

Determinate Sentence Proceedings for the Violent or Habitual Offender



Speaker Information

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Most if not all of this topic is covered by statute, therefore, I have attempted to reproduce the Statutes that govern this subject so that they will be in a convenient place. Care has been given to try to reproduce only the more important parts of the quoted statutes.

STATUTORY OVERVIEW

I. §53.045 TFC VIOLENT OR HABITUAL OFFENDERS

Amended in 1995, the statute increased the number of offences covered. The statute was amended again in 2001, and the current list of covered offences is over 30.

The following crimes may be the subject of a petition presented to a Grand Jury for consideration as a Determinate case, all of which are listed in § 53.045, TFC,

1. Section 19.02 Penal Code (murder);
2. Section 19.03 Penal Code (capital Murder);
3. Section 19.04 Penal Code (manslaughter);
4. Section 20.04 Penal Code (aggravated kidnapping);
5. Section 20.011 Penal Code (sexual assault) *;
6. Section 22.021 Penal Code (aggravated assault) *;
7. Section 29.03 Penal Code (aggravated robbery);
8. Section 22.04 Penal Code (injury to a child, elderly individual, or disabled individual), if the offense is punishable as a felony, other than a state jail felony;
9. Section 22.05 (b) Penal Code (felony deadly conduct involving discharging a firearm);
10. Subchapter D, Chapter 481, Health and Safety Code, if the conduct constitutes a felony of the first degree or an aggravated controlled substance felony (certain offenses involving controlled substances);
11. Section 15.03 Penal Code (criminal solicitation);
12. Section 21.11 (a) (1) Penal Code (indecent with a child);
13. Section 15.31 Penal Code (criminal solicitation of a minor);
14. Section 15.01 Penal Code (criminal attempt), if the attempt was an offense under Section 19.02 Penal Code (murder), or Section 19.03 Penal Code (capital murder) or an offense listed by Section 3g (a) (1), Article 42.12 Code of Criminal Procedure;
15. Section 28.02 Penal Code (arson), if bodily injury or death is suffered by any person by reason of the commission of the conduct; or
16. Section 49.08 Penal Code (intoxication manslaughter)

* The prosecuting attorney may not refer a petition that alleges the child engaged in conduct that violated Section 22.011 (a) (2), Penal Code, or Section 22.021 (a) (1) (B) and (2) (B), Penal Code, unless the child is more than three (3) years older than the victim of the conduct.

The petition seeking a Determinate Sentence is presented to a Grand Jury, who may approve the petition by a vote of nine members. TFC §53.045 (B)."

II. §51.031 TFC HABITUAL FELONY CONDUCT

This section, part of the Determinate Sentencing Act, provides for Habitual Conduct and sentencing under §54.04 (d) (1), if the criteria of §51.03 TFC are satisfied.

"(a) Habitual Felony Conduct is conduct violating a penal law of the grade of Felony, other than a State Jail felony if:

- (1) the child who engaged in the Conduct has at least two previous final adjudications as having engaged in delinquent conduct violating a penal law of the grade of felony;
- (2) the second previous final adjudication is for conduct that occurred after the date the first previous adjudication became final; and
- (3) all appeals relating to the previous adjudications considered under Subdivisions (1) and (2) have been exhausted.

- (b) For purposes of this section, an adjudication is final if the child is placed on probation or committed to the Texas Youth Commission.
- (c) An adjudication based on conduct that occurred before January 1, 1996 may not be considered in a disposition made under this section."

Note that either a commitment to TYC or being placed on probation counts as an adjudication for habitual felony conduct, but not if an appeal is still pending.

III. **§54.04 TFC DISPOSITION HEARING**

This section of the Juvenile Justice Code, contains the requirements, placed on the court or jury, and ultimately on defense counsel with regard to the proper findings which should be made.

Section 54.04 (a) provides: "the disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing, There is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d) (3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence."

At this stage of the proceedings, the court may consider written reports of court personnel or consultants. The court shall provide the attorney for the child with access of all written material it plans to consider is disposition.

"No disposition may be made under this section unless the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made.

If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition. No disposition placing the child on probation outside the child's home may be made under this section unless the court or jury finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation."

§54.04 (c) TFC.

TFC Section 54.04 (d) (2) provides as follows: "if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony or, if the requirements of Subsection (s) or (t) are met, of the grade of misdemeanor, and if the petition was not approved by the grand jury under Section 53.045, the court may commit the child to the Texas Youth Commission without a determinate sentence;

Section (d) (3) states: "if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 (a) and if the petition was approved by the grand jury under Section 53.045, the court or jury may sentence the child to commitment in the Texas Youth Commission with a possible transfer to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice for a term of:

- (A) not more than 40 years if the conduct constitutes:
 - (i) a capital felony;
 - (ii) a felony of the first degree;
 - (iii) an aggravated controlled substance felony;
- (B) not more than 20 years if the conduct constitutes a felony of the second degree; or
- (C) not more than 10 years if the conduct constitutes a felony of the third degree;"

IV. **§ 54.0411 TFC JURISDICTION FOR TRANSFER or RELEASE HEARING**

The Court retains jurisdiction over a person, without regard to the age of the person, who is referred to the Court under Section 54.11 for transfer to the Texas Department of Criminal Justice or release under supervision.

This section may have a much greater impact on plea negotiations than it may first seem.. Consider a juvenile Respondent charged with a determinate sentencing crime. A plea to probation with supporting programs, if appropriate under the facts, may keep the child from being transferred to TDCJ. If transferred to TDCJ, he or she, because of a lack of maturity and/ or sophistication may become further victimized by the adults in TDCJ.

A child who is committed to TYC may be transferred to TDCJ and the length of his/her sentence lengthened if a deadly weapon is involved. Therefore, the child is entitled to notice before the adjudication hearing begins that the State is seeking a deadly weapon finding. This notice is accomplished by: Government Code Section 508.145 (b);

- a. Expressly charging that the offense was committed with a deadly weapon in the petition, or
- b. the State may, in a separate notice, tell the child of its intent to seek a deadly weapon finding, or
- c. if the petition charges that a homicide was committed it has implicitly charged use of a deadly weapon.

HOWEVER, There can only be a deadly weapon finding by the Court if the child is in actual possession of the weapon. (i.e. there can be no deadly weapon finding on a juvenile who served as a lookout in an aggravated robbery.)

V. MINIMUM LENGTH OF STAY AND TRANSFER TO TDCJ

After the Respondent is sent to TYC on a commitment under the Determinate Sentencing Statute, how long must he/she stay?

Section 61.081 (f) Human Resources Code provides as follows:

"If a child is committed to the commission under a determinate sentence under Section 54.04 (d) (3), (determinate sentence, term of years), Section 54.04 (m), (habitual felony conduct) or Section 54.05 (F) (Modification of Disposition), TFC, the commission may not release the child under supervision without the approval of the juvenile court that entered the order of commitment unless the child has served at least:

- (1). 10 years, if the child was sentenced to commitment for conduct constituting capital murder;
- (2). 3 years, if the child was sentenced to commitment for conduct constituting an aggravated controlled substance felony or a felony of the first degree;
- (3) 2 years, if the child was sentenced to commitment for conduct constituting a felony of the second degree; or
- (4) 1 year. If the child was sentenced to commitment for conduct constituting a felony of the third degree"

VI. TERMINATION OF CONTROL

Section 61.084 Human Resources Code

The Texas Youth Commission cannot discharge a person under its custody except:

- " (b) The commission shall discharge without a court hearing a person committed to it for a determinate sentence under Section 54.04 (d) (3), Section 44.04 (m), or Section 54.05 (f), of the Texas Family Code, who has not been transferred to the Institutional Division of the Texas Department of Criminal Justice under a court order on the date that the time spent by the person in detention in connection with the committing case plus the time spent at the Texas Youth Commission under the order of commitment equals the period of the sentence.
- (c) The commission shall transfer to the Institutional Division of the Texas Department of Criminal Justice a person who is the subject of an order under Section 54.11(l) (2) TFC, transferring the person to the custody of the Institutional Division of the Texas Department of Criminal Justice for the completion of the person's sentence.

If a person has not been released on supervision or transferred to TDCJ, he or she must be discharged on that person's 21st birthday. §61.084 (e) Human Resources Code.

Further, if a person committed to TYC has not already been released on supervision or discharged, that person shall be transferred on his/her 21st birthday to the Institutional Division of the Texas Department of Criminal Justice. §61.084 (g) Human Resources Code.

VII. 61.084 HUMAN RESOURCES CODE

Determinate Sentence Parole

“Not later than the 90th day before the commission transfers a person to the custody of the pardons and paroles division of the Texas Department of Criminal Justice for release on parole under Section 61.08(f) or 61.084 (f) or (g) the commission shall submit to the department all pertinent information relating to the person, including:

- (1) the juvenile court judgment;
- (2) the circumstances of the person’s offense
- (3) the person’s previous social history and juvenile court records;
- (4) the person’s physical and mental health record;
- (5) a record of the person’s conduct, employment history, and attitude while committed to the commission;
- (6) a record of the sentence time served by the person at the commission and in a juvenile detention facility in connection with the conduct for which the person was adjudicated;
- (7) any written comments or information provided by the commission, local affidavits, or victims of the offense.”

VIII. 54.11 TFC, RELEASE or TRANSFER HEARINGS

Release and Transfer hearings are governed by Section 54.11 TFC.

“Notice of the hearing shall be given to the following people or agencies of the time and place of the hearing:

- (b)
- (1) the person to be released or transferred;
 - (2) the parents of the person;
 - (3) any legal custodians of the person, including the TYC;
 - (4) the office of the prosecuting attorney that represented the State in the juvenile delinquency proceeding;
 - (5) the victim of the offense that was included in the delinquent conduct that was a ground for the disposition, or a member of the victim’s family; and
 - (6) any other person who has filed a written request with the court to be notified of a release hearing with respect to the person to be transferred or released under supervision.
- (c) Except for the person to be transferred or released under supervision and the prosecuting attorney, the failure to notify a person listed in subsection (b) of this section does not affect the validity of a hearing conducted or determination made under this section if the record in the case reflects that the whereabouts of the person who did not receive notice were unknown to the court and a reasonable effort was made by the court to locate these persons.”

Section 54.11 (d) TFC, allows the judge to consider “written reports from probation officers, professional court employees, professional consultants, or employees of TYC.

Defense counsel must be given at least one day, before the hearing to review all written matter to be considered by the court.”

This last section, 54.11 (d) is very burdensome on defense counsel, as many times the material referred to may be quite voluminous and would require at least several days to properly review. Does this mean you should just watch from counsel table when these materials are offered into evidence at a hearing. Hopefully not. You should always object. Even though your objection will be overruled, you should object on the grounds of Hearsay at least, and also on the ground that this material violates the juvenile’s right to confront the witnesses who wrote the reports which make up these materials. Possibly an objection exist that to admit these materials with only one day to review them renders counsel ineffective.

As you can see, these few sections of juvenile law will greatly affect a respondent charged with a Determinate Sentence case. Aside from any defense the Respondent may have to the substantive charge against him or her, there does not appear to be much latitude for a creative defense at the sentencing stage of a determinate case. Many times I have been forced to try a determinate case to a jury so that they could have an explanation for the conduct charged, and possibly have some mercy for the juvenile at sentencing. However in a situation where the facts are particularly heinous, it becomes a judgment call as to whether any fact finder should hear the case on its merits. In such a situation, you should probably reach your best plea bargain agreement. You should try to get a statement on the record as to the time the Respondent has spent in detention awaiting his day in court. This statement of days in custody could prove very helpful in a later release hearing or in trying to determine how much time the Respondent will have to stay in custody under a minimum length of stay.

In 1985, the United States Supreme Court, in an appeal of an adult Capital Murder death case, addressed the issue of whether an indigent defendant was entitled to access to a psychiatrist to aid in his defense of insanity at the expense of the state. The defendant was tried on two counts of Capital Murder. His sole defense at guilt/innocence was insanity. Prior to trial the defendant had been housed at a mental health facility for three months and had been examined by many psychiatrists. No one had examined the defendant regarding his sanity at the time of the commission of the offense. The defendant had asked for a psychiatrist in a pretrial conference at state expense, and was denied his request. The Court in reversing this conviction stated, "We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. AKE V. OKLAHOMA, 470 U.S. 68, 105 S. Ct.1087, 84 L. Ed. 2d 53 (1985).

Here you may see that using pretrial motions to raise a seemingly basic constitutional law issue, preserving error by objecting at trial, (including obtaining a ruling) you may be able to have the trial court grant you some relief in an otherwise strictly statutory arena.

Within the last couple of years, there has been some movement in the areas of release/transfer hearings. Relying on basic Constitutional Law, there have been some decisions that relax some of the more burdensome requirements found in the law of transfer hearings.

In the Matter of M.R., 5 SW 3rd 879, (Tex. App.- San Antonio,1999), a release/transfer hearing was reversed and remanded. A juvenile was sentenced to a 15 year determinate sentence for aggravated sexual assault. His attorney received a copy of the report filed by the state one day before the hearing. The state had only one witness who testified based on the reports and opinions of others. The juvenile claimed a violation of his right of confrontation, under U.S.C.A. Const. Amend 6.

The juvenile's attorney filed a verified motion for continuance, and announced not ready when the case was called to a hearing. The attorney stated he had not had an opportunity to review the file and determine what witness were consulted in the preparation of the reports from which the state's witness testified. The attorney further stated: "Respondent therefore will need time to secure the attendance of witnesses through subpoena, as is his right." The trial court denied the motion for continuance, and after testimony from the state's one and only witness, ordered the juvenile transferred on his 18th birthday to the institutional division of the Texas Department of Criminal Justice.

The Court of Appeals stated: "The denial of the continuance deprived M.R. of any chance of securing witnesses or arranging any other means to enforce his right of confrontation. Considering these circumstances, the trial court's order transferring M.R. to TDCJ-ID must be reversed."

To preserve error under these circumstances, counsel should:

- 1) File a Verified Motion for Continuance;
- 2) Announce not ready when called to trial, again urge your motion for continuance, and obtain a ruling from the court.

A form for a verified motion for continuance is provided in exhibit 1.

In the Matter of J.E.H., 972 SW2d 928, (Tex. App.- Beaumont 1998), again reversing the ruling of the trial court transferring a juvenile to TDCJ-ID to serve the remainder of a 25 year sentence for Capital Murder. The trial court denied the juvenile's motion for funds to obtain expert assistance from a psychiatrist at the release/transfer hearing. The state conceded that medical evidence would be relevant. Holding "that when an indigent defendant's sanity at the time of his or her offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

In J.E.H., Supra, the state objected to the appointment of an expert at the release/transfer hearing, claiming that this hearing is not part of the guilt/innocence phase of the trial. The court responded saying; "we hold that a release/transfer hearing is sufficiently a part of the punishment-setting process as to afford the same due process right to J.E.H.", JEH, Id. at 93.

This case, although 6 years old, reestablishes the application of Due Process to the juvenile arena.

A form for a Defendant's Motion for Investigative and Expert Assistance Fee in Indigent case is attached in Exhibit 2.

IX. CONCLUSION

As I hope you can see, this area of the juvenile code is very statute intense. However, armed with just a few motions, and an understanding of the requirements laid down in the statutes, counsel may not only represent the juvenile respondent at a level unexpected by the state. By careful presentation of motions and objections, you may give a court or an Assistant District Attorney the opportunity to commit reversible error, or at worst, give the state the opportunity to become more "reasonable" in their negotiations.

If you are prosecuting, this section of the Juvenile Justice code gives you an opportunity to make the possible punishment fit the facts of the crime. You have many options including whether to proceed as a Determinate case at all. Likewise, you should arm yourself with the motions, statutes and objections which will allow you the opportunity to seek the punishment you think is appropriate.

VII. FORMS APPENDIX

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Although this motion is for a witness that has been subpoenaed, it may be easily adapted for circumstances where a witness has just been discovered as in the circumstances present in In the Matter of M.R., Supra. Great care should be taken to follow the requirements of Rule 252, T.R.C.P.

EXHIBIT 1

DEFENDANT'S MOTION FOR CONTINUANCE- MISSING WITNESS

To the Honorable Judge of Said Court:

COMES NOW, (*name of Respondent*) Respondent, by and through his attorney of record (*name of Attorney*), and pursuant to Rule 252, T.R.C.P., moves this court to continue the above entitled and numbered cause for the following reasons, to-wit:

I.

The Respondent stands charged by in a petition with the offense of (*name the offense*) in this cause. Trial is set for (*date of trial*). Defense counsel has been diligent in procuring the attendance of witnesses. Prior to this date on the (*date subpoenas were filed*) an application for subpoena was filed with the clerk of this Court wherein the attendance of (*name of witness*) was sought. Thereafter, on (*date that subpoena was issued*) a subpoena was delivered to the deputy sheriff who is assigned to this Court for purposes of serving such subpoena. The subpoena so delivered contained a good address for the witness named. At the call of the docket on (*date trial was set*) the Respondent appeared but withheld his announcement of ready for trial subject to the availability of the witnesses subpoenaed. It appearing that (*name of witness*) was not present, the Respondent made application for and attachment for (*name of witness*) at his address at (*insert address of witness*). The Respondent has used every available means of obtaining service on the said witness.

II.

The factual testimony of each witness subpoenaed by the Respondent and absent from Court is necessary to prove that _____.

III.

The witness sought is not absent by the procurement or the consent of the Respondent or his counsel.

IV.

This motion is not made for purposes of delay but only that justice may be done.

V.

There is no reasonable expectation that attendance of the witness can be secured by a short postponement of the trial to some future day. The attorney for the Respondent believes a postponement to (*insert the date sought for the postponement*) will allow the witness to be secured.

VI.

The Respondent is prepared to go forward with this case at any time the necessary witness is produced.

VII.

The name of the witness subpoenaed but not present is:

1) *Name and street address, city, state and telephone number, if known*

VIII.

The testimony of this witness or the substance thereof cannot be secured from any other source known to the Respondent.

IX.

The Respondent has a reasonable expectation of procuring the evidence indicated at the date sought for postponement.

WHEREFORE, premises considered, the Respondent prays that the Court grant a continuance in this cause to permit him to present the highly relevant facts to which the witness can testify.

Respectfully Submitted,

Respondent

Attorney for Respondent

STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared *(insert name of Respondent)* and after being by me first duly sworn on his oath deposed and said:

“My name is *(name of Respondent)* I am the Respondent in cause No. _____ pending in the _____ Court of Harris County, Texas. I have read the motion for continuance to which this affidavit is attached and which is to be filed in the aforestated cause. All of the facts and allegations contained in said motion are true and correct.”

Respondent

SUBSCRIBED AND SWORN TO before me by the said *(name of Respondent)* on this the ____ day of _____, 2004.

Notary Public in and for the State of Texas

EXHIBIT 2

RESPONDENT'S MOTION FOR INVESTIGATIVE AND EXPERT ASSISTANCE FEE IN INDIGENT CASE

To the Honorable Judge of Said Court:

COMES NOW (*name of Respondent*), Respondent in the above entitled and numbered cause by and through his court appointed counsel (*name of attorney*), and moves the Court to authorize the payment of a \$ _____ investigative and/or expert assistance fee and in support thereof would show the Court as follows:

I.

The defense will utilize the requested funds for the hiring of (*specify the type of assistance, i.e., investigator, expert, etc.*) whose services are essential to the proper representation of the Respondent.

II.

The Respondent is indigent and unable to afford such services unless the cost thereof is defrayed by the State of Texas.

WHEREFORE, premises considered, it is prayed that this Court will authorize the payment of an investigative fee.

Respectfully submitted,

Attorney for Respondent