

# CERTIFICATIONS IN TEXAS A GENERAL OVERVIEW

NUTS AND BOLTS OF JUVENILE LAW  
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# CERTIFICATIONS

## IN TEXAS A GENERAL OVERVIEW

### *Certifications*

#### *Introduction*

Specialized juvenile justice courts have been in existence since over a century ago when the first formally recognized juvenile court in the United States was established.<sup>1</sup> The first court established in Illinois, arose out of a reform movement to address the deplorable conditions and practices of incarcerating juveniles with adult inmates. Prior to the enactment of specialized juvenile courts; children were handled with adults in court. No special court system for handling cases involving minors existed. After the establishment of the first court dedicated to resolving cases with minors in 1899 the concept of dedicated juvenile courts quickly spread throughout the nation.<sup>2</sup> Currently every state in the nation and the District of Columbia have dedicated or specialized juvenile courts.

Initially juvenile courts were established under the doctrine of “*parens patriae*” (literally “the state as parent”).<sup>3</sup> Juvenile Courts although originally enacted as a result of children being treated as adults have increasingly enacted provisions to address the more serious juvenile offender. One of the ways that states have addressed this issue is by enacting legislation which allows for the

removal of juveniles from the juvenile system to adult criminal courts. Generally there are three basic processes for removing juveniles to adult criminal court utilized throughout the country.

Judicial waiver is the process by which a juvenile court judge makes the determination to transfer a child to adult court after a hearing. By far judicial waiver is the most common type of transfer or certification.<sup>4</sup>

Automatic waiver, legislative waiver or sometimes referred to as statutory exclusion is the transfer process where certain offenses alleged to have been committed by juveniles are statutorily excluded from juvenile court and original jurisdiction rests with the criminal court. Over half of the states in the country have this process. Commonly referred to as automatic waiver because these statutes remove juvenile court jurisdiction “automatically” and no

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<sup>1</sup> Illinois Juvenile Court Act of 1899; *In Re Gault*, 387 U.S. 1, 14, 87 S. Ct. 1428, 1437, 18 L. Ed. 2d 527, 539 (1967). See also, Davis et al., *Children in the Legal System* 742-43 (2<sup>nd</sup> ed. 1997).

<sup>2</sup> Davis et al., *Children in the Legal System* 745 (2<sup>nd</sup> ed. 1997).

<sup>3</sup> Sally Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 Penn St. L. Rev. 233 (2005).

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<sup>4</sup> Currently, forty-six states have *judicial waiver* provisions, in which juvenile court judges clear the way for criminal court prosecutions by waiving jurisdiction over individual juveniles. Under a waiver law, a case against an offender of juvenile age must at least originate in juvenile court; it cannot be channeled elsewhere without a juvenile court judge's formal approval. While all states prescribe standards that must be consulted in waiver decision-making, most leave the decision largely to the judge's discretion (45 states). However, some set up presumptions in favor of waiver in certain classes of cases (15 states), and some even specify circumstances under which waiver is mandatory (15 states). See, Patrick Griffin, National Center for Juvenile Justice “National Overviews,” *State Juvenile Justice Profiles*, [http://www.ncjj.org/stateprofiles/overviews/transfer\\_state\\_overview.asp](http://www.ncjj.org/stateprofiles/overviews/transfer_state_overview.asp) (current through 2004 legislative session) (last visited June 25, 2006).

motion or request from the State or even a decision by the juvenile court judge is required.<sup>5</sup>

Direct file, is the transfer process which gives the prosecution the discretion to determine whether to proceed in juvenile court or criminal court against the juvenile. Direct file places sole discretion with the prosecutor to determine if proceedings will be initiated in juvenile court or criminal court.<sup>6</sup>

In Texas the judicial waiver process is used in removing juveniles to adult criminal court and is referred to as discretionary transfer, waiver of jurisdiction or most commonly certification. Discretionary transfer to criminal court or certification allows a juvenile judge to make the determination whether a juvenile respondent is transferred from the juvenile system to the adult criminal system. Although certifications account for a relatively small percentage of proceedings in juvenile court they are extremely important hearings in that the juvenile court is making a decision to transfer a respondent to adult criminal court.<sup>7</sup>

Proceedings in juvenile court are

considered civil in nature and have been designed to remove the “taint of criminality from children” and to focus on treatment, training and rehabilitation of the child<sup>8</sup>.

In 1973 the Texas legislature promulgated Title III of the Family Code. The enactment of Title III was in response in part to U.S. Supreme Court decisions, increases in juvenile crime and an overall desire for Texas officials to be progressive.<sup>9</sup> The initial goals of Title III were

1. to provide for the care, the protection, and the wholesome moral, mental and physical development of children coming within its provisions;

2. to protect the welfare of the community and to control the commission of unlawful acts of children;

3. consistent with the protection of the public interest, to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation;

4. to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and when a child is removed from his family, to give him the care that should be provided by parents;

5. to provide a simple judicial procedure through which the provisions of Title Three are

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<sup>5</sup> Twenty-nine states have *statutory exclusion* provisions that grant criminal courts original jurisdiction over certain classes of cases involving juveniles. Legislatures in these states have essentially predetermined the question of the appropriate forum for prosecution-taking the decision out of both prosecutors' and judges' hands. *Id.*

<sup>6</sup> Fifteen states have *direct file* laws, which leave it up to prosecutors to decide, at least in specified classes of cases, whether to initiate cases in juvenile or criminal courts. *Id.*

<sup>7</sup> The number of certification proceedings has shown an overall decrease over the last decade; Texas Juvenile Probation Commission statistics show 596 actual certifications occurred in 1994 compared to 268 certifications in 2008. See generally, “*Who Gets Certified? An Empirical Study of Discretionary Transfers from Juvenile to Criminal Court*” Robert O. Dawson, Juvenile Law Section Report December 2002.

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<sup>8</sup> TEX. FAM. CODE § 51.01.

<sup>9</sup> 29 THOMAS S. MORGAN, TEXAS PRACTICE, JUVENILE LAW AND PRACTICE §1 (1985).

executed enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.<sup>10</sup>

Once a juvenile is certified to stand trial as an adult all of the protections available in the juvenile system are lost and the adult system takes over.

Texas law establishes basically three types of transfer or waiver of jurisdiction proceedings: hearings where the juvenile respondent is under the age of eighteen at the time of the hearing; hearings where the respondent is an adult or over the age of eighteen at the time of the commencement of the hearing; and the mandatory certification where a person has previously been certified and commits a new eligible offense.

#### *Certification Eligibility*

The certification proceedings are initiated by the State filing a motion or petition for discretionary transfer and the issuance of a summons. The minimal requirements necessary for certification bestow on State prosecutors a wide range of discretion in determining which cases to seek certification. However, certifications are usually limited to, the more serious offenses, juveniles with chronic delinquent history, or individuals over eighteen who are accused of committing offenses when they were younger than seventeen.

The juvenile court has exclusive jurisdiction over nearly all criminal offenses committed by juveniles.<sup>11</sup> Texas

Penal Code §8.07(b) states:

[u]nless the juvenile court waives jurisdiction under Section 54.02, Family Code, and certifies the individual for criminal prosecution or the juvenile court has previously waived jurisdiction under that section and certified the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age except an offense described by Subsections (a)(1)-(5).<sup>12</sup>

It is important to note that the age limitation is considered jurisdictional.<sup>13</sup> Article 4.18 requires that a defendant or underage child raise the issue of being underage by written motion and the issue must also be presented to the district court judge.<sup>14</sup> If the issue of underage is not raised by written motion in district court then the issue will be considered waived.

#### *Perjury*

Generally the age limits for juvenile court to have original jurisdiction of a child exists between the ages of ten and seventeen.<sup>15</sup> However a general exception to this provision deals with perjury offenses.<sup>16</sup> The Family Code

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ten and fourteen. TEX. FAM. CODE § 51.03(c) (providing exception for perjury). TEX. FAM. CODE § 51.04(a); *In the Matter of N.J.A.*, 997 S.W.2d 554 (Tex. 1999).

<sup>12</sup> TEX. PEN. CODE 8.07(b).

<sup>13</sup> See generally, TEX. CODE CRIM. PROC. Art. 4.18.

<sup>14</sup> *Id.*; *Rushing v. State*, 85 S.W.3d 283,286 (Tex. Crim. App. 2002); *Adams v. State*, 161 S.W.3d 113 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004); *Mays v. State*, No. 01-03-01345-CR, 2005 Tex. App. Lexis 3842 (Tex. App.—Houston [1<sup>st</sup> Dist.] 5/19/05 unpublished).

<sup>15</sup> See, TEX. FAM. CODE § 51.03.

<sup>16</sup> TEX. PEN. CODE § 8.07(a)(1); *See also.*, *Ponce v. State*, 985 S.W.2D 594 (Tex. App.—Houston [1<sup>st</sup> Dist.], *no pet.*) (affirming a criminal conviction for aggravated perjury committed by 13 year old

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<sup>10</sup> See original TEX. FAM. CODE §§51.02 (1-5). Amended.

<sup>11</sup> See generally, TEX. PEN. CODE 8.07(a)(1)-(5). TEX. PEN. CODE § 8.07(a)(7) was enacted in 2001 to eliminate a potential defense to prosecution under TEX. FAM. CODE § 54.02(j)(2)(A), and now permits prosecution in criminal court of a person eighteen or older charged with murder or capital murder allegedly committed between the ages of

§51.03 states “[n]othing in this title prevents criminal proceedings against a child for perjury.”<sup>17</sup> Texas Penal Code §8.07 provides that perjury and aggravated perjury cases may be prosecuted in adult court even against defendants under the age of fifteen.<sup>18</sup>

### *Under Age Eighteen*

Section 54.02 of the Family Code establishes when a child under eighteen may be transferred to adult court. Section 54.02 generally sets forth three requirements for transfer to adult court:

1. the child is alleged to have violated a penal law of the grade of felony;
2. the child was:
  - a. fourteen or older at the time he is alleged to have committed the offense, if the offense is
    - a capital felony,
    - an aggravated controlled substance felony,<sup>19</sup> or
    - a first degree felony;or
  - b. fifteen or older at the time he or she allegedly committed
    - a second degree felony,
    - a third degree felony, or
    - a state jail felony;

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without court having conducting a certification hearing).

<sup>17</sup> TEX. FAM. CODE § 51.03

<sup>18</sup> TEX. PEN. CODE § 8.07.

<sup>19</sup> A felony that carries a higher minimum term or higher possible fine than a first degree felony such as possession of large amounts of narcotics.

and no adjudication hearing has been conducted concerning that offense;

3. 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.<sup>20</sup>

### *Eighteen Or Older*

The Texas Family Code establishes when a respondent age eighteen or over may be certified or transferred to adult criminal court as follows:

1. the person is eighteen or older;
2. the person was:
  - a. ten or older and under seventeen at the time he or she allegedly committed a capital felony or murder;
  - b. fourteen 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. fifteen or older and under seventeen at the time he or she allegedly committed a second or

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<sup>20</sup> TEX. FAM. CODE § 54.02(a).

- third degree felony or a state jail felony;
3. no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
  4. the juvenile court finds from a preponderance of the evidence that:
    - a. for a reason beyond the control of the State, it was not practicable to proceed before the person's eighteenth birthday, or
    - b. after due diligence of the State, it was not practicable to proceed before the person's eighteenth birthday because:
      - the State did not have probable cause to proceed and new evidence has been found since the person's eighteenth 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. the juvenile court determines that there is probable cause to believe that the person before the court committed the offense alleged.<sup>21</sup>

In certification hearings involving respondents over the age of eighteen the court only has authority to either waive its jurisdiction or if jurisdiction is not waived to dismiss the State's petition, or motion to transfer, and any petition seeking to

adjudicate the respondent delinquent.<sup>22</sup>

One of the primary elements of the State's burden in these hearings is providing justification for the delay beyond the respondent's eighteenth birthday.<sup>23</sup> In these types of transfer hearings where the State is initially proceeding after the eighteenth birthday of the respondent demonstrating due diligence is mandatory for the State to meet its burden of transfer. If the State cannot justify the delay in proceeding prior to the juvenile turning eighteen the juvenile court has no jurisdiction to transfer.<sup>24</sup> Establishing due diligence is a jurisdictional matter and no harm analysis is necessary.<sup>25</sup>

<sup>22</sup> Robert O. Dawson, TEXAS JUVENILE LAW § 10 (7<sup>th</sup> ed. 2008).

<sup>23</sup> See *Powell v. State*, UNPUBLISHED, No. 05-07-01078-CR, 2009 Tex. App. Lexis 2517, Juvenile Law Newsletter ¶ 09-2-13 (Tex. App.—Dallas 2009, pet. Ref'd) (nineteen month delay in serving and detaining juvenile, whose location was known to the State at all times, before his eighteenth birthday did not constitute due diligence). Cf. *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998) in justifying a delay the court in stated [w]e find no authority ... holding that the State must search out and use new, unproven scientific theories or test to meet the due diligence requirement. To the contrary, the law requires the State to show that novel scientific evidence is reliable, and thus probative and relevant.... The State would be in an untenable position if it were required to prove that a cutting edge scientific test was reliable when the experts were still developing and refining the technology. .

<sup>24</sup> See generally, *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998)(new DNA testing became available after the respondent turned eighteen); *In the Matter of J.C.C.*, 952 S.W.2d 47 (Tex. App.—San Antonio 1997)(State unable to provide justification for not proceeding against respondent before turning eighteen when it proceeding against his twin brother for the same offense prior to the twin brother turning eighteen).

<sup>25</sup> See, *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). In *Webb*, the State did not establish that the delay in proceeding in juvenile court before the defendant's eighteenth birthday was not

<sup>21</sup> TEX. FAM. CODE § 54.02(j).

The court in *Webb*, held it is incumbent upon the State to file and conclude the certification hearing before the respondent's eighteenth birthday.<sup>26</sup> In *Webb*, the court opined that the meaning of "proceeding" in juvenile court, meant concluding the hearing before the respondent's eighteenth birthday, agreeing with the trial court.<sup>27</sup>

The certification provisions establish four justifications for the delay as follows:

1. not practicable to proceed before age eighteen;
2. new evidence discovered;
3. respondent could not be found;
4. appellate reversal of certification order

#### *Certifications For Capital Murder And Murder*

Only individuals eighteen or over who are alleged to have committed either Capital Murder or Murder while between the ages of ten and fourteen can be considered for waiver of jurisdiction or certification to adult court.<sup>28</sup> This provision of the family code was promulgated by the legislature with the 1999 amendments to the Texas Family Code. The rationale for this provision is that Capital Murder and Murder have no statute of limitations and the juvenile court would have been able to impose a sentence of commitment to the Texas Youth Commission with a possible transfer to the Texas Department of

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beyond its control. In reviewing the decision the court vacated the murder conviction following certification and dismissed the juvenile proceedings for want of jurisdiction. The defect was held to be jurisdictional and no harm analysis was necessary.

<sup>26</sup> *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).

<sup>27</sup> *Id.*

<sup>28</sup> TEX. FAM. CODE § 54.02(j)(2)(A).

Criminal Justice for up to a forty year term.<sup>29</sup> Before this legislative change, these offenses would not have been eligible for certification if the person was under fourteen at the time the offense allegedly was committed.

If the State, however, was unable to proceed before the eighteenth birthday of the juvenile the juvenile system could not handle the case because the person was over eighteen, and the adult criminal system would also have no jurisdiction since the offense has original jurisdiction with juvenile court.<sup>30</sup>

#### *Due Process And Constitutional Safeguards*

The Supreme Court articulated minimum levels of constitutional protections and due process necessary in juvenile certification proceedings in a landmark series of cases beginning in 1966 with *Kent v. United States*.<sup>31</sup> In *Kent* the Court stated "the waiver hearing must measure up to the essentials of due process and fair treatment." Prior to *Kent*, the states enacted various legislation to set procedures for juvenile proceedings. However, since juvenile courts were operating under the doctrine of "parens patriae" and hearings were deemed civil and not criminal procedural safeguards afforded adults were vastly lacking in juvenile courts. Beginning in *Kent* and following immediately with *Gault* the Supreme Court for the first time promulgated constitutional protections applicable to juvenile proceedings. In *Gault* the Court stated "[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and

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<sup>29</sup> Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6<sup>th</sup> ed. 2004).

<sup>30</sup> See TEX. PEN. CODE § 8.07.

<sup>31</sup> *Kent v. United States*, 383 U.S. 541 (1966).



procedure.”<sup>32</sup>

Title III of the Texas Family Code has adopted the constitutional mandates of *Kent*, and its progeny in affording procedural protections to respondents in certification hearings.<sup>33</sup> Respondents are entitled to due process in that notice of the charges or allegations are required; the right to counsel is not waivable; the right of confrontation is guaranteed; and the privilege against self-incrimination as spelled out in *Kent* constitutionally guaranteed.<sup>34</sup>

#### *Notice Of Petition Or Motion For Discretionary Transfer*

Section 54.02(b) states: “[t]he 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.”<sup>35</sup>

The requirements of Section 53.04, mandate that the motion for transfer or 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.

Notice to the juveniles parents has been considered mandatory.<sup>36</sup> In *Carlson v. State*, the court reversed a conviction for Aggravated Assault were the juvenile plead guilty; the court opined that “although service upon a parent is a ‘waivable right’ pursuant to the waiver provisions in Section 53.06(e), no such waiver occurred in this case. Neither of appellant’s parents attended the hearing or waived service of the summons in writing. Since the right to service of the summons was not waived, service upon a parent was mandatory.”<sup>37</sup> Additionally, the motion must state “that the hearing is for the purpose of considering discretionary transfer to criminal court.”<sup>38</sup>

#### *Criminal Transaction*

When a juvenile court waives its jurisdiction and transfers a juvenile respondent to adult criminal court it is not actually transferring the respondent for all purposes. In essence the juvenile court is waiving jurisdiction for a particular

<sup>32</sup> *In Re Gault*, 387 U.S. at 541.

<sup>33</sup> *See generally*, TEX FAM. CODE § 54.02.

<sup>34</sup> *Id.*

<sup>35</sup> TEX. FAM. CODE § 54.02(b); *See also* Texas Fam. Code § 54.02 (k)(addressing certifications when respondent over eighteen); *See also McBride v. State*, 655 S.W.2d 280 (Tex. App.—Houston [14th Dist.] 1983, no writ).

<sup>36</sup> *Carlson v. State*, 151 S.W.3d 643 (Tex. App.—Eastland 2004).

<sup>37</sup> *Id.*

<sup>38</sup> TEX. FAM. CODE § 54.02(b).

criminal conduct or transaction.<sup>39</sup> Section 54.02(g) of the Family Code states

[i]f 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<sup>40</sup>.

Multiple felony offenses pending against the Respondent for which there is probable cause can and should be alleged in the same petition to transfer. If the State files a petition which alleges multiple offenses that constitute more than one criminal transaction, the juvenile court may either retain or transfer all offenses relating to each transaction.

Accordingly, if the court retains jurisdiction over any criminal transaction the respondent is not subject to prosecution for any offense for which the court retains jurisdiction.<sup>41</sup> The State upon receiving the transferred case 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.<sup>42</sup> In *Allen*, the Court established the principal that the juvenile court in deciding to waive or transfer its jurisdiction assesses the underlying conduct in the waiver hearing. Accordingly, if a respondent is transferred the adult court not only has jurisdiction over the offense transferred and any lesser included offenses but any conduct that

resulted from the same criminal transaction.<sup>43</sup> As a result of the *Allen* principal a defendant transferred to adult court can be prosecuted for any offense the State can prove as long as the offense charged is based on conduct from the criminal transaction from which the juvenile court waived jurisdiction. However, the offense charged by the State must have been an offense for which the respondent was eligible for certification. For example if a respondent is certified for a criminal transaction which occurred at the age of fourteen only the first degree felony may be prosecuted. These situations would prevent the State from charging any lesser included offenses.<sup>44</sup>

#### *Diagnostic Study, Social Evaluation And Investigation*

Prior to the actual certification hearing the juvenile court is required to order and have completed various evaluations and reports.<sup>45</sup> Section 54.02(d) provides:

“[p]rior 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.”<sup>46</sup>

#### *Diagnostic Study*

The legislature has not established or expressly stated what must be included

<sup>39</sup> See, *Ex Parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

<sup>40</sup> TEX. FAM. CODE §54.02(g).

<sup>41</sup> *Id.*

<sup>42</sup> *Ex parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

<sup>43</sup> See, e.g., *Ex Parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981); *Livar v. State*, 929 S.W. 2d 573 (Tex. App.—Fort Worth 1996, pet. reFd); *Brosky v. State*, 915 S.W.2d 120 (Tex. App.—Fort Worth, pet. reFd)

<sup>44</sup> TEX. CRIM. PROC. CODE § 4.18.

<sup>45</sup> TEX. FAM. CODE § 54.02(d).

<sup>46</sup> *Id.*

in a diagnostic study.<sup>47</sup> However the purpose of the diagnostic study is to assist the court in determining whether to exercise its discretion to either retain or waive its jurisdiction.

Opinions vary regarding the contents of the diagnostic examination but generally the report is a forensic examination by a clinical psychologist or psychiatrist and social investigation by the juvenile probation department. The report generally addresses such issues as the child's sophistication, maturity, background and family history.<sup>48</sup>

The provisions of Section 54.02(d) are mandatory and apply to transfer hearings regardless of the age of the respondent. The only exception are certifications where the state is seeking automatic or "mandatory" transfer proceedings conducted pursuant to the Texas Family Code.<sup>49</sup> If the court fails to order the diagnostic study, evaluation or investigation or to consider the reports in the discretionary transfer hearing the certification hearing is subject to being reversed by a reviewing court.<sup>50</sup> In *R.E.M. v. State*, the court stated:

Section 54.02(d) is mandatory.... It is impossible to read Title 3 of the Family Code...without reaching the conclusion that its effect is to give to a juvenile offender the right not to be treated as an adult offender unless he is divested of that right by judicial order entered after complying with the requirements

set forth in Section 54.02. The necessary conclusion is that, in the absence of an effective waiver by the child, he can be subjected to treatment as an adult only if there has been compliance with the mandatory provisions of Section 54.02.<sup>51</sup>

Although it is mandatory for the court to order a diagnostic evaluation, the respondent may choose to exercise his Fifth Amendment right and not answer questions. Further, the use of the examination results have limited results in a adult criminal proceeding if a juvenile is certified to stand trial as an adult. When the psychological examination is used both as the basis of the examiner's determination that the juvenile should be transferred and as a source of incriminating evidence introduced at trial, it requires additional constitutional safeguards.<sup>52</sup> When used only for its intended purpose, the examination has been held not to be considered a custodial interrogation; however, when the State seeks to use the examination in a subsequent criminal proceeding then the examination serves a dual purpose. In *Cantu v. State*, the court held that notwithstanding the neutral nature of the psychological examination, the statements a juvenile utters during the examination are not automatically removed from the reach of the Fifth Amendment, if a juvenile is not adequately informed of his Fifth Amendment rights with respect to the diagnostic examination or that his testimony during that examination would be used against him in an adjudicatory proceeding, a waiver of his rights is ineffective.<sup>53</sup>

<sup>47</sup> *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

<sup>48</sup> 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).

<sup>49</sup> TEX. FAM. CODE § 54.02(n).

<sup>50</sup> *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

<sup>51</sup> Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6<sup>th</sup> ed. 2004)(citing *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975)).

<sup>52</sup> *Cantu v. State*, 994 S.W.2d 721 (Tex. App.—Austin 1999).

<sup>53</sup> *Id.* at 735; See also, *Estelle v. Smith*, 451 U.S. 454,

### *Full Investigation*

Also not defined in certification statutes is the term “full investigation of the child, his circumstances, and the circumstances of the alleged offense.”<sup>54</sup> In looking at this provision one Texas court opined

“[t]he phrase ‘full investigation of the circumstances of the offense’ is not defined in section 54.02. We believe that for good reasons the legislature did not attempt to define the phrase. Of necessity, any inquiry into the circumstances of an offense must be one of degree. It is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the event.”<sup>55</sup>

The certification statutes allow the juvenile court judge to consider and admit written reports from probation officers and other professionals.<sup>56</sup> The mandatory procedures enunciated in Section 54.02(d) are established with the purpose of providing the court information sufficient enough to make an informed decision regarding waiving jurisdiction. Although mandatory these procedures must be

balanced against the constitutional protections afforded respondents facing transfer to criminal court.. Section 54.02(e) seeks to strike a balance by requiring disclosure to counsel for the Respondent prior to the certification hearing<sup>57</sup>. Accordingly, an attorney for a child facing transfer or certification must make appropriate and informed decisions regarding when to invoke such rights as privilege against self-incrimination.<sup>58</sup> What various courts do seem to suggest is that counsel for defense can assert constitutional protections but cannot then complain on appeal that the required studies or evaluations are incomplete because of his or her own actions.<sup>59</sup>

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<sup>57</sup> TEX. FAM. CODE § 54.02(e) requires five day notice to the attorney representing the child to written reports that will be considered by the court. (This statute was enacted effective September 1, 2009.

<sup>58</sup> See e.g., *In K.W.M. v. State*, 598 S.W.2d 660 (Tex. Civ. App.—Houston[14<sup>th</sup> Dist.] 1980, no writ) (the court stated that section 54.02(d) does not require a court to order that the child discuss his 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.

<sup>59</sup> 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: “[w]e 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 Texas Family Code 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 dismissed); and *In the Matter of C.C.*, 930 S.W.2d 929 (Tex. App.—Austin 1996, no writ).

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465, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359 (1981).

<sup>54</sup> See e.g., *In re I.B.*, 619 S.W.2d 584 (Tex. Civ. App.—Amarillo 1981).

<sup>55</sup> *In re I.B.*, 619 S.W.2d 584 (Tex. Civ. App.—Amarillo 1981, no writ). See also *Price v. State*, unpublished, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex. App. Lexis 2852 (Tex. App.—Dallas 4/24/02)(appellant 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.)

<sup>56</sup> TEX. FAM. CODE § 54.02(d).

### *The Hearing*

Certification hearings in Texas are conducted by the court without a jury.<sup>60</sup> Specifically, §54.02(c) provides: “[t]he juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.”<sup>61</sup> The absence of a jury trial is consistent with the dictates of both state and federal law, since it has been held that juveniles are not constitutionally entitled to jury trials in juvenile proceedings.<sup>62</sup> No deprivation of any constitutional right should be construed in the absence of juries in the certification hearing. Although a right to jury is not available in certification hearings, a waiver hearing before the court is mandatory prior to a court exercising its jurisdiction and transferring a respondent to adult criminal court.<sup>63</sup>

Further it has been well settled that certification proceedings are not trials on the merits, but hearings to determine whether the juvenile court will waive its original jurisdiction and transfer the case to adult criminal court for trial or retain its jurisdiction and keep the proceedings in juvenile court.<sup>64</sup>

### *Right Of Counsel*

An attorney cannot be waived in a certification proceeding.<sup>65</sup> It has been held that proceeding with the transfer hearing without the presence of counsel for the

juvenile is reversible error.<sup>66</sup> It is well established that a juvenile is entitled to the effective assistance of counsel at a certification hearing.<sup>67</sup> In *Kent*, the court stated “[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.”<sup>68</sup> In addition counsel must provide effective representation to a juvenile respondent. The ineffectiveness of counsel in juvenile cases is measured by the *Strickland v. Washington*,<sup>69</sup> standard just as in adult criminal cases.

### *Evidence*

The certification statutes do not expressly promulgate the evidentiary procedures which must be adhered to in waiver hearings, however, the Texas Rules of Evidence provides in pertinent part “[e]xcept as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.”<sup>70</sup>

Many courts have opined that the Texas Rules of Evidence are not applicable in certification proceedings; the primary rationale for this position was that the court needed to make a determination

<sup>60</sup> TEX. FAM. CODE § 54.02(c)

<sup>61</sup> *Id.*

<sup>62</sup> See, generally, *McKeiver v. Pennsylvania*, 403 U.S. 528, 533, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Strange v. State*, 616 S.W.2d 951 ; *In the Matter of P.B.C.*, 538 S.W.2d 448 (Tex. Civ. App.—El Paso 1976, no writ).

<sup>63</sup> *Id.*

<sup>64</sup> *M.A.V., Jr. v. Webb County Court at Law*, 842 S.W.2d 739 (Tex. App.—San Antonio 1992, writ denied).

<sup>65</sup> TEXAS FAM. CODE § 51.10(b)(1).

<sup>66</sup> *In the Matter of D.L.J.*, 981 S.W.2d 815 (Tex. App.—Houston [1st Dist.] 1998, no writ).

<sup>67</sup> 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).

<sup>68</sup> *Kent v. United States*, 383 U.S. at 561.

<sup>69</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(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.); See also, *In re K.J.O.*, 27 S.W.3d at 343.

<sup>70</sup> TEX. RULES EVID. 101(b). See also TEX. FAM. CODE § 51.17(c) which apply the Texas Rules of Evidence applicable to criminal cases in juvenile proceedings.

as to whether a grand jury would indict. However with the amendments to the statute effective in 1996 the grand jury provision was repealed.<sup>71</sup> The issue of hearsay as well as the application of the Sixth Amendment Confrontation clause in certification hearings have been addressed by some appellate courts.<sup>72</sup> However neither of the state's highest courts, the Texas Supreme Court or Court of Criminal Appeals, have yet to address this issue. However it is settled that Texas Rules of Evidence applicable to criminal cases are to be used in certification proceedings.<sup>73</sup>

#### *Factors To Be Considered By The Court*

In the seminal case, *Kent v. United States*, the Supreme Court articulated factors which were determinative in addressing whether a judge should waive its jurisdiction and transfer a case to adult criminal court.<sup>74</sup> The factors articulated by the Court were

1. The seriousness of the alleged offense to the community

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<sup>71</sup> TEX. FAM. CODE § 54.02(f)(3) repealed.

<sup>72</sup> See generally, *Milligan v. State*, No. 03-04-00531-CR, 2006 Tex. App. Lexis 1356, (Tex. App.—Austin 2/16/06) (Neither Sixth Amendment or Crawford confrontation rights apply at the juvenile certification hearing); *In the Matter of S.M.*, No. 2-05-262-CV, 2006 Tex. App. Lexis 9056 (Tex. App.—Fort Worth, 10/19/06) (Crawford v. Washington does not apply to determinate sentence transfer hearings since they are not a critical stage of a criminal prosecution) *c.f.* *In the Matter of M.P.*, No. 10-06-00008-CV, 2007 Tex. App. Lexis—Waco, 2/7/07 (Court held that a juvenile has no Sixth Amendment or Article I, Section 10 of the Texas Constitution right of confrontation during a disposition hearing however, he does have a limited right of confrontation under the Due Process Clause of the Fourteenth Amendment, which requires a balancing test).

<sup>73</sup> TEX. FAM. CODE § 51.17 (c).

<sup>74</sup> *U.S. v. Kent* 383 U.S. at 566-567.

and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the

likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.<sup>75</sup>

The Texas provision of the certification statute §54.02(f) adopts and incorporates the *Kent*, factors which were promulgated to provide constitutional safeguards to juvenile respondents in transfer hearings.<sup>76</sup> Section 54.02(f) requires the juvenile court to consider the following factors in making the decision to waive jurisdiction:

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.<sup>77</sup>

This list is not exhaustive, in that the court may consider other factors which it deems appropriate in determining whether to transfer a case to criminal court. However the court must “consider” the statutory factors in making

its determination.<sup>78</sup>

### *Required Findings*

There are five basic requirements that must be established before the juvenile court may waive its jurisdiction. Prior to transfer the court must make the following findings:

1. the child is alleged to have committed a felony;
2. the child was:
  - a. fourteen 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. fifteen 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 alleged offense; and
5. because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings.<sup>79</sup>

If the court is proceeding under a hearing where the respondent is over eighteen the court must make the additional findings regarding due diligence.<sup>80</sup> The burden is on the State to prove the allegations in the petition or

<sup>75</sup> *Id.*

<sup>76</sup> *Kent v. United States*, 383 U.S. 541, 561-62 (1966)

<sup>77</sup> TEX. FAM. CODE § 54.02(a). The legislative changes which took effect in January 1, 1996, eliminated two factors: 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.

<sup>78</sup> *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.)

<sup>79</sup> TEX. FAM. CODE § 54.02(f).

<sup>80</sup> TEX. FAM. CODE § 54.02(j)(4).

motion for discretionary transfer by a preponderance of the evidence.

### *Community Welfare Provision*

Of most important in a court's consideration to transfer a juvenile to adult court is whether the evidence dictates that the welfare of the community requires transfer to adult criminal court.<sup>81</sup> This finding will be reviewed by an appellate court on legal and factual sufficiency grounds.<sup>82</sup> If the evidence is deemed legally insufficient on appellate review the respondent may not be transferred to adult court since judgment should be rendered for the respondent and the waiver petition dismissed with prejudice.<sup>83</sup>

### *Order*

Although courts are required to give its reasons for transfer in its order it is well settled that juvenile courts have wide latitude in determining whether to retain or waive jurisdiction in a certification proceeding.<sup>84</sup> In reviewing a court's order to transfer a reviewing court will defer to the trial court's findings.

### *Mandatory Certification*

#### *Once Certified Always Certified*

The third basic type of certification in Texas is often referred to as "mandatory certification."<sup>85</sup> The mandatory provisions were enacted with

the advent of the legislative changes in 1995. The provisions of the code establishing the mandatory transfer proceedings basically codifies the doctrine or practice of "once certified always certified." Although the statute is commonly referred to as mandatory certification the process is not automatic and not all inclusive. The prosecutor has discretion whether to seek a mandatory transfer or not. However, if the State does seek transfer under this provision and the requirements of the statute are complied with, the juvenile court must transfer the case. Mandatory transfer requires:

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 seventeen years old.

The mandatory transfer provision do not apply if at the time of the 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.<sup>86</sup>

Of major importance to this provision is the requirement that the respondent was previously certified to adult court and a valid transfer order exists and a new felony offense is alleged.<sup>87</sup> Additionally, the case which the respondent was previously certified to

<sup>81</sup> TEX. FAM. CODE § 54.02(a)(3).

<sup>82</sup> *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).

<sup>83</sup> See generally, *In the Matter of A.T.S.*, 694 S.W.2d 252 (Tex. App.—Fort Worth 1985) (Appellate Court held evidence did not support transfer hearing since offense committed was crime of "juvenile nature").

<sup>84</sup> See generally, TEX. FAM. CODE § 54.02(h).

<sup>85</sup> TEX. FAM. CODE § 54.02(m).

<sup>86</sup> TEX. FAM. CODE § 54.02(m).

<sup>87</sup> *Id.*



adult court must be final and not have resulted in an acquittal, dismissal prior to indictment, no billed or reversed on appeal.<sup>88</sup>

Once the statutory provisions are met transfer to adult court is mandatory; hence the term “mandatory certification.” These procedures were designed to expedite the transfer process and increase judicial economy.<sup>89</sup> This streamlined process does away with the requirements of obtaining a complete diagnostic study, social investigation and investigation of the child and the circumstances of the alleged offense. Although the statute calls for an extremely streamlined process and does not address additional proof requirements it should be concluded that probable cause demonstrating the respondent committed a felony offense would still be necessary to be shown by the State.<sup>90</sup>

### *Appeals*

A juvenile respondent has a right to appeal the decision of a juvenile court transferring jurisdiction to adult court; however, this right has been severely curtailed. Prior to the 1995 legislative changes to the Family Code direct appeals to the Court of Appeals, then possible review by the Texas Supreme Court were available.<sup>91</sup> Effective with offenses occurring after January 1, 1996, the right to take a direct appeal from a certification order was eliminated.<sup>92</sup> Presently, Texas

law provides that an appeal from a transfer order may be taken only after a conviction and direct appeal in adult criminal court.<sup>93</sup> This joint appeal may include claims of error which occurred in the transfer hearing along with any errors from the adult criminal conviction.<sup>94</sup> Additionally, the criminal rules are applicable in the appellate process which result in ultimate state review by the Court of Criminal Appeals instead of the Texas Supreme Court.

### *Miscellaneous Certification*

Two essentially identical provisions of the juvenile mental health statutes allow for “automatic” transfer of certain cases to adult criminal court.<sup>95</sup> These statutes state in pertinent part:

1. The juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the eighteenth birthday of a child for whom the juvenile court or a court to which the child’s case is referred under Section 55.12(2) has ordered inpatient mental health services if:

a. The child is not discharged or furloughed from the inpatient mental health facility before reaching eighteen years of age; and

b. The child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section

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<sup>88</sup> *Id.*

<sup>89</sup> See generally, TEX. FAM. CODE § 54.02(n).

<sup>90</sup> TEX. FAM. CODE § 54.02(a)(3); *Kent v. United States* 557; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6<sup>th</sup> ed. 2004).

<sup>91</sup> TEX. FAM. CODE § 56.01(c)(1).

<sup>92</sup> TEX. FAM. CODE § 56.01(c)(1)(A), which had authorized a direct appeal from an order of transfer, was repealed. See e.g., *Silva v. State*, \_\_ S.W.3d \_\_, No. 01-06-00031-CR, 2007 Tex. App. Lexis 3698 (Tex. App.—Houston [1<sup>st</sup> Dist.] 5/10/07), *Rodriguez v. State*, 191 S.W.3d 909

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(Tex. App.—Dallas 2006).

<sup>93</sup> CCP Art. 44.47; See e.g., *Small v. State*, 23 S.W.3d 549 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2000, writ ref’d).

<sup>94</sup> CCP Art. 44.47; *Vasquez v. State*, unpublished, No. 09-99-00664-CR, 2000 WL 795328, *Juvenile Law Newsletter* 00-3-08 (Tex. App. – Austin 6/22/00).

<sup>95</sup> See, TEX. FAM. CODE §§ 55.19, 55.44; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (6<sup>th</sup> ed. 2004).

53.045 and no adjudication concerning the alleged conduct has been made.<sup>96</sup>

These provisions require transfer to adult court juveniles charged with offenses under the Determinate Sentence Act who remain confined under a commitment order at the age of eighteen. Section 55.44 permits adult criminal proceedings when the respondent is competent to stand trial after age eighteen and is charged with an offense under the Determinate Sentence Act. There has been minimal use or litigation of these provisions however the juvenile court has no discretion in its application<sup>97</sup>.

### *Conclusion*

Certifications of juveniles in Texas account for roughly one percent of all juvenile referrals. Although this comprises a relatively small number of juvenile proceedings, these hearings are of utmost importance. Upon transfer to adult court the juvenile protections and safeguards which have been mandated in Texas law since the *Gault* decision are lost and adult provisions and statutes become applicable.

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<sup>96</sup> *Id.*

<sup>97</sup> TEX. FAM. CODE §55.44.

## **§ 54.02. Waiver of Jurisdiction and Discretionary Transfer to Criminal Court**

(a) The juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:

- (1) the child is alleged to have violated a penal law of the grade of felony;
- (2) the child was:

(A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; or

(B) 15 years of age or older at the time the child is alleged to have committed the offense, if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offense; and

(3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

(b) 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.

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

(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.

(e) 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. At least five days 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. The court may order counsel not to reveal items to the child or his parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) the sophistication and maturity of the child;

(3) the record and previous history of the child; and

(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

(g) 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.

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

(i) 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.

(j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

(1) the person is 18 years of age or older;

(2) the person was:

(A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code;

(B) 14 years of age or older and under 17 years of age at the time the person is alleged to have

committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code; or

(C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;

(3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;

(4) the juvenile court finds from a preponderance of the evidence that:

(A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or

(B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:

(i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;

(ii) the person could not be found; or

(iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and

(5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

(k) 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 waiver of jurisdiction under Subsection (j) of this section.

( l ) The juvenile court shall conduct a

hearing without a jury to consider waiver of jurisdiction under Subsection (j) of this section.

(m) Notwithstanding any other provision of this section, the juvenile court shall waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal court for criminal proceedings if:

(1) the child has previously been transferred to a district court or criminal district court for criminal proceedings under this section, unless:

(A) the child was not indicted in the matter transferred by the grand jury;

(B) the child was found not guilty in the matter transferred;

(C) the matter transferred was dismissed with prejudice; or

(D) the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final; and

(2) the child is alleged to have violated a penal law of the grade of felony.

(n) A mandatory transfer under Subsection (m) may be made without conducting the study required in discretionary transfer proceedings by Subsection (d). The requirements of Subsection (b) that the summons state that the purpose of the hearing is to consider discretionary transfer to criminal court does not apply to a transfer proceeding under Subsection (m). In a proceeding under Subsection (m), it is sufficient that the summons provide fair notice that the purpose of the hearing is to consider mandatory transfer to criminal court.

(o) If a respondent is taken into custody for possible discretionary transfer

proceedings under Subsection (j), the juvenile court shall hold a detention hearing in the same manner as provided by Section 54.01, except that the court shall order the respondent released unless it finds that the respondent:

(1) is likely to abscond or be removed from the jurisdiction of the court;

(2) may be dangerous to himself or herself or may threaten the safety of the public if released; or

(3) has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term of jail or prison and is likely to commit an offense if released.

(p) If the juvenile court does not order a respondent released under Subsection (o), the court shall, pending the conclusion of the discretionary transfer hearing, order that the respondent be detained in:

(1) a certified juvenile detention facility as provided by Subsection (q); or

(2) an appropriate county facility for the detention of adults accused of criminal offenses.

(q) The detention of a respondent in a certified juvenile detention facility must comply with the detention requirements under this title, except that, to the extent practicable, the person shall be kept separate from children detained in the same facility.

(r) If the juvenile court orders a respondent detained in a county facility under Subsection (p), the county sheriff shall take custody of the respondent under the juvenile court's order. The juvenile court shall set or deny bond for the respondent as required by the Code of Criminal Procedure and other law applicable to the pretrial detention of adults accused of criminal offenses.

# Certifications

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**Kameron D. Johnson**

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# Police Say Girl, 13, Killed Man Over Milk

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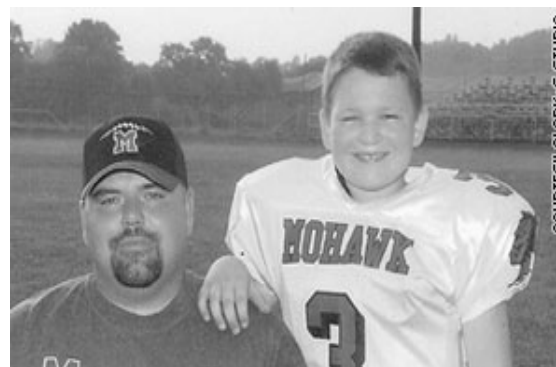
MILWAUKEE (Aug. 11) - A long-simmering feud between a 13-year-old girl and her step-grandfather erupted after the man allegedly poured her milk down the drain, prompting the girl to fatally stab him in the neck, court documents said. L.T. B., who allegedly threatened her step-father with knives before, told an officer who responded, "I killed him," and said to a neighbor, "I'm not afraid to go to jail for this," according to the criminal complaint against her.

## Boy, 12, faces grown up murder charges

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(CNN) -- On a chilly morning in February 2009, state police found 26-year-old Kenzie Houk in her bed with a bullet through her head. She was eight months pregnant.

The search for her killer ended with the most surprising murder suspect residents of Wampum, Pennsylvania, had ever seen: 11-year-old Jordan Brown, the son of the victim's fiancé. He is one of the youngest suspects in the country to be charged with homicide, legal experts say. There are two counts of homicide, one covering the fetus.





# 14 Year charged with mothers murder

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**BASTROP COUNTY, Texas (KXAN) - The Bastrop County Sheriff's officials say a woman missing from McDade may have been shot to death by her teen daughter and the girl's boyfriend - both of whom are in jail on murder charges. Tracy Lynn Bellard's daughter, 14, and Joseph Dwayne Douglas, 18, are charged with first-degree murder in her death - even as deputies work to positively identify the charred remains found on the boy's property in Smithville late Monday**



# Aggravated Robbery

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## §51.02 Texas Family Code

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- 10 years of age or older and under 17 years of age; or
- 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or CINS as a result of acts committed before becoming 17 years of age

# Age Affecting Criminal Responsibility

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Unless the juvenile court waives jurisdiction under Section 54.02, Family Code, and certifies the individual for criminal prosecution or the juvenile court has previously waived jurisdiction under that section and certified the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age...

# TRANSFER TYPES

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1. Judicial Waiver—Discretionary Transfer
2. Automatic Waiver
  1. Statutory Exclusion
  2. Legislative Waiver
3. Prosecutorial Discretion

## **Kent v. United States,**

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1. A hearing must be held
2. The juvenile is entitled to defense counsel for the hearing
3. Counsel is entitled to access to the Respondent's social records





# Texas Certifications

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■ 1990 – 161

■ 1991 – 208

■ 1992 – 279

■ 1993 – 327

■ 1994 – 596

■ 1995 – 535

■ 1996 – 589

■ 1997 - 467

1998 – 433

1999 – 236

2000 – 198

2001 – 142

2002 – 214

2003 – 139

2004 – 167

2005 – 155

2006 - 220

# Texas Certifications

## Post SB 103

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2007	245
2008	270

# Types of Certification

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1. Child is under age 18 when proceedings start
2. Child is age 18 or older when proceedings start
3. Mandatory Certification

# Prosecutor

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- ☑ Discretion when to file
- ☑ Felony offense
- ☑ Proper Age
- ☑ Probable Cause
- ☑ Good reasons for delay if Respondent over 18
- ☑ Petition
  - ☑ In the Matter of
  - ☑ Consider discretionary transfer to criminal court



# Certification Requirements

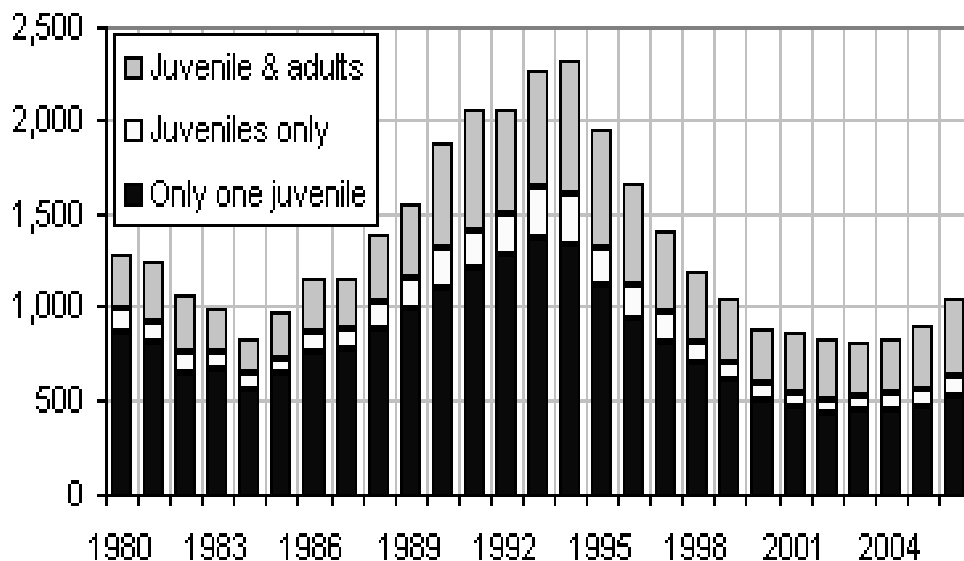
## Child Under 18 – TFC 54.02(a)

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- ✓ Felony
- ✓ 14 + for capital, agg. controlled substance, or first degree (as of 1/1/96)
- ✓ 15 + for second, third, state jail
- ✓ No adjudication
- ✓ Probable cause
- ✓ Because of seriousness of offense OR child's background, welfare of community requires criminal proceedings

# MURDER CASES

Number of homicide victims of known juvenile offenders, 1980-2006



Between 1994 and 2003, the estimated number of murders involving a juvenile offender fell 65%, to its lowest level since at least 1980. However, between 2003 and 2006, the estimated number of juvenile murder offenders increased 30%, returning to the level of the late 1990s.

In the 1980s, 25% of the murders involving a juvenile offender also involved an adult offender. This proportion grew to 31% in the 1990s and averaged 37% for the years 2000–2006.

# CERTIFICATIONS FOR MURDER

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- ✓ (1999) Person 18 +  
can be certified for  
murder or capital  
murder
- ✓ Committed while 10  
– 14
- ✓ Detention in  
juvenile detention or  
county jail



# Kennedy charged with murder of girl

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# Certification Requirements Respondent Over 18 TFC 54.02(J)

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- ✓ 10 or older and under 17 if capital felony or murder
- ✓ 14 or older under 17 if aggravated controlled substance felony or 1<sup>st</sup> degree felony other than murder
- ✓ 15 or older under 17 if 2<sup>nd</sup> or 3<sup>rd</sup> degree

AND ...

## ... Over Eighteen (18)

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✓ Court finds not practicable to proceed prior to 18

✓ For reason beyond control of State or

✓ After due diligence of State:

✓ no probable cause + new evidence found since 18<sup>th</sup> birthday

✓ person could not be found

✓ transfer order reversed or set aside

# Criminal Transactions

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- ✓ Juvenile court certifies a transaction, not a specific offense
- ✓ Court must retain or transfer all offenses related to one transaction
- ✓ Court may retain or transfer different transactions
- ✓ Can be indicted for any offense from criminal transaction...even lesser included offenses

# “Mandatory” Certification

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- ✓ TFC 54.02(m) and (n) –
  - ✓ Once Certified, Always Certified
- ✓ Requirements
  - ✓ Child previously transferred to criminal court under TFC 54.02; and
  - ✓ Has allegedly committed any new felony, after prior transfer order but before 17<sup>th</sup> birthday

# Exceptions to “Mandatory” Certification

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- ✓ In matter transferred:
  - ✓ Not indicted
  - ✓ Acquitted
  - ✓ Dismissal with prejudice
  - ✓ Conviction reversed on appeal, final

# PROBATION

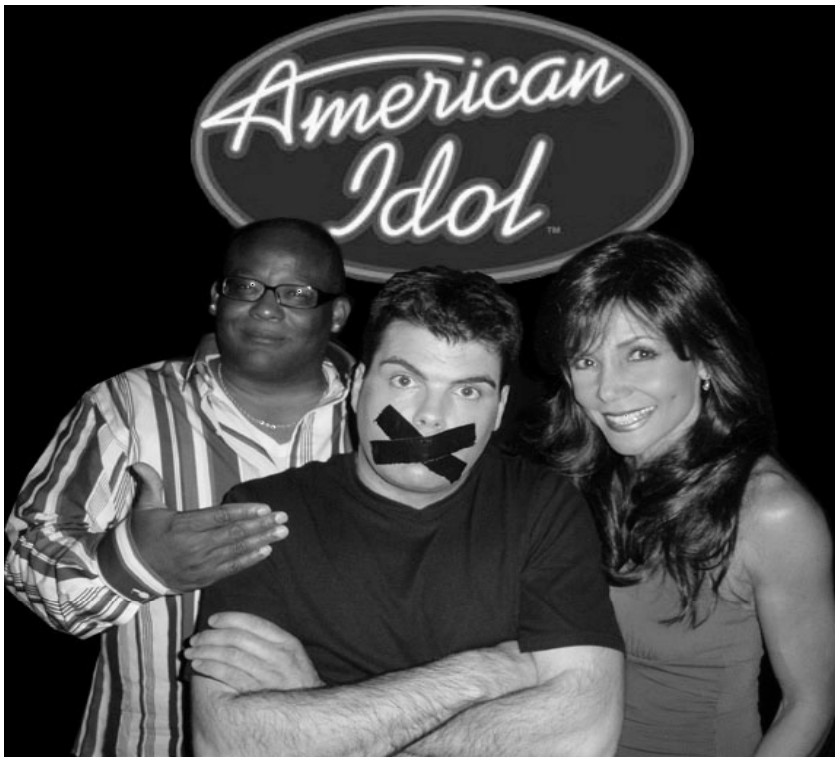
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- ☑ Service of Petition
  - ☑ Respondent
  - ☑ Parent
  - ☑ Sections 53.04, 53.05, 53.06, 53.07
- ☑ Diagnostic Study
- ☑ Social Evaluations
- ☑ Full Investigation



# Judges

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- ✓ TFC 51.102
  - ✓ Mandatory appointment of counsel
  - ✓ Appointment of counsel plan
  - ✓ Recognize difference
    - ✓ Determinate Sentence
    - ✓ Certifications



# Attorney for Respondent

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- ☑ Mandatory—No Waiver
- ☑ Effective Representation
- ☑ Notice for written materials
- ☑ TFC 51.09

# Hearing

“not a kangaroo court”

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✓ TFC 51.17

“Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases . . . Apply in a judicial proceeding under this title.”

✓ No statute makes Rules of Evidence inapplicable to certification proceedings

# COURT TO CONSIDER

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- ✓ Whether offense was against person or property, with greater weight in favor of transfer for offenses against the person;
- ✓ The sophistication and maturity of the child;
- ✓ Record and previous history of child;
- ✓ Prospects of adequate protection of public and the likelihood of the rehabilitation of the child by use of services available in juvenile court

# Transfer Findings

## §54.02

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- ✓ Felony
- ✓ 14 + if capital, agg. controlled substance, or first degree
- ✓ 15 + if second or third degree or state jail
- ✓ No adjudication
- ✓ Probable cause
- ✓ Because of seriousness of offense or child's background, welfare of community requires criminal proceedings

# Criminal District Court

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- ✓ If record in criminal prosecution shows accused was under 17 at time offense committed, there must be evidence of juvenile court transfer order
  - ✓ If none, conviction will be reversed
  - ✓ Legal issue (jurisdictional matter of law), not one for jury
  - ✓ Sufficient that transfer order is valid on its face
- ✓ CCP 4.18 (1995) – criminal defendant must make claim of underage as defense to prosecution, or else it is waived

# Appeal

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- ✓ Immediate appeal to Court of Appeals for pre--1996 offenses
  - ✓ Appeal does not prevent criminal prosecution
  - ✓ Appellate court will not order criminal court to await outcome of appeal
  - ✓ If transfer is reversed on appeal, any conviction is set aside and case returned to juvenile court

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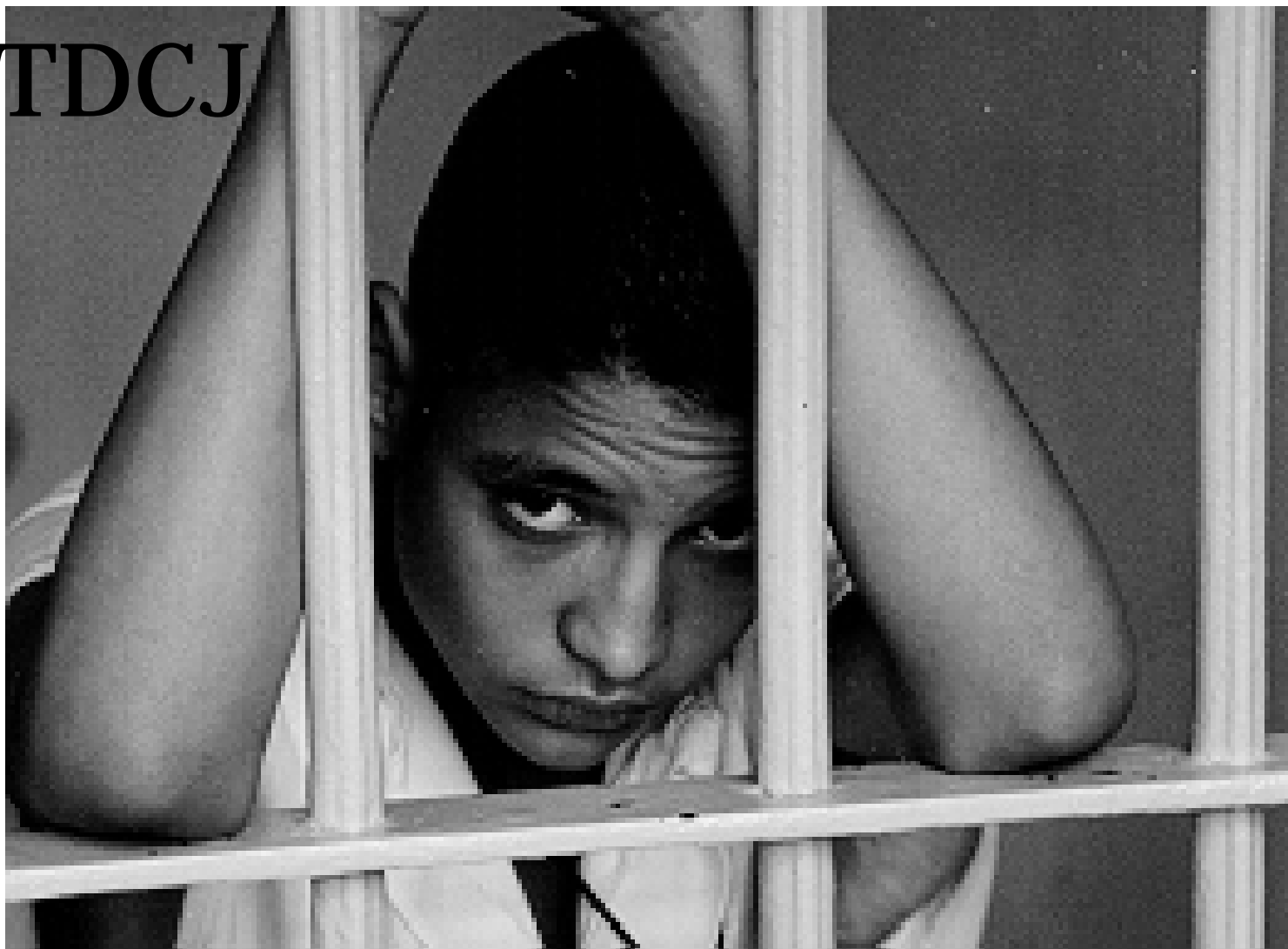
- ✓ **No right to immediate appeal for offenses committed after 1996**

- ✓ Appeal must be taken following conviction in criminal court for transferred conduct
- ✓ Appeal is plenary, not restricted to jurisdictional issues

- ✓ **CCP 4.18**

- ✓ No timely objection is required in criminal court to preserve claim of defect in certification proceedings for post-conviction appeal, only for claim that there were no certification proceedings at all

TDCJ





# Transferred Offenders Housing

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Males

Clemens Unit, Brazoria Texas

Females

Hilltop Unit, Gatesville, Texas

# HOE SQUAD CLEMENS UNIT



<b>Disposition Statistical Column</b>	
	Frequency
Homicide	39
Attempted Homicide	2
All Sexual Assaults	48
Robbery	96
Aggravated Assault	18
Burglary	14
Theft	2
Drug Offenses	9
Weapons Violations	4
Other Felony	13
Total	245

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