Certification as an Adult

Speaker Information

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4th Annual Nuts and Bolts of Juvenile
Renaissance Hotel • Austin, Texas
July 22 - 23, 2004

Sponsored by the Texas Juvenile Probation Commission
and Juvenile Law Section of the State Bar of Texas

Submitted with permission and written by
Ellen Smith, Associate Judge
323rd District Court
Fort Worth, Texas

I. ELIGIBILITY TO BE TRANSFERRED

A. Under Age 18

1. Requirements – TFC 54.02(a)

a. Child is alleged to have committed **felony**
b. Child was at time of offense:

i. **14 years*** or older at time he/she allegedly committed:

a) capital felony
b) aggravated controlled substance felony
c) First degree felony

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

ii. **15 years** or older at time he/she allegedly committed:

a) second degree felony
b) third degree felony
c) state jail felony

c. **No adjudication** hearing has been conducted
d. After full investigation and hearing, juvenile court finds:
i. **probable cause** to believe child committed the offense and
ii. because of the **seriousness of the offense or background** of the child, welfare of community requires criminal proceedings

2. Certification for offense committed while 14

a. 1995 amendments
b. capital, first degree, or aggravated controlled substance felony (felonies that carry a higher minimum term or a higher possible fine than a first degree felony)

3. Age at the time the offense is committed controls.

Leno v. State, 934 S.W.2d 421 (Tex.App. Waco 1996, pet. dism.): Transfer order need not recite that the offense was committed while the respondent was of certifiable age if there is evidence in the criminal record showing he or she to have been of certifiable age.

4. The age of the juvenile at the time of the discretionary transfer proceedings is important. If the juvenile is 18 before the certification order is entered, than the special procedures applicable to 18 and older certifications must be used.

B. 18 Years or Older

1. Section 54.02(j) -(l), as amended in 1995, permits transfer to criminal court of a person who, although 18 years of age or older, committed an eligible felony between the ages of 14 and 17.

2. Requirements

a. Person is 18 years or older

b. Person was:

i. **14 years or older and under 17** at the time he/she is alleged to have committed a capital felony, an aggravated controlled substance felony or 1st degree felony; or
ii. **15 years or older and under 17** at the time he/she is alleged to have committed a 2nd or 3rd degree felony or a state jail felony

c. **No adjudication** or adjudication hearing concerning the offense has been conducted

d. The juvenile court finds from a preponderance of the evidence that:

i. for a reason beyond the control of the state it was **not practicable to proceed** in juvenile court before the 18th birthday of the person; or
ii. after **due diligence** of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:

a) the state **did not have probable cause** to proceed in juvenile court and new evidence has been found since the 18thbirthday;
b) the person **could not be found**; or
c) a previous transfer order was **reversed** by an appellate court or set aside by a district court; and

e. There is **probable cause** to believe that the child before the court committed the offense alleged.

3. If the juvenile court declines to transfer, then the case must be dismissed - juvenile court lacks jurisdiction to take any action other than transfer. **After age 18, court's only choices are certification or dismissal.**

4. **Due Diligence**

TFC 54.02(j)(4) requires State to show due diligence and sets out four circumstances that constitute justification for delay. It is the State's burden because the juvenile loses the opportunity to convince the juvenile court to retain jurisdiction and handle as delinquency or determinate sentence proceeding.

a. Not practicable to proceed before age 18:

TFC 54.02(j)(4)(a) - added in 1995 and includes those circumstances in which petition may have been filed before respondent's 18th birthday, but State could not get case to court until after respondent's 18th birthday, and circumstances in which the State was unable to file its petition before respondent's 18th birthday.

Example: Respondent is fugitive and apprehended after 18th birthday.

b. New evidence is discovered:

TFC 54.02(j)(4)(B)(i) - the State lacked probable cause before respondent's 18th birthday and new evidence has been discovered after respondent's 18th birthday.

Example: Identity of offender was not known or offense was not reported until after 18th birthday.

c. Respondent could not be found:

TFC 54.02(j)(4)(B)(ii) - proceedings could not be brought before respondent's 18th birthday because respondent could not be found. State must show due diligence in attempting to locate respondent.

d. Appellate reversal of certification order:

TFC 54.02(j)(4)(B)(iii) - added in 1995. Juvenile court does not lose jurisdiction over a certification case because respondent became 18 before the case was returned to juvenile court by a district court or an appellate court.

Example: The case began as an under-age-18 proceeding, respondent was certified, appealed, and obtained a reversal of the certification order but before re-hearing, respondent became 18.

This subdivision authorizes filing a new post-18 certification petition and defines the appellate reversal as grounds for delay, whether reversal of a criminal conviction or adjudication.

1. Section 51.041 provides "The 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 of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court."

2. Codifies R.E.M. v. State, 569 S.W.2d 613 (Tex.Civ.App. - Waco 1997, writ ref'd n.r.e.)

3. In the Matter of M.A.V., 954 S.W.2d 117 (Tex.App. - San Antonio 1997) held that when respondent becomes 18 after reversal of a certification order but before a new certification hearing can be conducted, the State must file a new petition for a post-18 proceeding under Section 54.02(j) and may not, under R.E.M., proceed on the original petition. Even when there is no defect in the original petition, it is best practice for prosecutor to file a new petition.

5. Proof of Due Diligence

a. In the Matter of N.M.P., 969 S.W.2d 95 (Tex.App. - Amarillo 1998) - DNA testing was not sufficiently well established prior to respondent's 18th birthday to fault the State for not pursuing it before then.

b. In the Matter of J.E.V. (UNPUBLISHED San Antonio 1996) - refusal of critical witness to cooperate was sufficient to show due diligence. Petition was filed as soon as witness agreed to cooperate.

c. In the Matter of J.C.C., 952 S.W.2d 47 (Tex.App. - San Antonio 1997) - Certification was reversed because State had no good explanation why it did not proceed with an adjudication at same time as the juvenile's twin brother for same offense.

d. In the Matter of F.A.A. (UNPUBLISHED San Antonio 1998) - juvenile court did not abuse its discretion in finding the State had used due diligence in attempting to locate respondent before his 18th birthday. Probation officer testified to 25 home visits and 5 phone calls in attempting to locate juvenile.

e. Webb v. State (UNPUBLISHED El Paso 2001) – murder conviction was vacated after certification and juvenile proceedings were dismissed for want of jurisdiction. State did not prove that delay in proceeding before respondent's 18th birthday was not beyond its control.

6. Certifications for Murder

a. TFC 54.02(j)(2)(A) - 1999 amendment authorizing certification of a person 18 years or older for a murder or capital murder committed after the person became 10 but before age 14. [Note: The offense would not have been certifiable had the State attempted it before the person's 18th birthday but the determinate sentence would have been available.]

Section 8.07(a) of the Penal Code, as of 9-1-01, is amended to conform to the amendments made in Section 54.02 in 1999.

b. **Detention** of person pending hearing:

TFC 54.02(o) - (r) was added in 1999 to authorize a juvenile court to detain a person 18 or older in the juvenile detention facility or in the county jail pending the certification hearing.

Initial detention hearing must be conducted and release is required unless findings In TFC 54.02(o)(1) – (3) are made. Detention criteria regarding parental presence and supervision were eliminated.

If detained, person must be kept separately from juveniles in detention facility. If committed to county jail, juvenile court must set or deny bond under CCP 17.15.

II. THE REQUIRED STUDY, EVALUATION, AND INVESTIGATION

TFC 54.02(d): "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."

TFC 54.02(e) authorizes the juvenile court at the transfer hearing to "consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses," which includes the 54.02(d) report.

A. Report is **not required for mandatory transfer**

TFC 54.02(n): "A mandatory transfer under Subsection (m) may be made without conducting the study required in discretionary transfer proceedings by Subsection (d)."

B. Report **is required for discretionary transfer**

TFC 54.02(d) is mandatory for discretionary transfer whether the subject is a child under age 18 or a person 18 or older. Failure to order the study, evaluation, and investigation or to obtain and consider the report will result in reversal of any discretionary transfer order.

1. R.E.M. v. State, 532 S.W.2d 645 (Tex.Civ.App. - San Antonio 1975): Attorney purported to waive the child's right to a diagnostic study and none was conducted. The appellate court held that the waiver was ineffective since the child did not join in it as required by Section 51.09 and that the requirement of a diagnostic study was mandatory.

2. Rodriguez v. State, 975 S.W.2d 667 (Tex.App. - Texarkana 1998): Conducting a diagnostic study, although mandatory, was not jurisdictional and therefore the absence of such a study could not be considered in an appeal from the criminal conviction.

NOTE: This appeal was decided prior to the abolition effective with offenses committed January 1, 1996 of the right to take a direct appeal. Under Code of Criminal Procedure Article 44.47 currently controlling, all claims, jurisdictional or not, can now be included in an appeal of a transfer order following criminal conviction.

C. Complete Diagnostic Study

1. R.E.M. v. State, 541 S.W.2d 841 (Tex.Civ.App. - San Antonio 1976, writ ref'd n.r.e.): Juvenile refused to cooperate with the psychologist and then claimed the report was not the complete study required by 54.02(d). The appellate court rejected this argument stating that a bona fide effort was made to comply with the statute and the failure was due to appellant's attitude.

2. L.M. v. State, 918 S.W.2d 808 (Tex.Civ.App. - Houston [1st Dist.] 1981, writ ref'd n.r.e.): Defense attorney successfully objected to the introduction of the report and the psychologist's testimony and then complained on appeal that the diagnostic study was incomplete because of this omission. The appellate court rejected this argument because the report was considered by the juvenile court but was not placed in evidence only because of respondent's attorney's objection.

3. In the Matter of R.L.M. (UNPUBLISHED San Antonio 1995, error den.): The diagnostic study was not defective because it was conducted by a person who held an M.S. degree rather than a licensed psychologist.

4. In the Matter of L.K.F. (UNPUBLISHED Houston [1st Dist.] 1995): Juvenile refused to be interviewed by court-appointed psychiatrist and requested a psychiatrist of his own choosing. Juvenile court denied his motion. Appellate court said juvenile has no constitutional right to appointment of a psychiatrist of his choosing at state expense. Even if the juvenile had not been asking for state payment of the psychiatrist, the court - not the juvenile - has the right to select the psychiatrist to conduct the required interview.

D. Previous Diagnostic Studies

In the Matter of I.L., 577 S.W. 2d 375 (Tex.Civ.App. - Austin 1979, writ ref'd n.r.e.): "The legislature did not clarify what must be included in a 'complete diagnostic study.' The authors of one article have suggested the elements necessary are examinations by a psychiatrist and clinical psychologist and an evaluation by a probation department caseworker."

The court did not abuse its discretion in the admission of the diagnostic study that included a psychiatric evaluation conducted less than a month before the hearing but did not include an examination by a clinical psychologist.

E. Full Investigation

TFC 54.02(d) requires a "full investigation of the child, his circumstances, and the circumstances of the alleged offense."

1. In re I.B., 619 S.W.2d 584 (Tex.Civ.App. - Amarillo 1981): The juvenile can test the fullness of the investigation. If tested, the matter of the completeness of the investigation is one for initial determination by the trial court that ordered it.

2. Turner v. State, 796 S.W.2d 492 (Tex.Civ.App. - Dallas 1990): Juvenile's transfer to criminal court was reversed and a second transfer hearing was conducted 15 months after the first hearing. A fresh diagnostic study was conducted but instead of conducting a new investigation, the probation officer submitted a one-page addendum to the original investigation. The Court of Appeals held that under the circumstances, the investigation was sufficient.

3. In the Matter of C.C., 930 S.W.2d 929 (Tex.App. - Austin 1996): Court of Appeals rejected juvenile's complaint that investigation was incomplete. It was so because of restrictions the defense attorney placed on access to his client's family by the investigating officer.

F. Addressing Certification Factors

Juvenile court must consider (1) whether the offense was against person or property, (2) the sophistication and maturity of the child, (3) the record and previous history of the child, and (4) the protection of the public and the likelihood of rehabilitation of the child within the juvenile system. Although appropriate to include a discussion of these factors in certification report, failure to do so does not made the report incomplete. Vasquez v. State (UNPUBLISHED Austin 2000).

G. Admissibility of Report

TFC 54.02(e) authorizes the juvenile court to consider the report required by 54.02(d): "At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses."

1. In the Matter of J.R.C., 551 S.W.2d 748 (Tex.Civ.App. – Texarkana 1977, writ ref'd n.r.e.): Contentions on appeal were made that report should have been excluded from evidence because it was hearsay, because its author was not called by the State to testify, and because it had not been authenticated. The court rejected all those arguments.

2. In re D.R.M. (UNPUBLISHED Houston [1st Dist.] 1990): The fact that the investigative report contains information from other reports (such as police reports) does not affect its admissibility under Section 54.02(e).

3. In the Matter of S.S.R. (UNPUBLISHED Houston [1st Dist.] 1996): the court rejected argument that the certification report was not admissible in evidence because it contained hearsay within hearsay and violated confrontation rights.

4. In re G.B.B., 638 S.W.2d 162 (Tex.App. - Houston [1st Dist.] 1982): Court concluded that it was permissible to place the report into evidence by having the clerk testify that she had received the report from the probation department.

H. Disclosure of the Report

TFC 54.02(e): "At least one day prior to the transfer hearing, the court shall provide the attorney for the child with access to all written matter to be considered by the court in making the transfer decision."

This provision is identical to the disclosure requirement in TFC 54.11(d) for the reports considered in determinate sentence release/transfer hearings.

Similar disclosure requirements for detention hearings [54.01(c)], disposition hearings [54.04(b)], and modification of disposition hearings [Section 54.05(e)]. Disclosure is required at or before the hearing.

NOTE: The one-day requirement for disclosure is required in certification and determinate sentencing release/transfer hearings because of the more serious consequences of these hearings.

1. In the Matter of R.S., 575 S.W.2d 641 (Tex.Civ.App. - Austin 1978): Appellate court reversed the transfer order because the juvenile court refused to disclose reports in its possession to the juvenile's attorney.

2. Alexander v. State (UNPUBLISHED Dallas 1999): Error in providing certification report to defense counsel on the morning of the hearing was not harmful because "the State did not act in bad faith, the study was filed three days prior to the hearing, the juvenile's attorney could reasonably anticipate that the study would occur, and [the juvenile] asked for neither a recess or continuance to allow him time to review the report."

I. Privilege Against Compelled Self-Incrimination

1. K.W.M. v. State, 598 S.W.2d 660 (Tex.Civ.App. - Houston [14th Dist.] 1980]: Court rejected the argument that ordering a psychiatric examination is in violation of a child's 5th amendment privilege against compelled self-incrimination. A certification proceeding is not an adjudication of the child's guilt or innocence and therefore the child's Fifth Amendment rights are not in issue. Second, 54.02(d) does not require the court to order the child to discuss his or her involvement in the alleged crime with the examiner but merely 'the circumstances of the alleged offense.' No self-incriminatory statements are required by 54.02(d) and any given must be preceded by the warnings in 51.09(b) [custodial statements] to be used against the child in any subsequent trial.

2. Mena v. State, 633 S.W.2d 564 (Tex. App. - Houston [14th Dist.] 1982): Person conducting the diagnostic study is not required to give the child Miranda warnings when the report is used only in a transfer hearing.

3. In the Matter of R.L.M. (UNPUBLISHED San Antonio 1995, error den.): Held that failure to give Miranda warnings when interviewing the juvenile did not preclude admissibility of the report at the certification hearing because certification does not involve an adjudication of guilt or innocence.

NOTE: Statutory procedures for obtaining statements from juvenile in custody must be followed for any admissions made by juvenile to person conducting diagnostic interview to be admissible in any later adjudication or criminal hearing.

J. Right to Counsel

Hidalgo v. State, 983 S.W.2d 746 (Tex.Crim.App - 1999): Court of Criminal Appeals held that the psychiatric examination was not a critical stage in the proceedings giving rise to a right to counsel under the Sixth Amendment. "Whether a particular event is a critical stage depends on whether the accused requires aid in coping with legal problems or assistance in meeting his adversary…. The exam is mandated by statute so counsel is aware of the need to advise his client when the State files the transfer petition."

"Because appellant was forced to supply neither incriminating evidence nor investigative leads, we do not agree with appellant's contention that the exam amounted to a custodial interrogation entitling him to Fifth and Sixth Amendment protections. Furthermore, because the State's use of the information elicited from the exam was limited to the transfer determination, we find no constitutional violations…."

Because there is no Sixth Amendment right to counsel at the examination, there is no violation of the Sixth Amendment in failing to notify counsel of the time, place, and purpose of the examination.

Hildago does not address the question whether there is a state statutory right to counsel that may be more extensive than the Sixth Amendment right. Section 51.10 (a) provides, "A child may be represented by an attorney at every stage of proceedings under this title…" That expansive statement would certainly encompass psychological or psychiatric examinations conducted as part of the certification process.

K. Use of Examination Outside the Certification Process

Part of the rationale of the Court of Criminal Appeals decision in Hidalgo is that constitutional rights are not implicated when the examination report is used only at the certification hearing and not at a juvenile adjudication hearing or a criminal trial. In Cantu v. State, 994 S.W.2d 721 (Tex.App. - Austin 1999), writ dism., 19 S.W.3d 436 (Tex.Crim.App. 2000), Appellant was convicted of first degree murder in criminal court after certification. At the penalty phase, the psychiatrist testified based on the juvenile certification examination and the jury assessed punishment at 40 years. The Court of Appeals held that the Fifth and Sixth Amendments require that the doctor should have warned appellant that he has a right to remain silent and that any statements he makes can be used against him or her in subsequent criminal proceedings. In the absence of such warnings, the results of the examination are admissible only in certification proceedings.

Nave v. State (UNPUBLISHED Dallas 2000): juvenile respondent admitted to participation in capital murder during psychiatrist's examination for certification report. He had not been given Miranda warnings. He was certified and testified in the criminal trial, claiming that his prior confession to the police in which he admitted to murder was false. The State then cross-examined him about his admission to the psychiatrist in order to impeach his testimony. On appeal, Nave argued that the statement was inadmissible under TFC 51.095 and CCP 38.22. The appellate court found it was admissible as a voluntary statement bearing on the credibility of the witness, to which TFC 51.095 and CCP 38.22 do not apply.

L. Mental Health Privilege Claim

A child cannot claim that information given to a psychiatrist or psychologist in a diagnostic study cannot be revealed to the juvenile court in a transfer hearing.

1. In the Matter of C.J.P., 650 S.W.2d 465 (Tex.App. - Houston [14th Dist.] 1983): Appellant claimed the information was privileged under the mental health information privilege of Section 5561h of the Civil Statutes. The court rejected that argument, holding that the juvenile court may order a psychiatric examination conducted and receive such report in evidence for the court's consideration in such a hearing without violating article 5561h. (Article 5561h was repealed effective September 1,1983.)

2. Rule 509(b) Texas Rules of Evidence: "There is no physician-patient privilege in criminal proceedings."

3. TFC 51.17(c): Texas Rules of Evidence applicable to criminal cases…apply in judicial proceedings under this title.

4. Therefore, there is **no physician-patient privilege in juvenile proceedings.**

III. THE TRANSFER HEARING

TFC 54.02(c): "The juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings."

A. Evidence

1. TFC 54.02 does not state what type of evidence is admissible in transfer hearings. Courts have permitted any rationally-persuasive evidence including illegally obtained evidence, confessions obtained in violation of Title 3, and hearsay evidence. Rationale - The transfer hearing is not a trial, but a hearing to determine where the trial will be conducted: in criminal or juvenile court.

2. B.L.C. v. State, 543 S.W.2d 151 (Tex.Civ.App. - Houston [14th Dist.] 1976, writ ref'd n.r.e.): Juvenile claimed confession was improperly admitted because of 51.095 violations. Appellate court said 51.095 restrictions do no apply to transfer hearings.

3. In the Matter of S.A.R., 931 S.W.2d 585 (Tex.App. - San Antonio 1996, error den.): Juvenile's confession is not admissible in a certification hearing without a showing that it was taken in compliance with Family Code Section 51.095. NOTE: THIS CASE IS A RADICAL BREAK FROM THE DECISIONS BY OTHER COURTS OF APPEALS.

4. In the Matter of T.L.C., 948 S.W.2d 41 (Tex.App. – Houston [14thDist.] 1997): Court refused to follow S.A.R. and said confession admissibility is not an issue at certification.

5. In the Matter of P.A.C., 562 S.W.2d 913 (Tex.Civ.App. - Amarillo 1978): Court permitted the use of affidavits from absent witnesses at a transfer hearing.

   Numerous cases permit hearsay evidence (when the person making the statement is not in court available for cross-examination) to be used in transfer proceedings.

6. In the Matter of S.J.M., 922 S.W.2d 241 (Tex.App. - Houston[14th Dist.] 1996): Constitutional right of confrontation of witnesses does not apply at a certification hearing. No error in admitting into evidence the confessions of co-respondents that implicated the juvenile respondent.

B. No statute makes the Texas Rules of Evidence inapplicable to certification proceedings.

1. Rule 101(b): "Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas…."

2. TFC 51.17(c): "Except as otherwise provided by statute, the Texas Rules of Evidence applicable to criminal cases…apply in a judicial proceeding under this title."

C. Grand Jury Criterion

1. One of the rationales frequently used by appellate courts for not applying rules of evidence to certifications has been that one of the six factors required to be considered in making the transfer decision was "whether there is evidence on which a grand jury may be expected to return an indictment." TFC 54.03(f)(3) repealed this criterion, effective January 1,1996, possibly because it duplicated that requirement that the juvenile court find probable cause to believe that the offense was committed (the same determination a grand jury makes in screening cases). Will this impact the admissibility of evidence in transfer hearings?

2. In the Matter of D.J., 909 S.W.2d 621 (Tex.App. - Fort Worth 1995): Co-defendant's confession was admissible against a Confrontation Clause claim because of the grand jury criterion.

3. In the Matter of G.F.O., 874 S.W.2d 729 (Tex.App. - Houston [1st Dist.]1994): Witness statements were admissible over a hearsay claim because of grand jury criterion.

4. L.M.C. v. State, 861 S.W.2d 541 (Tex.App. – Houston [14th Dist.] 1993): Respondent's confession was admissible without regard to compliance with Section 51.095 because of grand jury criterion.

D. Joinder of Respondents

In re D.R.M. (UNPUBLISHED Houston [1st Dist.] 1990): In the absence of showing of prejudice to one respondent from the joinder, a denial of motion to sever will be upheld on appeal.

E. Consular Notification

1. The Vienna Convention on Consular Relations provides for notification to consular officials when a foreign national has been taken into custody if the person arrested requests notification and requires arresting officials to notify the foreign national of his or her rights under the Convention.

2. Melendez v. State, 4 S.W.3d 437 (Tex.App. – Houston [1st Dist] 1999): Juvenile argued that juvenile court lacked jurisdiction to transfer appellant to criminal court because he was not notified that he had a right under the Convention to have consular officials of El Salvador notified of his arrest. Court of Appeals rejected that argument on the ground that even if the Convention had been violated, that condition would not deprive the juvenile court of jurisdiction to certify.

F. Right to Counsel

1. TFC 51.10 (b)(1) gives a juvenile a mandatory, unwaivable right to counsel for discretionary transfer proceedings.

2. In the Matter of D.L.J., 981 S.W.2d 815 (Tex.App. - Houston[1st Dist.] 1998): Juvenile's attorney was not present for part of the certification hearing. Court of Appeals held that the denial of the right to counsel was structural error that is per se reversible - no showing of harm is required.

IV. TRANSFER FINDINGS AND ORDER

A. Requirements

1. TFC 54.02(a) requires:

   a. Child must be alleged to have committed a **felony** offense
   b. **15 years or older** at time of commission of felony

      ** 1995 amendments: **14 or older** at time of commission of capital felony, first degree felony, or aggravated controlled substance felony*
   c. **no adjudication** hearing concerning offense has been held
   d. **probable cause** to believe child before court committed offense
   e. because of the **seriousness** of the offense alleged or the **background** of the child the **welfare of the community requires criminal proceedings**

      *Note: For person **18 or older, additional requirements** exist – see 54.02(j)(4)*

2. **No Adjudication Hearing**

   a. TFC 54.02(a)(2)(A), (B) requires that no adjudication hearing has been conducted concerning that offense in order **to eliminate any double jeopardy claim** by a juvenile respondent who has been subjected to a transfer hearing. If an adjudication hearing is held before a transfer hearing, then under the interpretation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution in Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779 (1975) the respondent cannot later be criminally prosecuted for that same offense.

   b. In the Matter of L.R.L.C., 693 S.W.2d 552 (Tex.App. – San Antonio 1985): Conducting a full hearing at transfer on offenses alleged does not convert hearing into an adjudication hearing that invokes double jeopardy protections.

   c. Colon v. State, 696 S.W.2d 267 (Tex.App. – San Antonio 1985, pet. ref'd): Court rejected double jeopardy argument where State offered proof of each element of offenses alleged and court found offense had been proved. Issue was whether or not cause should be transferred, not guilt or innocence.

d. In the Matter of A.C. (UNPUBLISHED San Antonio 1996): A void prior adjudication in the case does not preclude certification because the juvenile was never placed in jeopardy in the prior adjudication hearing.

3. Probable Cause

a. Section 54.02 (a)(3) requires the juvenile court to determine that there is probable cause to believe that the child before the court committed the offense alleged.

b. **Lesser included offenses** of the offense charged, so long as it is a transferable offense, can be found to be supported by probable cause since a lesser included offense is also alleged by charging the greater offense.

c. Requirement is **mandatory**

i. In the Matter of R.P., 759 S.W.2d 181 (Tex.App. - San Antonio 1988): Court of Appeals discovered on its own (no objection had been made, was not briefed as point on appeal) that probable cause had not been found. Transfer order was reversed and case was remanded ("fundamental error").

ii. In the Matter of R.A.G., 866 S.W.2d 199 (Tex. 1993): juvenile court found probable cause to believe that respondent committed " the offense of capital murder, attempted capital murder, or solicitation of capital murder" and transferred all three cases to criminal court. The Texas Supreme Court held there must be a finding of probable cause **for each case transferred** - that it is not sufficient that a finding of probable cause might be made with regard to one of the three offenses transferred.

iii. Fuentes v. State (UNPUBLISHED San Antonio 1997): While it is mandatory that the juvenile court make a probable cause finding, it is **not required that it be recited in the transfer order**. An oral finding is sufficient.

4. Evidentiary Basis for Determination

a. The juvenile court is permitted to base its probable cause determination on **hearsay evidence** of the commission of the offense and the respondent's involvement in it.

i. In the Matter of D.W.L., 828 S.W.2d 520 (Tex.App. - Houston [14th Dist.] 1992)
ii. Edwards v. State (UNPUBLISHED Dallas 1991, dismissed w.o.j.): Hearsay testimony by investigating officers sufficient.
iii. In the Matter of K.R.B. UNPUBLISHED San Antonio 1996)

b. Sutton v. State (UNPUBLISHED Dallas 1992): Court may terminate hearing after evidence produced from which the juvenile court can rationally conclude that respondent committed offense alleged.

c. In the Matter of B.N.E., 927 S.W.2d 271 (Tex.App. – Houston [1st Dist.] 1996): Juvenile court can determine probable cause **without hearing alibi evidence**.

d. In the Matter of D.L.N., 930 S.W.2d 253 (Tex.App. – Houston [14th Dist.] 1996): Juvenile court may make the certification finding of probable cause based on the **law of parties** - a showing of personal commission of the offense by the respondent is not required.

e. In the Matter of D.D.A. (UNPUBLISHED Fort Worth 1995): Juvenile court can base finding of probable cause on the **uncorroborated testimony of an accomplice** because a grand jury could indict under such circumstances. Whether there is sufficient corroboration of the accomplice's testimony to convict is a separate question that must be addressed by the criminal court.

5. **Community Welfare Requires Criminal Proceedings**

   a. TFC 54.02(a)(3): Juvenile court must find that "because of the **seriousness of the offense alleged** or the **background of the child** the welfare of the community requires criminal proceedings."

   b. In the Matter of A.T.S., 694 S.W.2d 252 (Tex.App. – Fort Worth 1985): **Reversed** a transfer on a burglary where juvenile had **no prior record except truancy**. Public protection and juvenile's rehabilitation served by retaining case in juvenile system.

   c. In the Matter of C.C.G., 805 S.W.2d 10 (Tex.App. – Tyler 1991, error denied): **Transfer can be based on the seriousness of the offense alone**.

   d. Appellate Review

      i. Court's finding of fact that welfare of community requires criminal proceedings is subject to appellate **review on legal and factual sufficiency** bases.

      ii. Claim of factual insufficiency requires appellate court to evaluate all the evidence and to uphold factual finding unless it is "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust."

         - Quinones v. State (UNPUBLISHED Austin 1998):
           Factual sufficiency upheld where juvenile stabbed his mother to death and showed no remorse.

      iii. Claim of legal insufficiency requires appellate court to consider only that evidence that supports the juvenile court's finding to determine whether that finding has rational support in the evidence.

      iv. If juvenile prevails on claim of legal sufficiency, he/she is not thereafter subject to being transferred for that offense.

      v. If juvenile prevails on claim of factual insufficiency, he/she would be subject to recertification following a new hearing with new evidence.

B. **Criteria for Transfer**

1. Pre-1995, TFC 54.02(f) provided: "In making the determination required by Subsection (a) of this section, the **court shall consider**, among other matters:

   a. whether the alleged offense was against **person or property**, with greater weight in favor of transfer given to offenses against the person;

   b. whether the alleged offense was committed in an **aggressive and premeditated** manner;

   c. whether there is evidence on which a **grand jury** may be expected to return an indictment;

   d. the **sophistication and maturity** of the child;

      i. the record and **previous history** of the child; and
      ii. 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.

2. In 1995, TFC 54.02(f) was **amended to eliminate the second and third criteria**. Beginning with offenses committed January 1, 1996 or later, the juvenile court is no longer required to consider "whether the alleged offense was committed in an aggressive and premeditated manner" or "whether there is evidence on which a grand jury may be expected to return an indictment."

3. **Finding on each criterion is not required**

In the Matter of J.R.C., 551 S.W.2d 748 (Tex.Civ.App. - Texarkana 1977, writ ref'd n.r.e.): TFC 54.02 does not require that all of the matters listed in Subsection (f) must be established to certify. Rather, it provided that the court may waive its jurisdiction if it finds that, because of (1) the seriousness of the offense, or (2) the background of the child, the welfare of the community requires criminal proceedings instead of juvenile proceedings. The statute only directs that the juvenile court **consider** the matters listed under subsection (f) in making its determination.

4. **Sufficiency of Evidence to Support Criteria**

Transfer order will not be reversed because there is insufficient evidence to support one or another of the findings so long as there is sufficient evidence to support the ultimate conclusion that the welfare of the community requires criminal proceedings.

C. **Statement of Reasons**

1. TFC 54.02(h) provides that "if the juvenile court waives jurisdiction, it shall **state specifically in the order its reasons for waiver**…"

   a. Identical to the requirement of TFC 54.04(f) pertaining to dispositions and TFC 54.05(i) pertaining to modification of disposition.

   b. In the Matter of J.R.C., 522 S.W.2d 579 (Tex.Civ.App. – Texarkana 1975, writ ref'd n.r.e.): "Reasons for waiver" means the court's **rationale** of its order.

   c. In the Matter of Honsaker, 539 S.W.2d 198 (Tex.Civ.App. – Dallas 1976, writ ref'd n.r.e.): Statement by the juvenile court that it has considered the subsection (f) factors and relating those factors to the evidence in the hearing is a sufficient statement of reasons for the transfer order.

2. What happens if the juvenile court failed to provide a statement of reasons for its transfer order? No cases in transfer hearing. The cases that have dealt with the failure to state reasons for a juvenile court disposition have all abated the appeal to permit the juvenile court to provide a statement of reasons and then review its adequacy.

D. **Sending Diagnostic Study to Criminal Prosecutor**

1. TFC 54.02(h): 1999 amendment requires juvenile court when transferring a case to criminal court to "cause the results of the diagnostic study of the person…including psychological information, to be transferred to the appropriate criminal prosecutor."

2. CCP 42.09, Sec. 8(c), as amended in 1999, requires that the diagnostic report in the possession of the criminal prosecutor must accompany the defendant to prison.

V. TRANFERRING FEWER THAN ALL OFFENSES ALLEGED

A. **Pre-1995** TFC 54.02(g): "if the juvenile court retains jurisdiction, the child is not subject to criminal prosecution at any time for **any** offense alleged in the petition."

If juvenile court declines to transfer any offense alleged in petition, there can be no criminal prosecution.

B. **Multiple offenses alleged in transfer petition**

1. Stanley v. State, 687 S.W.2d 413 (Tex.App. - Houston [14th Dist.] 1985): court transferred two robbery charges and retained one. Court of Appeals held that **once juvenile court retains jurisdiction as to any count** alleged in certification petition, **child's status is fixed as to all offenses** alleged in the petition and thus the child is not subject to criminal prosecution as an adult for any offense alleged in petition.

2. Richardson v. State, 728 S.W.2d 128 (Tex.App. – Houston [14thDist. 1987): "We hold that when a petition to waive jurisdiction alleges multiple offenses, section 54.02(g) of the Family Code requires that the child's status be fixed as a juvenile as to all offenses alleged in the petition once the juvenile court **retains and exercises jurisdiction** over any count alleged in the certification petition…The trial court may still exercise its discretion in waiving jurisdiction as to any alleged offenses and in refusing to waive jurisdiction as to any alleged offenses; it is only the trial court's subsequent exercise of jurisdiction over the retained offense that renders the order waiving jurisdiction invalid."

   NOTE: Reversed by Court of Criminal Appeals

3. Richardson v. State, 770 S.W.2d 797 (Tex.Crim.App. 1989): "We hold that when a motion or petition to waive jurisdiction alleges multiple offenses, the juvenile **court must either waive or retain jurisdiction as to all offenses alleged**, at one time. Absent a complete waiver, the juvenile court retains jurisdiction over all offenses alleged in the petition. The district court does not obtain jurisdiction over any offense alleged in the petition."

4. The **nonsuit solution**

   a. R.T. v. State, 764 S.W.2d 588 (Tex.App. - Dallas 1989): Reversed a transfer order because juvenile court retained jurisdiction over two arson offenses that were alleged in the transfer petition without any showing that juvenile court had exercised jurisdiction over them.

   b. In R.T. on remand and upon the State's motion, the juvenile court nonsuited the arson counts over which it had originally retained jurisdiction. Thereafter, when the juvenile court transferred all remaining offenses to the criminal district court, it completely waived its jurisdiction because it did not retain jurisdiction of any part of the case. Turner v. State, 796 S.W.2d 492 (Tex.App. - Dallas 1990).

   c. In the Matter of R.G., Jr., 865 S.W.2d 504 (Tex.App. - Corpus Christi 1993) and In the Matter of D.D. (UNPUBLISHED Austin 1996): Motion to dismiss or nonsuit counts alleged in the certification petition was timely although made after the State rested its case. TRCP 162 requires that a nonsuit be entered before the plaintiff has introduced all of his evidence other than rebuttal evidence. **A transfer hearing is not a trial on the merits**, but only a pre-trial hearing, therefore the nonsuit did not occur after the State had presented its case-in-chief in the trial on the merits.

5. **Legislative Overruling Of Richardson**

   a. TFC54.02(g) was amended in 1995: "If the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile **court shall either retain or transfer all offenses relating to a single transaction**. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.

   b. Ex parte Allen, 618 S.W.2d 357 (Tex.Crim.App. 1981): Prosecutor can charge any offense supported by probable cause provided only that the offense arose out of a criminal transaction that was certified by the juvenile court.

   c. **Juvenile court certifies a transaction, not a specific statutory offense.** Court may transfer or retain different transactions.

VI. MANDATORY TRANSFER

A. If, after transfer but prior to becoming 17 years old, the transferred juvenile commits a felony, the new offense is still a juvenile offense.

   1. Prior to 1995, if juvenile officials wish to certify the new offense to criminal court, an entirely new discretionary transfer proceeding had to be conducted, with a new study and investigation.

B. TFC 54.02(m) and (n), 1995 amendments, created a mandatory certification procedure whereby a new offense committed by a certified juvenile under 17 is "automatically" transferred to criminal court for a more comprehensive disposition = "once certified, always certified."

B. Scope of Mandatory Transfer

1. **Requirements**

a. Child was **previously transferred** to criminal court and
b. Has allegedly committed **any new felony*** before 17th birthday.

**Legislative intent is that the transfer order must have been made by the juvenile court before the felony was committed.*

2. Mandatory transfer provision does **not** apply if at the time of the juvenile court hearing:

a. Child was **not indicted** by the grand jury in the matter transferred;
b. Child was found **not guilty** in the matter transferred;
c. Matter transferred was **dismissed with prejudice**; or
d. Child was convicted in the matter transferred, the conviction was **reversed** on appeal, and the appeal is final.

3. If mandatory transfer is not available and if the proper procedures are followed, discretionary transfer would ordinarily be available even in such cases.

4. One circumstance in which mandatory transfer is available but discretionary transfer is not: If a child is certified for committing a capital, first degree or aggravated controlled substance felony while 14 and later commits a second degree, third-degree or a state jail felony before his or her 15th birthday, he or she is not subject to discretionary transfer for the subsequent offense (because it was not a capital, first degree or aggravated controlled substance felony) but would nevertheless be subject to mandatory transfer because **any** felony committed by a 14 year old is sufficient.

C. **Procedures** for Mandatory Transfer (mandatory, but not automatic)

1. **Detention Options**

a. Child can be detained in the certified juvenile detention facility until the certification order is entered.
b. Child can continue to be incarcerated on the previous charge while mandatory transfer proceedings are pending in juvenile court.
c. If the child is on adult community supervision, the child may be detained in the certified juvenile detention center.
d. If a community supervision revocation warrant has been issued, the child may be detained in the county jail under authority of that warrant.
e. If the child is free on bond in the criminal case, he may be detained in the juvenile detention center.
f. If bond is revoked or terminated, may be detained in the county jail in the previous criminal case.

2. **Petition and hearing required**

a. Petition should allege:

i. prior viable transfer order
- cause number and date of prior transfer order
- that none of 4 negating conditions exist

ii. new felony offense

b. Relief prayed for in petition should clearly indicate that the prosecutor is seeking to invoke the mandatory transfer procedure.

c. If the prayer includes discretionary transfer, then the certification report in Section 54.02 (d) will be required.

3. TFC 54.02(n) **eliminates the need for the certification report** required in discretionary proceedings.

4. Summons

a. TFC 54.02(n) excuses the requirement of TFC 54.02(b) that the summons must state that the purpose of the hearing is to consider discretionary transfer to criminal court.

b. Subsection (n) provides that "it is sufficient that the summons provide **fair notice** that the purpose of the hearing is to consider mandatory transfer to criminal court."

5. Proof Required

a. State must prove:

i. the prior transfer order
ii. that none of the four negating conditions in TFC 54.02(m)(1) exist
iii. New felony offense*

* *Statute is ambiguous regarding whether State must prove probable cause to believe that the new felony was committed by the respondent as alleged in the petition or whether it is sufficient that it merely prove that the respondent is alleged in the petition to have committed the felony. A showing of probable cause probably is required to avoid equal protection issues.*

VII. POST-TRANSFER PROCEEDINGS

A. Examining Trials

1. Prior to 1987, Texas courts had interpreted the Family Code to create a mandatory right to an examining trial prior to the prosecution in criminal court of a transferred juvenile.

2. In 1987, TFC 54.02(h) was amended to provide for an examining trial if the district court in the criminal case determined there was good cause for conducting an examining trial.

a. TFC 54.02(a)(3) was also amended to require the juvenile court in the transfer hearing to make a probable cause finding to transfer.
b. Beginning in 1987, the requirement of showing probable cause was shifted from the post-transfer examining trial to the transfer hearing itself.

3. Amendments in 1995 eliminated the remains of the mandatory examining trial system.

a. TFC 54.02(h) provision referring to the district court finding of good cause for an examining trial was repealed.
b. TFC 54.02(i) was amended in 1995 to provide that "a waiver under this section is a waiver of jurisdiction over the child and the criminal court may not remand the child to the jurisdiction of the juvenile court."

B. Transfer Order

1. If record in criminal prosecution shows that accused was younger than 17 at the time of offense, there must also be in the criminal court record evidence that there was a juvenile court transfer order.

a. In the absence of such evidence, the resulting criminal conviction will be reversed on direct appeal.

i. Whytus v. State, 624 S.W.2d 290 (Tex.App. – Dallas 1981)
ii. Ellis v. State, 543 S.W.2d 135 (Tex.Crim.App. 1976)

b. CCP 4.18 (added in 1995) makes it the obligation of the criminal defendant to make a claim of underage as a defense to criminal prosecution - that he was under 17 at the time of the offense and no certification proceedings occurred. Failure to raise the claim in a timely fashion will result in its forfeiture.

2. There is no requirement that the State present evidence of the transfer order to the jury in the criminal trial, as transfer is a jurisdictional matter to be decided by the judge as a matter of law.

a. Darnell v. State (UNPUBLISHED Houston [14th Dist.] 1991): Sufficient if papers in criminal case show a juvenile court transfer order that is valid on its face.

b. Cornealius v. State, 870 S.W.2d 169 (Tex.App. – Houston [14th Dist. 1994): Juvenile court corrected transfer order by substituting name of one complainant for another. Court of Appeals characterized change as judicial, not clerical, and error could not, therefore, by corrected by nunc pro tunc order. But correction was made before the grand jury returned an indictment in transferred case, so "the criminal district court could not acquire jurisdiction over the juvenile. Therefore, at the time [the] juvenile court corrected its order, it still retained plenary power over this cause."

c. Youngs v. State (UNPUBLISHED Houston [14th Dist.] 1999): juvenile court transferred 3 separate cases to criminal court. The criminal court clerk placed 2 orders under the file number for the other. Appellate court held that criminal court had acquired jurisdiction by the certification.

d. Moss v. State, 13 S.W.3d 877 (Tex. App. - Fort Worth 2000): transfer order was not sent to district court or filed in the criminal case. Appellate court found that all that is necessary under TFC 54.02(h) is that the juvenile court enter a transfer order, although it is preferable to file the written order in the criminal case.

C. Prosecution Only for Transaction Transferred

1. Juvenile court waives jurisdiction only with respect to conduct and a criminal court has jurisdiction to adjudicate only for the same conduct for which the juvenile court transferred jurisdiction.

a. Ex parte Allen, 618 S.W.2d 357 (Tex.Crim.App. 1981): Allen was charged in juvenile court with attempted capital murder of one person, and concurrently charged with capital murder of another person which occurred on a different date. State only introduced evidence of the attempted capital murder at transfer hearing and court transferred Allen to criminal court based on that evidence.

He was convicted of capital murder, but Court of Criminal Appeals reversed conviction because appellant had not been transferred for the conduct underlying the capital murder, only the entirely separate attempted capital murder.

b. Livar v. State, 929 S.W.2d 573 (Tex.App. – Fort Worth 1996, pet. ref'd): Livar involved in criminal transaction in which one person received serious bodily injury and another was killed. Livar was certified for the assault and later certified in another proceeding for murder. Appellate court held that second certification was void because entire transaction was transferred at first certification hearing, and both offenses could be prosecuted as a result in criminal court without second certification.

c. Caldwell v. State (UNPUBLISHED Dallas 1998): appellant was certified for solicitation of capital murder of her father. Her mother was murdered by boyfriend in same transaction, but she wasn't charged for that because State lacked evidence. Based on new evidence obtained at criminal trial on solicitation charge, she was later certified as party to capital murder of her mother.

On appeal from conviction for capital murder, appellant claimed Allen principle was violated. Court of Appeals upheld conviction. It is likely that State could have proceeded on capital murder without second certification hearing because both offenses were part of same criminal transaction.

d. The Allen principle deals with the underlying conduct (the criminal transaction) for which a child is transferred to criminal court.

i. Criminal court is not restricted to the particular offense label that juvenile court placed on the conduct.

ii. Hamilton v. State (UNPUBLISHED San Antonio 1995): Conviction for capital murder affirmed even though juvenile court certified only murder - same criminal transaction.

iii. Brosky v. State, 915 S.W.2d 120 (Tex.App. – Fort Worth 1996, pet. ref'd): State may, after certification, replace an overt act alleged in certification petition for engaging in organized criminal activity with a different overt act arising out of the same conspiracy.

iv. Jones v. State (UNPUBLISHED Houston [1st Dist.] 1999): transfer order said certified offenses were committed 12/23/97, but indictments alleged offense date of 12/19/97. Held to be acceptable variance because same conduct was alleged in both transfer order and indictment.

v. Lopez v. State (UNPUBLISHED El Paso 2000): transfer order recited aggravated assault by threat with deadly weapon on a public servant, while indictment read aggravated assault by threat with deadly weapon. Held that it is the conduct that is transferred, not the penal code category.

e. The prosecutor in criminal court may charge any offense that can be proved so long as it is based on conduct from the criminal transaction for which the juvenile court has ordered the respondent transferred.

D. Juvenile Detention Credit on Criminal Sentence

1. Ex parte Green, 688 S.W.2d 555 (Tex.Crim.App. - 1985): Court of Criminal Appeals held that under CCP 42.03, Sec.2(a), a transferred juvenile is entitled to receive credit on any prison sentence for the time spent in juvenile detention pending certification.

2. In Ex parte Gomez, 15 S.W.3d 103 (Tex.Crim.App. 2000): Court of Criminal Appeals held that a certified juvenile is entitled under that same provision to receive on any prison sentence credit for good conduct while detained in the juvenile detention facility.

3. Melendez v. State (UNPUBLISHED San Antonio 2000): juvenile was detained on 2/18, certified on 6/8, and released from jail on bond on 6/10. He only got 3 days' credit on sentence for pre-trial incarceration. Court of Appeals modified judgment to give 113 days' credit on prison sentence.

E. Relationship of Appeal to Criminal Proceedings

1. TFC 56.01(c)(1): When a juvenile is transferred to criminal court, he is entitled to appeal the transfer proceedings to the appropriate Court of Appeals if the offense was committed before January 1, 1996.

a. TFC 56.01(g): Pendency of an appeal does not prevent the criminal prosecution from proceeding at its normal pace.

b. L.L.S. v. Wade, 565 S.W.2d 251 (Tex.Civ.App. – Dallas 1978): Appellate court will not order criminal court to await outcome of appeal before proceeding with criminal trial.

c. If the defendant is convicted for a transferred offense and later the appellate court on immediate appeal reverses the transfer order on direct appeal, the conviction will be set aside and the case returned to the juvenile court.

2. For offenses committed January 1, 1996 or later, a transferred juvenile has no right to take an immediate appeal to a Court of Appeals from a transfer order. The transfer order may be challenged only in an appeal filed after conviction in criminal court for the transferred conduct.

   a. The scope of the post-conviction appeal is the same as the scope of the pre-1996 immediate appeal.

   b. The appeal is plenary and not restricted to "jurisdictional" issues. CCP 44.47

3. Under CCP 4.18, as amended in 1999, there is no requirement that a transferred juvenile make a timely objection in district court to preserve for post-conviction appellate review a claim that there was a defect in the juvenile court certification process. Such an objection is required by CCP 4.18 only for a claim that there were no certification proceedings at all but there should have been.

F. Criminal Expunction Proceedings

1. Venue - CCP 55.02, sec. 2

   a. Currently: county where arrest occurred or county where offense occurred

   b. Pre-1999: county where arrest occurred

2. Quertemous v. State, 52 S.W.3d 862 (Tex. App. – Fort Worth 2001): pre-1999, juvenile taken into custody in Tarrant County, case filed in Dallas County, his county of residence. Dallas County certified case and it was transferred back to Tarrant County for criminal prosecution, where it was dismissed without indictment. Trial court denied expunction in Tarrant County on ground that venue lay in Dallas County. Appellate court agreed because taking juvenile into custody is not an arrest [TFC 52.01(b)], but transfer of custody following certification is [TFC 54.02(h)]. Arrest occurred in Dallas County where appellant was certified.

3. All files and records relating to an arrest are expunged. Since certification is an arrest, all juvenile court files relating the case that is certified should be expunged, even though TFC 58.003(c) prohibits sealing of records of a certified juvenile.

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 listed 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 in common vernacular, a "child" is often said to be certified or transferred, it actually is the criminal transaction that 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 occurred 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 differ 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 proceeding 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 to certify or dismiss 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 01-4-45 (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 18th birthday was not beyond its control. The defect was held to be jurisdictional and no harm analysis was necessary. In Webb, the appellate court discussed the meaning of "proceeding" in juvenile court, which is the statutory language contained in TFC 54.02(j)(4)(A) and (B). The State argued that "proceeding" meant filing the transfer petition in juvenile court. The trial court believed that it meant concluding the hearing before the respondent's 18th birthday, and the Court of Appeals apparently agreed with the trial court.

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. As amended in 2001, the statute 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." TFC 51.041 now clearly extends the juvenile court's jurisdiction over those 18 or older whose post-certification criminal convictions were reversed on appeal. 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

A 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 enacted in 2001 to eliminate a potential defense to prosecution under TFC 54.02(j)(2)(A), and now permits prosecution in criminal court of a person 18 or older charged with murder or capital murder allegedly committed between the ages of 10 and 14.

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 just as in the case for any person in custody in a juvenile proceeding, and the court must release the respondent unless certain findings are made. TFC 54.02(o)(1) – (3). The detention criteria in TFC 54.01(e) regarding parental presence and supervision were eliminated from TFC 54.02(o)(1)-(3) since it deals specifically with those 18 years of age or older. If the person is detained in the juvenile detention facility, "to the extent practicable, the person shall be kept separate from children detained in the same facility." TFC 54.02(q). 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). If the court sets bond, it should use the criteria set forth in CCP Art. 17.15 to fix the amount.

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 or petition 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 prosecutor does not have to verify under oath the contents of the petition for waiver of juvenile court jurisdiction [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 denied).

The law of parties need not be alleged in the petition even if the State presents evidence at the hearing that the respondent is culpable 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, pet. ref'd).

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, that has been held to be 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. CCP Art. 44.47.

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 over 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 Court of Criminal Appeals reviewed the issue of whether the appellate court in *Light v. State,* 993 S.W.2d 740 (Tex.App. – Austin 1999) addressed or overlooked the State's argument that the respondent had made a judicial admission that he had been personally served with a summons. *Light v. State,* 15 S.W.3d 104 (Tex.Crim.App. 2000). The respondent may have acknowledged service when the trial court asked him if he had been "served with notice of this summons two entire days before today." The return of service, however, recited that the respondent's father had been served with the respondent's summons. The Court of Criminal Appeals remanded the case to the Court of Appeals for it to consider the argument that the respondent judicially admitted to personal service. The opinion implies that such an admission would override the recitation in the return of service. Justice Johnson, writing in dissent, noted that "[T]he issue, however, is whether there has been compliance with the requirement of personal service mandated by Tex. Fam. Code section 53.07, not whether appellant knew through his father that his case had been set on a particular day."

The prosecutor 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. After transfer, the appellant was convicted of murder and on appeal claimed that he was not served with the transfer petition or summons. The Court of Criminal Appeals reversed the conviction. "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.

Although a juvenile may not waive service of petition and summons, it has been held that a defect in the return of service can be waived by the juvenile. *In the Matter of R.G.S.,* unpublished, No. 05-97-01383, 1998 WL 136490, 1998 Tex.App. Lexis 1894, Juvenile Law Newsletter 98-2-10 (Tex.App. – Dallas 3/27/98) (typographical errors in the spelling of the respondent's name).

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 the Matter of R.M.,* 648 S.W.2d 406 (Tex.App. – San Antonio 1983).

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 respondent 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, regardless of the age of the respondent, but is not required in a mandatory transfer proceeding under TFC 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 statute does not specify what information the "complete diagnostic study, social evaluation, and full investigation" should contain. The course and scope of an investigation will vary according to the circumstances surrounding the events, and the completeness of the study is determined by the juvenile court that orders its preparation. *In re I.B.,* 619 S.W.2d 584 (Tex.Civ.App. – Amarillo 1981, no writ). The report commonly includes information obtained by an interview with the respondent and from the prosecutor's file, a psychological or psychiatric evaluation, and a social history prepared by the probation department containing prior referrals, school records, and information about the circumstances of the offense. 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.

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 *Ortega v. State,* unpublished, No. 05-00-00086-CR, 2002 WL 14163 (Tex.App.-Dallas 2002); *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 appellant in *Price v. State,* unpublished, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex.App.Lexis 2852 (Tex.App. – Dallas 4/24/02), argued that a "full investigation" required the probation department to personally interview the victims or include the respondent's version of the circumstances of the offense in the report. The appellate court rejected this argument, finding that the court did not abuse its discretion in concluding that a full investigation was performed.

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 denied). In another case, the respondent refused to be interviewed by the court-appointed psychiatrist and then requested that the court appoint one whom he selected. The appellate court stated that a 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, and not the respondent, selects the psychiatrist or psychologist to conduct the evaluation. *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 denied).

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., 19 S.W.3d 436 (Tex.Crim.App. 2000), 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' confinement. 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.

Both the juvenile and the adult confession statutes, TFC 51.095 and CCP Art. 38.22, require that certain warnings be given prior to a custodial statement for the statement to be admissible. Both statutes, however, provide that these warning requirements do not apply to voluntary statements bearing on the credibility of a witness. TFC 51.095(b) and CCP Art. 38.22, sec. 5. In *Nave v. State,* unpublished, No. 05-99-01366-CR, 2000 WL 1711937, 2000 Tex.App.Lexis 7723, Juvenile Law Newsletter 00-4-25 (Tex.App. – Dallas 11/14/00), the juvenile respondent, during a psychiatrist's examination for the certification report, admitted to participation in a capital murder. He had not been given *Miranda* warnings prior to the examination. He subsequently was certified and during his testimony in his defense at the criminal trial, claimed that his prior written confession to the police in which he admitted to the homicide was false. The State was allowed to cross-examine the defendant about the statement he had given to the psychiatrist in order to impeach his trial testimony. On appeal, Nave argued that the statement was inadmissible under TFC 51.095 and CCP Art. 38.22. The Court of Appeals found the statement to the psychiatrist admissible as a voluntary statement bearing on the credibility of the witness. Nave testified that he had lied in his written statement to the police admitting to the murder prior to the State's questioning about his statement to the psychiatrist, so the questions had a direct bearing on the credibility of his testimony.

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), alleged error in the use of the juvenile psychiatric report in the criminal pre-sentence 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 to a probation officer by a juvenile in detention 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 juvenile 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 a study, 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 did not waive 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 a severance of 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).

A juvenile who objects to the jurisdiction of the court because of his or her age must raise the objection at the discretionary transfer hearing or else such objection is waived at a later hearing or on appeal. TFC 51.042.

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 denied).

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).

A juvenile is entitled to the effective assistance of counsel at a transfer hearing. See *Kent v. United States,* 383 U.S. 541, 561-62 (1966); *In re K.J.O.,* 27 S.W.3d 340, 342 (Tex.App. – Dallas 2000, pet. denied). The ineffectiveness of counsel in juvenile cases is measured by the *Strickland* standard used in criminal cases: whether counsel's performance fell below an objective standard of reasonableness and, if so, whether a reasonable probability exists that, but for counsel's unprofessional errors, a different outcome would have resulted. *In re K.J.O.,* 27 S.W.3d at 343; *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984).

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 an offense. Even if the juvenile court makes a finding that the offense has been proven, later juvenile or criminal proceedings concerning 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 juvenile court must determine whether probable cause exists to believe that the child committed the offenses alleged in the transfer petition. TFC 54.02(a)(3). Probable cause is shown by facts and circumstances sufficient to warrant a prudent person to believe the child committed the offense. *In the Matter of D.L.N.,* 930 S.W.2d 253, 255 (Tex.App. – Houston [14th Dist.] 1996, no writ); *In the Matter of J.P.O.,* 904 S.W.2d 695, 700 (Tex.App. – Corpus Christi 1995, writ denied). The probable cause standard embraces a practical, common sense approach rather than the more technical standards applied in the burdens of proof of either beyond a reasonable doubt or a preponderance of the evidence. *J.P.O.,* 904 S.W.2d at 700.

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 Tex.App.Lexis 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 as a party.

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 re J.J.,* 916 S.W.2d 532, 535 (Tex.App. – Dallas 1995, no writ); *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, 2000 Tex.App.Lexis 4129, 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 made to determine whether he 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 a prior adjudication of delinquency 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 to determine guilt or innocence, but rather a hearing to determine whether the trial will be conducted in juvenile or criminal court. See *In re Honsaker,* 539 S.W.2d 198, 201 (Tex.Civ.App. – Dallas 1976, writ ref'd n.r.e.). 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 in order to indict.

Recently, the Corpus Christi Court of Appeals wrote: "No consistent rules regarding the admissibility of evidence have been developed for a transfer hearing, and juvenile courts often consider evidence that would be inadmissible at an adjudication hearing. Strict rules of evidence are not applied in transfer proceedings because the weight of the evidence is judged by whether it would support an indictment for the offense, and, a grand jury, when considering an indictment, is permitted to receive evidence that would be inadmissible at an adjudication hearing or trial." *Jimenez v. State,* unpublished, No. 13-99-776-CR, 2002 WL 228794, 2002 Tex.App.Lexis 1275 (Tex.App. – Corpus Christi 2/14/02).

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).

In *Price v. State,* unpublished, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex.App.Lexis 2852 (Tex.App. – Dallas 4/24/02), the juvenile court admitted evidence of what the victims told the police about the offense. The appellate court found that the statements were not offered for the proof of the matter asserted, but rather to show that the statements were made and thus, to support a finding of probable cause. Because the statements were not offered for the proof of the matter asserted, they were not hearsay and were admissible.

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 denied) (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'd), 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 does not also have to 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 denied) (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 denied); *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. The prosecutor may 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 denied). 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 years of age 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. 14-90-01139-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 transfer order 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 in the criminal case. On appeal following certification and conviction, the trial court held a hearing to determine the authenticity of a copy that was later filed with the appellate court. Other documents regarding the transfer had been filed in the criminal court that showed that the judge was aware of the transfer and assumed jurisdiction. The Court of Appeals found that all that is required under TFC 54.02(h) is that the juvenile court render a transfer order, not that the written order actually be filed in the criminal case, although that practice certainly is preferable.

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 validly 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 has 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. Prior to referring the case to the grand jury, 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.

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 certification petition because jurisdiction over the criminal transaction and 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. See *Castro v. State,* 703 S.W.2d 804, 805-06 (Tex.App. – El Paso 1986, pet. ref'd.). 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, but had been 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. In *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), certification for solicitation of capital murder did not prevent a second certification for capital murder.

Because the criminal transaction is transferred to criminal court and not the juvenile, a juvenile 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), the certification order recited the transferred offense as aggravated assault by threat with a deadly weapon on a public servant, while the indictment alleged the lesser-included offense of aggravated assault by threat with a deadly weapon. On appeal, Lopez 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).

In *Jones v. State,* unpublished, No. 01-99-00010-CR, 1999 WL 1240928, 1999 Tex.App.Lexis 9456, Juvenile Law Newsletter 00-1-10 (Tex.App. – Houston [1st Dist.] 12/23/99, pet. ref'd), the date of the offense recited in the transfer order was December 23, 1997, while the indictment alleged the offense date as being December 19, 1997. On appeal, Jones argued a denial of due process because of the variance between the notice of charges in the transfer petition and the indictment. Citing *Ex parte Allen,* 618 S.W.2d 357, 358 (Tex.Crim.App. 1981), the appellate court found the variance to be acceptable because the indictment clearly arose out of the same events described in both the transfer petition and transfer order.

If the child is indicted by the grand jury, the criminal district court conducts the trial. If the grand jury does not 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, 2001 Tex.App.Lexis 7414, Juvenile Law Newsletter 01-4-49 (Tex.App. – Amarillo 11/1/01), defense counsel in the criminal trial filed a plea to the jurisdiction on the basis that the court conducting the trial, the 364th District Court, did not have jurisdiction over the defendant because the juvenile court had transferred the case by written order to the 140th District Court. No written order was signed transferring the case from the 140th District Court to the 364th District Court. The plea to the jurisdiction was overruled and Bishop was convicted. On appeal, he argued that TFC 54.02(a) permitting a transfer to "the appropriate district court" implies that juvenile jurisdiction can only be transferred to one appropriate district court. A local administrative rule, however, provided for the random filing of criminal cases between several courts, including the two in issue. The appellate court relied on sections 74.093 and 74.092 of the Texas Government Code to hold that the administrative rule constituted an effective transfer order authorizing the 364th District Court 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).

If the trial court errs by not giving credit for time served in confinement, the appellate court can reform the judgment to reflect credit for time served if the necessary information is included in the appellate record. *Stokes v. State,* 688 S.W.2d 539, 542 (Tex.Crim.App. 1985). In *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), the juvenile was detained on February 18th, certified on June 8th, and released from jail on bond on June 10th. The criminal court only gave him three days' credit on his sentence for pre-trial incarceration. The Court of Appeals, citing *Ex parte Green,* modified the judgment to provide for 113 days' credit on the sentence. In *Delgado v. State,* unpublished, No. 14-00-01238-CR, 2002 WL 27297, 2002 Tex.App.Lexis 195 (Tex.App. – Houston [14th Dist.] 1/10/02), the appellate record did not reflect the amount of time spent in juvenile detention prior to certification, so the case was remanded to the trial court with an instruction to modify the sentence to account for the total time appellant spent in confinement.

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 or third degree felony or a 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 juvenile 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 such a 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.

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 should testify and 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 TFC 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 TFC 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 denied) 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 in 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).

In *Small v. State,* 23 S.W.3d 549 (Tex.App. – Houston [1st Dist.] 2000, writ ref'd), the appellate court held that the 1995 amendment abolished the right to an immediate appeal from a certification order, overruling *Melendez v. State,* 4 S.W.3d 437 (Tex.App. – Houston [1st Dist.] 1999), which did not recognize the effect of the amendment. An appeal under CCP Art. 44.47 is criminal, governed by the Rules of Appellate Procedure applicable to criminal cases, and is taken to the Court of Criminal Appeals rather than the Texas Supreme Court.

CCP Art. 44.47(b) allows an appeal of a transfer order to be taken only in conjunction with an appeal of a "conviction of the offense for which the defendant was transferred to criminal court." If a transferred juvenile pleads to deferred adjudication 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). Those issues must be raised in the appeal from the criminal court order proceeding to judgment in the deferred adjudication criminal case.

If a defendant pleads guilty or nolo contendre pursuant to a plea agreement and is sentenced in accordance with the agreement, then the notice provisions of Texas Rules of Appellate Procedure 25.2(b)(3) must be followed in perfecting an appeal. *Cooper v. State,* 45 S.W.3d 77, 78-79 (Tex.Crim.App. 2001). TRAP 25.2(b)(3) requires that when a notice of appeal is filed in a criminal case with a plea- bargained sentence, the notice of appeal must:

(a) specify that the appeal is for a jurisdictional defect;
(b) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
(c) state that the trial court granted permission to appeal.

Failure to do so deprives the appellate court of jurisdiction to consider the appeal.

TRAP 25.2(b)(3) applies to defendants on deferred adjudication probation. *Vidaurri v. State,* 49 S.W.3d 880, 884-85 (Tex.Crim.App. 2001). Following a plea-bargained deferred adjudication, the trial court does not exceed the recommendation if it later, upon proceeding to an adjudication of guilt, imposes any sentence within the range allowed by law. *Watson v. State,* 924 S.W.2d 711, 714 (Tex. Crim. App. 1996). TRAP 25.2(b)(3), therefore, applies to an appeal challenging a conviction by a defendant placed on deferred adjudication probation, whether made before or after an adjudication of guilt. TRAP 25.2(b)(3); CCP Art. 42.12, sec. 5(b); CCP Art. 44.01(j); *Vidaurri,* 49 S.W.3d at 884-85; *Kirk v. State,* 942 S.W.2d 624, 625 (Tex.Crim.App. 1997); *Watson,* 924 S.W.2d at 713-15.

This principle was extended to an appeal from an order certifying a juvenile when she later was placed on deferred adjudication probation in *Woods v. State,* 68 S.W.3d 667, No. 1889-00, 2002 WL 237756, 2002 Tex.Crim.App.Lexis 40 (Tex.Crim.App. 2/20/02). Following certification, Woods pleaded guilty pursuant to a plea agreement to ten years' deferred adjudication probation, and as part of the plea agreement, waived her right to appeal. She was thereafter adjudicated guilty and received a 50-year sentence. She requested a new trial based on an inaudible record of the certification hearing. The Court of Appeals held that it could review the certification order pursuant to CCP Art. 44.47(b) and granted a new trial based on the inaudible record. The Court of Criminal Appeals reversed and remanded, holding that because the trial court sentenced appellant within the punishment range, appellant was required to comply with TRAP 25.2(b)(3). Appellant did not do so, but only filed a general notice of appeal; therefore, the appellate court did not have jurisdiction to consider the merits of her appeal.

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 TRAP 25.2(b)(3), which mandates that the notice of appeal, when applicable, specify that the appeal is for a jurisdictional defect.

TRAP 25.2(b)(3) does not apply to a plea of guilty without a plea agreement. In *Faisst v. State,* __S.W.3d __, No. 12-00-00289-CR, 2001 WL 1535453 (Tex.App. – Tyler 11/30/01), the appellant, following certification, pleaded guilty without the benefit of a plea recommendation and later appealed on the basis of abuse of discretion in the transfer decision. The Court of Appeals applied the *Young* rule and held that a defendant who voluntarily and

understandably pleads guilty waives all non-jurisdictional defects where the resulting judgment of conviction was independent of, and was not supported by, the error. *Young v. State,* 8 S.W.3d 656, 666-67 (Tex.Crim.App. 2000). The court found that the conviction in criminal court was not dependent on the alleged error of abuse of discretion by the juvenile court in making the transfer decision, and therefore was not preserved for review under *Young.*

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 the law then in effect required an interlocutory appeal of the certification order. Because the appellant did not file an interlocutory appeal, he was limited to appealing issues involving jurisdictional errors in the transfer process. The San Antonio Court of Appeals held that whether findings on due diligence are against the great weight of the evidence is not a jurisdictional issue, so the court did not have jurisdiction to consider the issue. Cf. *Manuel v. State,* 994 S.W.2d 658, 662 n. 6 (Tex.Crim.App. 1999) (sufficiency of the evidence is a non-jurisdictional claim).

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.

Article 4.18 of the Code of Criminal Procedure, however, requires that a criminal defendant 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. 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. If the issue of underage is not raised by the defendant in a timely manner, then he or she is precluded from raising the issue in any subsequent proceeding. CCP Art. 4.18 only applies to a claim that no certification proceeding was conducted when there should have been and not to challenges to errors or defects in transfer proceedings. CCP Art. 4.18(g).

In *Pratt v. State,* unpublished, No. 14-99-00162-CR, 2000 WL 963530, 2000 Tex.App.Lexis 4616, Juvenile Law Newsletter 99-3-17 (Tex.App. – Houston [14th Dist.] 7/13/00), the defendant did not raise the defense of underage in a proceeding to revoke his adult community supervision before pleading guilty in criminal court, so he was precluded by CCP Art. 4.18 from attacking jurisdiction on appeal.

CCP Art. 4.18 was erroneously relied upon in *Jones v. State,* unpublished, No. 08-00-00021-CR, 2001 WL 1452206 (Tex.App. – El Paso 11/15/01). The appellant argued that the transfer order was defective and the Court of Appeals found that he had failed to preserve error by not filing a written motion prior to pleading guilty in criminal court as required by CCP Art. 4.18. Such a motion, however, is required only when a claim is made that there was no certification hearing conducted at all when there should have been in order to vest the criminal district court with jurisdiction.

Article 4.18 was enacted in 1995 to abrogate the *Bannister* rule. In *Bannister v. State,* 552 S.W.2d 124 (Tex.Crim.App. 1977), a 15-year-old TYC escapee was taken into custody for burglary of a habitation and lied about her name and age, claiming to be 19. She pleaded guilty in criminal court without any prior juvenile court proceedings and received five years' probation. At her probation revocation hearing, Bannister informed the court that she was actually 15 years old at the time of the offense, which was confirmed by a copy of her birth certificate. The Court of Criminal Appeals reversed the revocation of her probation on the ground that the criminal court never had jurisdiction of her case based on her true age. Judge Onion, writing for the majority, commented that the Family Code and the Penal Code as written allowed the juvenile to benefit from a fraud upon the court. Id at 130. This approach was also taken in *Ex parte McCullough,* 598 S.W.2d 272 (Tex.Crim.App. 1980) and *Ex parte Pierce,* 621 S.W.2d 634 (Tex.Crim.App. 1981).

The *Bannister* rule was followed in *Ex parte Waggoner,* 61 S.W.3d 429 (Tex.Crim.App. 2001), a case that involved an offense committed prior to the enactment of CCP Art. 4.18. Waggoner committed the offense of theft the day before his 17th birthday. He pleaded guilty and was placed on deferred adjudication. He then was convicted of forgery and adjudicated guilty in the prior theft case. He was sentenced to ten years' confinement on each, to run consecutively, with the theft sentence to run first. Waggoner filed a post-conviction application for writ of habeas corpus and relief was granted. The criminal court had no jurisdiction of the theft case because there had been no transfer of jurisdiction from the juvenile court; therefore, the first sentence was invalid and the later consecutive sentence ran from the date of original imposition.

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. In *Rushing,* in an appeal from a post-certification conviction of capital murder, Rushing claimed that the criminal court never acquired jurisdiction because the juvenile court's transfer order had not been filed in the criminal case. He had not objected to this deficiency earlier, as the appellate court found CCP Art. 4.18 purportedly to require. CCP Art. 4.18, however, did not apply to the facts in *Rushing* since he did not claim that there had not been a certification proceeding at all, but only that it had been defective. In any event, the Waco Court of Appeals allowed the record to be supplemented with the transfer order and affirmed the life sentence.

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).

With regard to expunction, CCP Art. 55.01(a) allows a person, if eligible, to have "all records and files relating to the arrest expunged." Because certification is an arrest, the expungement order should reach all of the juvenile records relating to the criminal case that was certified. Although TFC 58.003(c) prohibits the sealing of juvenile records concerning a juvenile respondent who has been certified to criminal court, an expunction order should include all juvenile records relating to the criminal case. Otherwise, the criminal records would be expunged, but the juvenile records would not be sealed or expunged, a result that the legislature probably did not intend.

CCP Art. 55.02, sec. 2, provides that the proper venue for an expunction proceeding is the county in which the arrest occurred or in which the offense was alleged to have occurred. For arrests before August 30, 1999, the venue for expunction was restricted to the county in which the arrest occurred.

Quertermous v. State, 52 S.W.3d 862 (Tex.App. – Fort Worth 2001), dealt with the proper venue for expunction of certification records under the statute as it existed before its amendment. In 1994, the appellant was taken into custody in Tarrant County and certified in Dallas County, which was the respondent's county of residence. The certified criminal case was transferred back to Tarrant County for prosecution. He was not indicted, no further action was taken, and he thereafter filed a petition for expunction in Tarrant County. The district court denied the expunction request on the ground that venue lay in Dallas County and the decision was appealed. The appellate court agreed, holding 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. Pursuant to TFC 52.01(b), the taking of a child into custody is not an "arrest", which is a threshold requirement under CCP Art. 55.01, the expunction statute. A juvenile is not effectively "arrested" until the juvenile court certifies him and renders a proper transfer order to district court. TFC 54.02(h) provides that the transfer of custody following certification is an arrest; accordingly, the proper venue for expunction was Dallas County where Quertermous was certified.

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."