Law Newsletter 99-2-18 (Tex.App. – Austin 4/15/99). In *Hidalgo*, the psychiatric examination was conducted without notice to appellant's attorney. The Court of Criminal Appeals held that the examination is not a critical stage of the proceedings triggering a Sixth Amendment right to counsel as long as it is used only in the transfer proceeding. The court stated: "The exam is mandated by statute so counsel is aware of the need to advise his client when the state files the transfer petition." *Hidalgo,* 983 S.W.2d at 755. Arguably, a respondent's statutory right to counsel is broader than his constitutional right because TFC 51.10(a) provides that a "child may be represented by an attorney *at every stage* of proceedings under this title…." (Italics added for emphasis).

The respondent in a transfer proceeding does not have a mental health or a physician-patient privilege with regard to the required diagnostic study. In *In the Matter of C.J.P.,* 650 S.W.2d 465 (Tex.App. – Houston [14th Dist.] 1983, no writ), the appellant claimed a mental health privilege under 5561h, Civil Statutes (repealed as of September 1, 1983). The court held that the juvenile court may order a psychiatric examination and consider the report in a certification hearing without violating the statute. See also *A.D.P. v. State,* 646 S.W.2d 568 (Tex.App. – Houston [1st Dist.] 1982, no writ). Texas Rules of Evidence 509(b) provides for no physician-patient privilege in criminal proceedings and TFC 51.17(c) makes the Rules of Evidence for criminal cases applicable in juvenile proceedings.

The failure of the juvenile court to order and obtain a study, evaluation, and investigation in a discretionary transfer proceeding is reversible error. In *R.E.M. v. State,* 532 S.W.2d 645 (Tex.Civ.App. – San Antonio 1975), a diagnostic study was not conducted because the respondent refused to be interviewed on his attorney's advice. The respondent's attorney then "waived" the child's right to one, and the trial court proceeded without it. The Court of Appeals, on direct appeal, held that the waiver was ineffective because the child did not join in the waiver as required by TFC 51.09. Further, the court stated that the child may have asserted his or her right to remain silent, but not the right to a diagnostic study.

In *Rodriguez v. State,* 975 S.W.2d 667 (Tex.App. – Texarkana 1998, writ ref'd), the diagnostic study was held to be mandatory but not jurisdictional, so the failure of the court to order one could not be raised on appeal following a criminal conviction after certification. *Rodriguez* was decided based on the law as it existed prior to the abolition of the right to take a direct appeal from a certification order. CCP Art. 44.47 has provided since January 1, 1996 that all jurisdictional and non-jurisdictional claims can be appealed following a criminal conviction after transfer.

**PRE-TRIAL ISSUES**

The respondent in a certification hearing is not entitled to sever multiple offenses into separate hearings. *Moore v. State,* 713 S.W.2d 766 (Tex.App. – Houston [14th Dist.] 1986, no writ).

The State may seek to certify more than one respondent in the same hearing if multiple actors allegedly were involved in the commission of an offense. The juvenile court has discretion to grant or deny a motion to sever respondents, and a denial of such a motion will be upheld if there is not a specific showing of prejudice to one respondent from the joinder. *In re D.R.M.,* unpublished, No. 89-1192-CV, 1990 WL 159335, Juvenile Law Newsletter 90-4-1,-2,-3 (Tex.App. – Houston [1st Dist.] 1990).

TFC 51.042 requires a child who objects to the jurisdiction of the court because of the age of the child to raise the objection at the discretionary transfer hearing or else such objection is waived at a later hearing or on appeal.

In *Melendez v. State,* 4 S.W.3d 437 (Tex.App. – Houston [1st Dist.] 1999, no writ), the appellant claimed that the juvenile court lacked jurisdiction to transfer his case to criminal court because as a national of El Salvador, he was not notified of his rights under the Vienna Convention on Consular Relations. The Convention provides that a foreign national who is arrested must be advised of his rights under the Convention and, if requested, consular officials must be notified of the arrest. The Court of Appeals held that the juvenile court was not deprived of jurisdiction even if the Convention was violated.

If the child has been detained but was not represented by an attorney at the initial detention hearing, TFC 51.10(c) requires the court to immediately appoint an attorney or order that one be retained. If the child is not detained, TFC 51.101(d) (first of two), effective September 1, 2001, requires that the juvenile court, on a finding of indigence, appoint an attorney to represent the child on or before the fifth working day after the date a petition for discretionary transfer is served on the child. As of January 1, 2002, an appointed attorney must meet the qualifications required to take appointments for certifications by the county's juvenile board's appointment of counsel plan. TFC 51.101(b)(2)(C) (second of two).

CCP Art. 26.057 gives the county a cause of action against the parent or other person responsible for the support of the child for recovery of fees and costs following a transfer to criminal court of a child under 18.

TFC 51.10(b)(1) provides: "The child's right to representation by an attorney shall not be waived in a hearing to consider transfer to criminal court as required by 54.02 of this code…."

**THE HEARING**

TFC 54.02(c) provides: "The juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings." Accordingly, a non-jury hearing is mandatory before the juvenile court may waive its jurisdiction and transfer a case to criminal district court. A transfer hearing is not a trial, but a hearing to determine whether the trial will be conducted in juvenile court or criminal court. The juvenile court is not required to give the admonitions of TFC 54.03 at a certification hearing because it is not an adjudication hearing. *M.A.V., Jr. v. Webb County Court at Law,* 842 S.W.2d 739 (Tex.App. – San Antonio 1992, writ den.).

The burden is on the State to prove the allegations in the petition or motion for discretionary transfer by a preponderance of the evidence. *In the Matter of P.B.C.,* 538 S.W.2d 448 (Tex.Civ.App. –El Paso 1976, no writ).

Conducting the hearing without the presence of counsel for the juvenile is reversible error. *In the Matter of D.L.J.,* 981 S.W.2d 815 (Tex.App. – Houston [1st Dist.] 1998, no writ).

**REQUIRED FINDINGS**

Before the juvenile court may waive its jurisdiction, it must make the following findings:

1. the child is alleged to have committed a felony;
2. the child was:
    a. 14 or older at the time he or she allegedly committed a capital felony, an aggravated controlled substance felony, or a first degree felony, or
    b. 15 or older at the time he or she allegedly committed any other felony;
3. no adjudication hearing has been conducted concerning the offense;
4. there is probable cause to believe that the child before the court committed the offense alleged; and
5. because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings.

TFC 54.02(a). The court must make the additional findings set forth in 54.02(j)(4) if the respondent is 18 years of age or older.

**NO ADJUDICATION**

The Double Jeopardy Clause of the Fifth Amendment precludes a certification hearing if an adjudication hearing concerning the same conduct has been previously conducted by the juvenile court. *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779 (1975). The State, however, may offer proof of each element of the offense at the transfer hearing for consideration by the juvenile court without violating double jeopardy. *In the Matter of L.R.L.C.,* 693 S.W.2d 552 (Tex.App. – San Antonio 1985, no writ). The issue in a certification hearing is whether or not the case should be transferred to criminal court, not whether the respondent has committed a crime. Even if the juvenile court makes a finding that the offense has been proven, later juvenile or criminal proceedings on the same offense may still occur. A transfer hearing does not subject the respondent to jeopardy because guilt or innocence is not determined by the juvenile court at the transfer hearing. *In the Matter of F.A.,* 835 S.W.2d 748 (Tex.App. – San Antonio 1992, no writ).

**PROBABLE CAUSE**

The probable cause finding is mandatory as to each criminal transaction transferred by the juvenile court to criminal court. *In the Matter of R.P.,* 759 S.W.2d 181 (Tex.App. – San Antonio 1988, no writ). In *In the Matter of R.P.,* the Court of Appeals decided that the trial court had not found probable cause, reversed the transfer order, and remanded the case because the failure to find probable cause was "fundamental error."

In *In the Matter of R.A.G.,* 866 S.W.2d 199 (Tex. 1993), the juvenile court found probable cause to believe that the respondent committed capital murder, attempted capital murder, *or* solicitation of capital murder, and transferred all three cases to criminal court. The Texas Supreme Court held that it was insufficient to find that probable cause *might* be found for one of the three transferred offenses, and that the juvenile court must find probable cause as to each case transferred.

In *Faggins v. State,* unpublished, No. 05-00-00067-CR, 2001 WL 576602, 2001 WL 3511, Juvenile Law Newsletter 01-3-02 (Tex.App. – Dallas 5/30/01), the appellate court found, in the absence of a reporter's record, that two affidavits in the clerk's file were sufficient to support probable cause to believe that the appellant committed the offense of aggravated robbery.

Probable cause can be found to support lesser-included offenses of the offense charged, and the conduct may be transferred to criminal court as long as the lesser-included offense is an eligible felony and the respondent is of eligible age. A lesser-included offense is implicitly pled by charging the greater offense.

The probable cause finding need not be recited in the transfer order, but may be made orally. *Fuentes v. State,* unpublished, No. 04-96-00600-CR, 1997 WL 120191, 1997 Tex.App.Lexis 2039, Juvenile Law Newsletter 97-2-15 (Tex.App. – San Antonio 3/19/97).

**CRITERIA TO BE CONSIDERED BY COURT**

TFC 54.02(f) requires the juvenile court to consider the following criteria in making the transfer decision:

1. whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
2. the sophistication and maturity of the child;
3. the record and previous history of the child; and
4. the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

While the juvenile court is required to consider the statutory factors in 54.02(f), it is not required to find that each factor is established by the evidence, nor is it required to give equal weight to each factor. *In the Matter of C.C.G.,* 805 S.W.2d 10 (Tex.App. – Tyler 1991, writ denied); *Moore v. State,* 713 S.W.2d 766 (Tex.App. – Houston [14th Dist.] 1986, no writ). See also *Melendez v. State,* unpublished, No. 04-99-00502-CR, 2000 WL 1728070, 2000 Tex.App.Lexis 7908, Juvenile Law Newsletter 00-4-26 (Tex.App. - San Antonio 11/22/00) for a discussion of these criteria.

In *Vasquez v. State,* unpublished, No. 09-99-00664-CR, 2000 WL 795328, Juvenile Law Newsletter 00-3-08 (Tex.App. – Austin 6/22/00), the appellant argued that the required diagnostic study, evaluation, and investigation was inadequate because it did not address the four criteria listed in TFC 54.02(f). The court held that the study is not required to address them. The juvenile court determines the adequacy of the required report, and the transfer order at issue stated that the court considered each of the four factors.

Prior to January 1, 1996, the juvenile court also was required to consider whether the offense was committed in an aggressive and premeditated manner and whether there was evidence on which a grand jury could be expected to return an indictment. These two criteria were eliminated by 1995 amendments to TFC 54.02(f).

**SOPHISTICATION AND MATURITY**

The juvenile court is not required to find that the respondent is as sophisticated and mature as others his age. This inquiry is to determine whether he or she appreciates the nature and effect of his voluntary actions and whether they were right or wrong. *In the Matter of E.D.N.,* 635 S.W.2d 798 (Tex.App. – Corpus Christi 1982, no writ). It also refers to the child's culpability and responsibility for the conduct, as well as whether the respondent can intelligently waive his rights and assist in his defense. *In re C.L.Y.,* 570 S.W.2d 238 (Tex.Civ.App. – Houston [1st Dist.] 1978, no writ). The intellectual quotient (I.Q.) of the respondent is only one element to be considered with regard to whether he or she is sufficiently sophisticated and mature to be tried as an adult. *In the Matter of K.D.S.,* 808 S.W.2d 299 (Tex.App. – Houston [1st Dist.] 1991, no writ).

**RECORD AND PREVIOUS HISTORY**

The respondent does not have to have been adjudicated delinquent before or have a prior referral history. *In the Matter of R.M.,* 648 S.W.2d 406 (Tex.App. – San Antonio 1983, no writ).

**EVIDENCE**

Traditionally, the rules of evidence have not been applicable in a transfer hearing because it is not a trial, but rather a hearing to determine whether the trial will be conducted in juvenile or criminal court. Although TFC 51.17(c) make the Texas Rules of Evidence for criminal cases applicable to judicial proceedings under the Juvenile Justice Code, numerous cases hold otherwise in the context of certification proceedings.

A common rationale for the inapplicability of the evidentiary rules of hearsay in discretionary transfer hearings has been based on the former TFC 54.02(f)(3) criterion: whether there was evidence on which a grand jury could be expected to return an indictment. Information presented to a grand jury is not restricted by the rules of evidence, so neither should that information presented to a juvenile court in making the transfer decision. See *In the Matter of E.D.M.,* 916 S.W.2d 9 (Tex.App. – Houston [1st Dist.] 1995, no writ); *In the Matter of D.J.,* 909 S.W.2d 621 (Tex.App. – Fort Worth 1995, writ dism. w.o.j.) (co-defendant's confession); *In the Matter of D.D.A.,* unpublished, No. 02-94-270-CV, Juvenile Law Newsletter 95-4-07 (Tex.App. – Fort Worth 9/29/95) (uncorroborated testimony of accomplice); *In the Matter of G.F.O.,* 874 S.W.2d 729 (Tex.App. – Houston [1st Dist.] 1994, no writ) (witness statements); *L.M.C. v. State,* 861 S.W.2d 541 (Tex.App. – Houston [14th Dist.] 1993, no writ) (respondent's confession taken without compliance with TFC 51.095).

Since the grand jury criterion's repeal, future cases may take a different approach regarding the applicability of the rules of evidence to certification hearings. In *In the Matter of E.D.M.,* the appellate court in footnote one stated: "We do not address at this time what effect the deletion of Section 54.02(f)(3) will have on the admissibility of evidence in future transfer proceedings." *E.D.M.,* 916 S.W.2d at 11-12. It may be that appellate courts will rely on TFC 54.02(a)(3) which requires that the juvenile court find probable cause to believe that the offense was committed, just as a grand jury must do.

Many cases hold that the juvenile court may base its probable cause finding on hearsay evidence. See *In the Matter of D.W.L.,* 828 S.W.2d 520 (Tex.App. – Houston [14th Dist.] 1992, no writ); *Edwards v. State,* unpublished, No. 05-91-00185-CV, 1991 WL 258726, Juvenile Law Newsletter 92-1-8 (Tex.App. – Dallas 1991, writ dism'd w.o.j.); *In the Matter of K.R.B.,* unpublished, No. 04-95-00856-CV, 1996 WL 460027, 1996 Tex.App.Lexis 3596, Juvenile Law Newsletter 96-3-20 (Tex.App. – San Antonio 8/14/96).

Other inadmissible evidence has been upheld when admitted in the context of certification hearings. The constitutional right to confrontation of witnesses has been held to not apply. *In the Matter of S.J.M.,* 922 S.W.2d 241 (Tex.App. – Houston [14th Dist.] 1996, no writ). Confessions obtained in violation of TFC 51.095 have been held to be admissible in certification proceedings because confession admissibility is not an issue in the transfer decision. *In the Matter of T.L.C.,* 948 S.W.2d 41 (Tex.App. – Houston [14th Dist.] 1997, no writ); *B.L.C. v. State,* 543 S.W.2d 151 (Tex.Civ.App. – Houston [14th Dist.] 1976, writ ref'd n.r.e.); but see *In the Matter of S.A.R.,* 931 S.W.2d 585 (Tex.App. – San Antonio 1996, writ den.) (required showing that custodial confession was taken in compliance with TFC 51.095).

TFC 54.03(e) provides in part: "Evidence illegally seized or obtained is inadmissible in an adjudication hearing." This provision arguably authorizes the admissibility of illegally seized or obtained evidence in a certification hearing.

After the State presents evidence on which the juvenile court may base its probable cause determination, the court is not required to hear alibi evidence. *In the Matter of B.N.E.,* 927 S.W.2d 271 (Tex.App. – Houston [1st Dist.] 1996, no writ); *Sutton v. State,* unpublished, No. 05-91-01312-CV, 1992 WL 52418, Juvenile Law Newsletter 92-2-5 (Tex.App. – Dallas 1992). If the juvenile court does not allow

the defense attorney to call witnesses, the attorney should make a bill of exceptions to preserve the evidence for the appellate record.

Evidence of the personal commission of an offense is not required for certification. The probable cause determination may be based on the law of parties. *In the Matter of D.L.N.,* 930 S.W.2d 253 (Tex.App. – Houston [14th Dist.] 1996, no writ); *In the Matter of A.A.,* 929 S.W.2d 649 (Tex.App. – San Antonio 1996, no writ).

**COMMUNITY WELFARE REQUIRES CRIMINAL PROCEEDINGS**

The ultimate factual conclusion that the juvenile court must make in order to waive its jurisdiction and transfer a case to criminal court is "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." TFC 54.02(a)(3). This finding is subject to appellate review on legal and factual sufficiency grounds. *Green v. State,* unpublished, No. 05-97-01176-CR, 1999 WL 783734, 1999 Tex.App.Lexis 7328, Juvenile Law Newsletter 99-4-14 (Tex.App. – Dallas 10/4/99).

If the appellate court concludes that the evidence was legally insufficient to support the trial court's ultimate conclusion, the respondent may not be transferred thereafter for the same conduct. On the other hand, if the appellate court concludes that the evidence was factually insufficient, the State can re-file against the respondent seeking certification for the same conduct and present new evidence in the second discretionary transfer hearing.

In *In the Matter of A.T.S.,* 694 S.W.2d 252 (Tex.App. – Fort Worth 1985, writ dism.), a certification was reversed because the Court of Appeals found that the evidence did not support the juvenile court's decision to transfer. The respondent was a party to a burglary in which extensive damage was done to the home; however, the respondent had no prior history except for truancy. In addition, the appellate court in evaluating the evidence, found that the crime was one of a juvenile nature without aggression or harm to person, that the respondent was immature and unsophisticated, and that the public would be adequately protected and that the respondent could be rehabilitated in the juvenile system.

The transfer decision can be based on the seriousness of the offense alone. It must not also be based on the background of the respondent. *In the Matter of C.C.G.,* 805 S.W.2d 10 (Tex.App. – Tyler 1991, writ den.) (respondent shot his step-father four times, tried to prevent medical attention for him, and said "I want him to die.").

The juvenile court is not required to make findings of fact on each of the factors in TFC 54.02(f), but if it does, a transfer order will not be reversed because there is insufficient evidence to support one or more of the findings as long as there is sufficient evidence to support the ultimate conclusion that the welfare of the community requires criminal proceedings. *In the Matter of K.D.S.,* 808 S.W.2d 299 (Tex.App. – Houston [1st Dist.] 1991, no writ); *In the Matter of C.C.G.,* 805 S.W.2d 10 (Tex.App. – Tyler 1991, writ den.); *C.W. v. State,* 738 S.W.2d 72 (Tex.App. – Dallas 1987, no writ); *In re C.L.Y.,* 570 S.W.2d 238 (Tex.Civ.App. – Houston [1st Dist.] 1978, no writ); *Meza v. State,* 543 S.W.2d 189 (Tex.Civ.App. – Austin 1976, no writ).

**DENIAL OF MOTION FOR DISCRETIONARY TRANSFER**

If the juvenile court does not waive its jurisdiction and order the case to be transferred to criminal court, the State may file a delinquency petition in the juvenile court. Some prosecutors use the determinate sentencing statute as an alternative measure when the juvenile court denies a certification petition. See *Certification vs. Determinate Sentencing: A Study of the Two Procedures that Address the Problem of Violent Juvenile Offenses in Texas,* Thao Lam, 12 Juvenile Law Section Report (March 1998).

The defense attorney may seek a finding by the juvenile court that the court did not find probable cause. If the State later files a delinquency petition, the defense attorney may then file a motion to dismiss or a motion for summary judgment alleging res judicata based on the court's finding of no probable cause.

**TRANSFER ORDER**

TFC 54.02(h) provides: "If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver …." As with orders following disposition and modification of disposition hearings, the juvenile court must provide the specific reasons and rationale for its order in the order itself for appellate purposes. *In the Matter of J.R.C.,* 522 S.W.2d 579 (Tex.Civ.App. – Texarkana 1975, writ ref'd n.r.e.). If the juvenile court fails to do so, the appellate court most likely would abate the appeal to give the trial court an opportunity to state its reasons for transfer in the order prior to appellate review, as has been done in cases in which the court has failed to state its reasons for disposition in the order.

The juvenile court may state in its order that it has considered the factors in TFC 54.02(f) and relate those factors to the evidence. *In the Matter of Honsaker,* 539 S.W.2d 198 (Tex.Civ.App. – Dallas 1976, writ ref'd n.r.e.); *In the Matter of T.D.,* 817 S.W.2d 771 (Tex.App. – Houston [1st Dist.] 1991, writ den.). The court need not find that the TFC 54.02(f) factors have been established by the evidence. *In the Matter of F.A.,* 835 S.W.2d 748 (Tex.App. – San Antonio 1992, no writ).

Evidence of a juvenile court transfer order must be presented in the criminal trial if it appears that the defendant was under 17 at the time of the offense. If there is no evidence of the transfer of jurisdiction from juvenile court, a subsequent criminal conviction will be reversed on appeal. *Whytus v. State,* 624 S.W.2d 290 (Tex.App. – Dallas 1981, no writ); *Ellis v. State,* 543 S.W.2d 135 (Tex.Crim.App. 1976).

The transfer order does not have to be presented to the jury in the criminal trial, however, because transfer is a jurisdictional matter of law for the court. A juvenile court transfer order that appears valid on its face contained in the pleadings in the criminal case is sufficient. *Darnell v. State,* unpublished, No. B14-90-01139-CR, 1991 WL162902, Juvenile Law Newsletter 91-4-3 (Tex.App. – Houston [14th Dist.] 1991).

In *Rushing v. State,* 50 S.W.3d 715 (Tex.App. – Waco 2001), the order of transfer was not actually filed in the criminal case until after the appeal was filed. The Court of Appeals held that the actual transfer order does not have to be filed in criminal court as long as the juvenile court issued a proper transfer order and such order was communicated to the criminal court judge who accepted jurisdiction. The court relied on the case of *Ellis v. State,* 543 S.W.2d 135 (Tex.Crim.App. 1976), in which the transfer order was filed by way of a supplemental clerk's record after the appeal was initiated.

In *Moss v. State,* 13 S.W.3d 877 (Tex.App. – Fort Worth 2000, writ ref'd), the transfer order was misplaced and never filed, but the trial court held a hearing to determine the authenticity of a copy which was later filed with the appellate court. Other documents regarding the transfer had been filed in the criminal court which showed that the judge was aware of the transfer and assumed jurisdiction.

In *Youngs v. State,* unpublished, No. 14-97-00874-CR, 1999 WL 394653, 1999 Tex.App.Lexis 4488, Juvenile Law Newsletter 99-3-07 (Tex.App. – Houston [14th Dist.] 6/17/99), three separate cases were transferred by the juvenile court. The criminal court clerk filed two of the orders in the third cause number. The Court of Appeals took judicial notice of all three cases and held that the criminal court had acquired jurisdiction.

**POST-TRANSFER PROCEEDINGS**

TFC 54.02(h) provides: "If the juvenile court waives jurisdiction, it … shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure. The transfer of custody is an arrest."

The respondent's attorney should make sure that the certified juvenile and his or her family have been notified of any errors which may be appealed in the event of a later conviction. The attorney should

also provide the family with copies of all pleadings and a business card for use by the criminal defense attorney in preparation for the later trial.

The restriction against administering a polygraph to a juvenile in custody without the consent of the child's attorney or the juvenile court does not apply to a juvenile after certification. TFC 51.151.

The child is transferred to the county jail pursuant to the juvenile court's order of transfer and the child is dealt with as an adult, with the exception that the procedural protections of the Family Code, such as the requirements of TFC 51.095, continue to apply. *Griffin v. State,* 765 S.W.2d 422 (Tex.Crim.App. 1989). The criminal prosecutor has access to the information in the diagnostic study for use in the criminal trial. TFC 54.02(h). If the defendant is convicted and sentenced to prison, the county transferring the defendant to the Texas Department of Criminal Justice is required to also deliver the diagnostic study in the criminal prosecutor's file. CCP Art. 42.09, sec. 8(c).

In 1995 amendments to TFC 54.02, the requirement of an examining trial was eliminated entirely as probable cause is determined at the certification hearing. The criminal court does not have to conduct a hearing or provide any documentation of its determination of a lack of good cause to conduct an examining trial before referring the case to the grand jury.

In *George v. State,* unpublished, No. 01-97-00973-CR, 1999 WL 351081, 1999 Tex.App.Lexis 4176, Juvenile Law Newsletter 99-3-04 (Tex.App. – Houston [1st Dist.] 6/3/99), the parties agreed on a date for the examining trial, but it was not conducted because the prosecutor obtained an indictment before the scheduled date. The court held that the certified child's right to an examining trial is extinguished when the indictment is returned, as it is when a felony indictment is returned against an adult. The criminal court is not required to make a finding of lack of good cause to conduct an examining trial for an offense committed after 1995.

The grand jury does not have to indict on the specific offense alleged in the Motion for Discretionary Transfer because jurisdiction over the criminal transaction, not the specific statutory offense, is transferred to criminal court. TFC 54.02(g). Regardless of the offense alleged in the certification petition, the criminal prosecutor may charge any offense arising out of the transferred criminal transaction. This principle was established in *Ex parte Allen,* 618 S.W.2d 357 (Tex.Crim.App. 1981), in which the certification petition alleged attempted capital murder on one person and capital murder of another person, which occurred on a different date. The State proved probable cause to believe Allen committed the attempted capital murder, but not the separate capital murder of the other person on the other date. Allen was transferred and convicted of the capital murder of the other person. The capital murder conviction was reversed because that criminal transaction had not been transferred. Jurisdiction of the capital murder was retained in juvenile court.

In *Livar v. State,* 929 S.W.2d 573 (Tex.App. – Fort Worth 1996, writ ref'd), Livar was involved in a criminal transaction in which Steven was seriously injured and Ruiz was killed. Livar first was certified for the assault and was later certified in a separate proceeding for the murder. The appellate court held that the second certification was void because the entire criminal transaction was transferred following the first certification proceeding. See also *Caldwell v. State,* unpublished, No. 05-93-01641-CR, 1998 WL 131245, 1998 Tex.App.Lexis 1804, Juvenile Law Newsletter 98-2-07 (Tex.App. – Dallas 3/25/98).

Because the criminal transaction and not the child is transferred to criminal court, a child may be prosecuted and convicted of a different offense or theory of the offense arising out of the transferred conduct. In *Lopez v. State,* unpublished, No. 08-99-00023-CR, 2000 WL 799067, Juvenile Law Newsletter 00-3-12 (Tex.App. – El Paso 6/22/00), that appellant argued that the juvenile court transferred jurisdiction on one theory of aggravated assault and retained jurisdiction on another theory of aggravated assault for which the grand jury indicted him. The court rejected this argument because the conduct itself was transferred, not the offense. A certified juvenile, therefore, can be convicted of a different theory of assault than the theory pled in the certification proceeding.

In *Brosky v. State,* 915 S.W.2d 120 (Tex.App. – Fort Worth 1996, writ ref'd), Brosky had been certified, tried, and convicted for engaging in organized criminal activity and conspiracy. He was later tried again in criminal court for engaging in organized criminal activity based on an overt act not alleged in the certification petition, but arising out of the same criminal conspiracy. The court held that the district court had jurisdiction even though the indictment alleged different conduct than that considered by the juvenile court when waiving jurisdiction. See *Tatum v. State,* 534 S.W.2d 678 (Tex.Crim.App. 1976); *Wooldridge v. State,* 653 S.W.2d 811 (Tex.Crim.App. 1983); *Hamilton v. State,* unpublished, No. 04-93-00174-CR, 1995 WL 612401, Juvenile Law Newsletter 95-4-01 (Tex.App. – San Antonio 10/18/95, writ ref'd); *Rogers v. State,* unpublished, No. 14-95-00871-CR, 1999 WL 93274, 1999 Tex.App.Lexis 1241, Juvenile Law Newsletter 99-1-30 (Tex.App. – Houston [14th Dist.] 2/25/99, writ ref'd).

If the child is indicted by the grand jury, the criminal court conducts the trial. If the grand jury refuses to indict the child, TFC 54.02(i) provides that the criminal court may not remand the child to the jurisdiction of the juvenile court, as the waiver of jurisdiction at certification "is a waiver of jurisdiction over the child."

A certified case may be transferred from one criminal district court to another under local administrative rules. In *Bishop v. State,* unpublished, No. 07-01-0070-CR, 2001 WL 1345944, Juvenile Law Newsletter 01-4-50 (Tex.App. – Amarillo 11/1/01), defense counsel in the criminal trial filed a plea to the jurisdiction on the basis that the district court conducting the trial did not have jurisdiction over the defendant because the juvenile court had transferred the case by written order to a different district court. No written order was rendered transferring the case from that court to the court conducting the trial. A local administrative rule, however, provided for the random filing of criminal cases between several courts, including the two in issue. The appellate court held that the district court that conducted the trial had jurisdiction to indict and try the appellant.

The trial is a criminal proceeding just as though it involved an adult defendant, pursuant to the Code of Criminal Procedure. TFC 54.02(h). The criminal prosecutor may question the jury panel about their feelings on the issue of juvenile certifications to adult court. *Vannorsdell v. State,* unpublished, No. 14-96-00402-CR, 2000 WL 767696, 2000 Tex.App.Lexis 4012, Juvenile Law Newsletter 00-3-04 (Tex.App. – Houston [14th Dist.] 6/15/00).

If the certified juvenile is subsequently convicted in the criminal trial and the certification proceedings are later reversed following an appeal, the criminal conviction is void for want of jurisdiction and the case is returned to the juvenile court for further proceedings.

A certified juvenile is entitled to receive credit on any prison sentence for the time he or she spent in juvenile detention prior to the certification proceeding, as well as credit for good conduct. CCP Art. 42.03, sec. 2(a). *Ex parte Green,* 688 S.W.2d 555 (Tex.Crim.App. 1985); *Ex parte Gomez*, 15 S.W.3d 103 (Tex.Crim.App. 2000, no writ); *Trevino v. State,* unpublished, No. 14-95-01096-CR, 1997 WL 698489, 1997 Tex.App.Lexis 5840, Juvenile Law Newsletter 97-4-28 (Tex.App. – Houston [14th Dist.] 11/4/97); *Vidales v. State,* unpublished, No. 14-95-01519-CR, 1997 WL 576410, 1997 Tex.App.Lexis 5007, Juvenile Law Newsletter 97-4-17 (Tex.App. – Houston [14th Dist.] 9/18/97).

**MANDATORY TRANSFER**

In 1995, the legislature amended TFC 54.02 to create a mandatory certification procedure by which a new felony offense committed by a certified juvenile is "automatically" transferred to criminal court so that all charges can be prosecuted in the same system. The prosecutor has the discretion whether to seek a mandatory transfer, but if the prosecutor requests it and the requirements of the statute are met, the court does not have discretion and must transfer the case.

The requirements for mandatory transfer under TFC 54.02(m) are:

1. the child was previously transferred to criminal court for criminal proceedings; and
2. the child has allegedly committed a new felony offense before becoming 17 years old.

The mandatory transfer provision does not apply if at the time of the juvenile court transfer hearing:

1. the child was not indicted by the grand jury in the matter transferred;
2. the child was found not guilty in the matter transferred;
3. the matter transferred was dismissed with prejudice; or
4. the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final.

TFC 54.02(m). To be eligible for a mandatory transfer, there must be a viable prior transfer order. If one of the negating factors listed above is present in a case, the prosecutor might have the option of proceeding with a discretionary transfer proceeding. If a child, however, has been certified for a capital felony, aggravated controlled substance felony, or a first degree felony while he or she is 14 years old, and then commits a second, third, or state jail felony before becoming 15, the state cannot file a discretionary transfer petition against the child for the subsequent offense. A child 14 years of age cannot be transferred to criminal court for a second, third, or state jail felony, so in that instance, the child would not be subject to mandatory transfer despite the commission of a later felony.

Several options exist for the detention of a child awaiting a mandatory certification hearing. Until the transfer, the juvenile court has jurisdiction over the offense, so the child may be detained in the juvenile detention facility. If the child is on adult community supervision at the time of the new offense, he or she may be detained in the juvenile detention center. If a community supervision revocation warrant has been issued, the child may be detained in the county jail under the authority of the warrant. If the child is free on bond in the criminal case, he or she may be detained in the juvenile detention center, or if the bond has been revoked, in the county jail in the previous criminal case.

The diagnostic study, evaluation, and investigation required in a discretionary transfer proceeding is not required in a mandatory transfer proceeding. TFC 54.02(n). The purpose of the study is to assist the juvenile court in exercising its discretion in making the transfer decision, and when the decision is not discretionary, the study is unnecessary. Additionally, the "magic words" required in a summons for discretionary transfer by TFC 54.02(b) are not required by TFC 54.02(n). It is sufficient that the summons provide "fair notice" that the purpose of the hearing is to consider mandatory transfer to criminal court.

The motion or petition for mandatory transfer should allege the viable prior transfer order, including the cause number and the date of the prior transfer order, that none of the four negating factors exist, and the new felony offense. It should clearly indicate that the prosecutor seeks to invoke the mandatory transfer procedure. Examples of a mandatory transfer petition, citation, and transfer order are included with the materials at the end of this paper.

A mandatory transfer is not automatic, but requires a hearing to prove the contents of the petition. The State must prove the prior certification of the child before the court and the absence of any of the negating factors in TFC 54.02(m)(1) as a predicate for the mandatory transfer. Evidence should include a certified copy of the prior transfer order, a certified copy of the criminal court docket sheet, and the indictment. Although the statute does not clearly require proof of probable cause to believe that the child before the court committed the alleged felony, such a showing should be made. Witnesses might include the probation officer present at the prior certification hearing, the district clerk to prove the pending criminal case, the absence of negating factors, and indictment by the grand jury, and the investigating officer on the new felony.

**UNFITNESS TO PROCEED**

TFC 55.31(a) provides that a child who as a result of mental illness or mental retardation lacks the capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court as long as such incapacity

endures. To do so would violate the constitutional rights of the child. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788 (1960).

**MENTAL ILLNESS**

A split of authority exists with regard to whether the provisions concerning mental illness apply in a certification proceeding. In *R.K.A. v. State,* 553 S.W.2d 781 (Tex.Civ.App. – Fort Worth 1977, no writ), the court found that TFC 55.02 (the predecessor to current sections 55.11 and 55.12) did not apply in a discretionary transfer proceeding because the child has not been charged with delinquent conduct or conduct indicating a need for supervision. The court stated that section 55.02 applied only to a child "alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision."

In *T.P.S. v. State,* 590 S.W.2d 946 (Tex.Civ.App. – Dallas 1979, writ ref'd n.r.e.), however, the court did not follow *R.K.A.,* but found that section 55.02 does apply to discretionary transfer proceedings. The court noted that the petition for transfer alleged that the child "intentionally and knowingly caused the death of an individual by beating him with a club in violation of a penal law of this state punishable by imprisonment," thereby alleging delinquent conduct. The court further stated that legislative intent clearly requires proceedings to determine the need for temporary hospitalization whenever it appears to the juvenile court that the child may be mentally ill, regardless of his or her fitness to proceed and regardless of whether the petition seeks an adjudication of delinquency or certification. *M.A.V., Jr., v. Webb County Court at Law*, 842 S.W.2d 739 (Tex.App. – San Antonio 1992, writ den.) follows the holding of *T.P.S.*

**LACK OF RESPONSIBILITY FOR CONDUCT**

In *T.P.S. v. State,* 620 S.W.2d 728 (Tex.Civ.App. – Dallas 1981, no writ), the appellant on the appeal of a transfer order argued the juvenile court erred by not conducting a hearing to determine whether he was insane at the time of the conduct. The court held that a juvenile is not entitled to a hearing on insanity in the transfer hearing, but that it is a defensive issue to be considered in the criminal trial.

**APPEAL**

In 1995, the right to take an immediate appeal from a certification order was eliminated. TFC 56.01(c )(1)(A), which had authorized a direct appeal from an order of transfer, was repealed. CCP Art. 44.47 provides that an appeal from a transfer order may be taken only in conjunction with the appeal of a subsequent conviction of the offense for which the defendant was transferred to criminal court. This unified appeal may include claims of error in the criminal trial as well as the certification hearing. *Vasquez v. State,* unpublished, No. 09-99-00664-CR, 2000 WL 795328, Juvenile Law Newsletter 00-3-08 (Tex.App. – Austin 6/22/00); *Small v. State,* 23 S.W.3d 549 (Tex.App. – Houston [1st Dist.] 2000, writ ref'd). An appeal under CCP 44.47 is criminal, governed by the Rules of Appellate Procedure applicable to criminal cases, and can go to the Court of Criminal Appeals rather than the Texas Supreme Court.

If a person pleads to deferred adjudication following certification in criminal court, he cannot appeal issues arising out of the certification proceeding because he was not convicted of the offense. *Nguyen v. State,* unpublished, No. 05-98-01599, 2000 WL 688563, 2000 Tex.App.Lexis 3356, Juvenile Law Newsletter 00-2-25 (Tex.App. – Dallas 5/23/00).

In *Mosby v. State,* unpublished, No. 05-99-01355-CR, 2000 WL 1618466, 2000 Tex.App.Lexis 7314, Juvenile Law Newsletter 00-4-16 (Tex.App. – Dallas 10/31/00), the appellant had initially received deferred adjudication, but later was adjudicated guilty. An argument on appeal was that the juvenile court never acquired jurisdiction. The appellate court dismissed the appeal for failure to comply with Texas Rule of Appellate Procedure 25.2(b)(3), which mandates that the notice of appeal, when applicable, specify that the appeal is for a jurisdictional defect.

An appellate court does not have jurisdiction over a direct appeal from a transfer order concerning an offense committed on or after January 1, 1996, and any such attempt must be dismissed. *In the Matter*

*of G.L.C.,* unpublished, No. 04-97-01044-CV, 1998 WL 201520, 1998 Tex.App.Lexis 2443, Juvenile Law Newsletter 98-2-21 (Tex.App. – San Antonio 4/22/98); *In the Matter of D.L.N.,* unpublished, No. 05-97-2160-CV, 1998 WL 765380, 1998 Tex.App.Lexis 6892, Juvenile Law Newsletter 98-4-32 (Tex.App. – Dallas 11/4/98); *In the Matter of D.D.,* 938 S.W.2d 172 (Tex.App. – Fort Worth 1996, no writ).

Before 56.01(c)(1)(A) was repealed, a certified juvenile could challenge certain "jurisdictional" issues arising out of the certification hearing in an appeal following his or her criminal conviction. Such errors deprive the juvenile court, and thus the criminal court, of jurisdiction to act. All other matters had to be appealed directly from the transfer hearing. For example, in *Rodriguez v. State,* 975 S.W.2d 667 (Tex.App. – Texarkana 1998, writ ref'd), the court held that conducting the diagnostic study was mandatory but not jurisdictional; therefore, the fact that such a study was not done could not be considered on appeal from the subsequent criminal conviction. In addition, if a direct appeal was taken from a transfer order, an appellant could not argue the same errors or issues in an appeal following a later criminal conviction.

CCP Art. 44.47(d) states that an "appeal under this article may include any claims under the law that existed before January 1, 1996, that could have been raised on direct appeal of a transfer under Section 54.02, Family Code." This section makes clear that the previous jurisdictional error restriction does not apply to the current unified appeal following conviction, which is plenary. The scope of the post-conviction appeal is the same as the scope of the pre-1996 direct immediate appeal.

If the offense was committed before January 1, 1996, a certified juvenile cannot wait until after the criminal conviction to appeal non-jurisdictional defects in the certification petition. In *Wright v. State,* unpublished, No. 04-00-00285-CR, 2001 WL 608715, 2001 Tex.App.Lexis 3684, Juvenile Law Newsletter 01-3-06 (Tex.App. – San Antonio 6/6/01), the offense occurred on October 20, 1995, and accordingly, the appellant was limited to appealing issues involving jurisdictional errors in the transfer process.

A certified juvenile is not required to make a timely objection in criminal court stating a claim of error in the certification process in order to preserve that error for appeal in the event of a conviction. If such an objection must be made to preserve error, it need only be made in juvenile court.

A defendant, however, must object to being proceeded against in criminal court for an offense committed while he or she was a juvenile if no certification hearing was conducted by the juvenile court or else such claim is waived. CCP Art. 4.18; *Pratt v. State,* unpublished, No. 14-99-00162-CR, 2000 WL 963530, 2000 Tex.App.Lexis 4616 (Tex.App. – Houston [14th Dist.] 7/13/00). A claim that the criminal court has no jurisdiction because it was not waived by the juvenile court must be made by written motion in bar of prosecution filed and presented to the criminal court before a plea, jury selection, or the first witness is sworn in a bench trial. CCP Art. 4.18 only applies to a claim that no certification proceeding was conducted when there should have been. CCP Art. 4.18(g).

CCP Art. 4.18 was held to be unconstitutional in *Rushing v. State,* 50 S.W.3d 715 (Tex.App. – Waco 2001) as being in violation of the Separation of Powers clause of the Texas Constitution in that it requires that a jurisdictional complaint be presented to the trial court before it can be presented to an appellate court. Article II, section 1 of the Texas Constitution provides that appellate courts have the right to review jurisdiction of Texas trial courts that the legislature cannot take away.

**RECORDS**

A juvenile court may not order the sealing of records concerning a person adjudicated for felony delinquent conduct if the person has been transferred to criminal court for prosecution under TFC 54.02. TFC 58.003(c)(2). This provision contemplates a request to have records sealed regarding a felony other than the one that was transferred to criminal court because a transfer is not an adjudication. In such situations, access to the juvenile's record could be helpful in subsequent criminal proceedings.

Likewise, records relating to a person's juvenile case are not subject to automatic restriction of access under the new provisions of TFC 58.201 if the juvenile case was certified for trial in criminal court under TFC 54.02. TFC 58.203(3).

*Quertermous v. State,* __S.W.3d__, Juvenile Law Newsletter 01-3-12 (Tex.App. – Fort Worth 2001) dealt with the proper venue for expunction of certification records. In 1994, the appellant was taken into custody in Fort Worth, certified in Dallas, and then the criminal case was transferred to Tarrant County for prosecution. He was not indicted and no further action was taken. The appellant thereafter sought to have his records expunged under CCP art. 55.01 by filing a petition for expunction in Tarrant County district court. The district court denied the expunction request, which was appealed. The appellate court held that under the expunction statute as it existed at the time of the arrest in 1994, the venue for expunction was the county in which the certification occurred, not the county where the juvenile was taken into custody. The taking into custody of a juvenile is not an "arrest" [TFC 52.01(b)], which is a threshold requirement under the expunction statute. TFC 54.02(h) provides that the transfer of custody following certification is an arrest; accordingly, the proper venue for expunction was Dallas County.

Under the current version of CCP Art. 55.02, applicable to arrests made on or after August 30, 1999, the petition for expunction of records may be filed in either the county of the arrest or the county in which the offense was alleged to have occurred.

Three recent Attorney General Opinions deal with the confidentiality of records in the context of certifications. On March 21, 2001, an opinion was issued in a Public Information Act request ruling that a police offense report involving a juvenile offense retains its non-public, confidential status following certification and conviction in criminal court. The opinion stated: "Because the records pertaining to the murder investigation concern a "child" for purposes of the Family Code, we conclude that records of the murder investigation must be withheld in their entirety pursuant to section 58.007(c) of the Family Code." AG Op. No. OR2001-0779, 2001 WL 996575, Juvenile Law Newsletter 01-4-09 (3/1/01).

In another Public Information Act request, the Attorney General ruled that juvenile records pertaining to juvenile conduct occurring before January 1, 1996, when TFC 51.14 was repealed, lose their confidentiality following certification to criminal court. The opinion dealt with a request for police records, witness statements, and suspect statements in three cases. The Attorney General stated: "Because the juvenile defendant in these cases was tried as an adult in accordance with section 54.02 of the Family Code, the resulting criminal trials were not proceedings subject to the provisions of the Family Code. Consequently, none of the submitted information is confidential under section 51.14." AG Op. No. OR2001-4660, 2001 WL 1229425, Juvenile Law Newsletter 01-4-35 (10/15/01). Professor Dawson noted in his Editor's Comment to this opinion that TFC 58.007(c), the current juvenile law enforcement record confidentiality provision, provides no exception for juvenile certifications. TFC 54.02(h), however, provides that following certification, "the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure," language broad enough to exclude juvenile records in certification proceedings from TFC 58.007 confidentiality.

Records of certifications in the possession of the Texas Juvenile Probation Commission (TJPC), however, are confidential under the Public Information Act. AG Op. No. OR2001-4990, 2001 WL 1348603, Juvenile Law Newsletter 01-4-48 (10/31/01). TJPC received a request for information concerning all juveniles certified to stand trial as an adult since January 1, 1996, but contended that such information was confidential under TFC 58.005 and 58.007. The Attorney General agreed with TJPC, ruling that the information must be withheld from the requestor under section 552.101 of the Government Code. That provision excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."