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Discretionary Transfer to Criminal Court

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A. ELIGIBILITY TO BE TRANSFERRED

1. Under Age 18

a. Requirements – TFC 54.02(a)

- 1) Child is alleged to have committed **felony**
- 2) Child was at time of offense:
 - a) **14 years*** or older at time he/she allegedly committed:
 - capital felony
 - aggravated controlled substance felony
 - First degree felony

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

- b) **15 years** or older at time he/she allegedly committed:
 - second degree felony
 - third degree felony
 - state jail felony
 -
 - 3) **No adjudication** hearing has been conducted
 - 4) After full investigation and hearing, juvenile court finds:
 - a) **probable cause** to believe child committed the offense and
 - b) because of the **seriousness of the offense or background** of the child, welfare of community requires criminal proceedings

b. Certification for offense committed while 14

- 1) 1995 amendments
- 2) capital, first degree, or aggravated controlled substance felony (felonies that carry a higher minimum term or a higher possible

fine than a first degree felony)

c. **Age at the time the offense is committed controls.**

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

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

2. 18 Years or Older

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

b. Requirements

- 1) Person is 18 years or older
- 2) Person was:
 - a) **14 years or older and under 17** at the time he/she is alleged to have committed a capital felony, an aggravated controlled substance felony or 1st degree felony; or
 - b) **15 years or older and under 17** at the time he/she is alleged to have committed a 2nd or 3rd degree felony or a state jail felony
- 3) **No adjudication** or 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;
- 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) There is **probable cause** to believe that the child before the court committed the offense alleged.

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

c. Due Diligence

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

1) Not practicable to proceed before age 18:

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

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

2) New evidence is discovered:

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

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

3) Respondent could not be found:

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

4) Appellate reversal of certification order:

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

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

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

- a) Section 51.041 provides "The court retains jurisdiction over a person, without regard to the age of the person, for conduct engaged in by the person before becoming 17 years of age if, as a result of an appeal by the person under Chapter 56 of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court."
- b) Codifies R.E.M. v. State, 569 S.W.2d 613 (Tex.Civ.App. - Waco 1997, writ ref'd n.r.e.)
- c) In the Matter of M.A.V., 954 S.W.2d 117 (Tex.App. - San Antonio 1997) held that when respondent becomes 18 after reversal of a certification order but before a new certification hearing can be conducted, the State must file a new petition for a post-18 proceeding under Section 54.02(j) and may not, under R.E.M., proceed on the original petition. Even when there is no defect in the original petition, it is best practice for prosecutor to file a new petition.

d. Proof of due diligence

- 1) In the Matter of N.M.P., 969 S.W.2d 95 (Tex.App. - Amarillo 1998) - DNA testing was not sufficiently well established prior to respondent's 18th birthday to fault the State for not pursuing it before then.
- 2) In the Matter of J.E.V. (UNPUBLISHED San Antonio 1996) - refusal of critical witness to cooperate was sufficient to show due diligence. Petition was filed as soon as witness agreed to cooperate.
- 3) In the Matter of J.C.C., 952 S.W.2d 47 (Tex.App. - San Antonio 1997) - Certification was reversed because State had no good explanation why it did not proceed with an adjudication at same time as the juvenile's twin brother for same offense.
- 4) In the Matter of F.A.A. (UNPUBLISHED San Antonio 1998) - juvenile court did not abuse its discretion in finding the State had used due diligence in attempting to locate respondent before his 18th birthday. Probation officer testified to 25 home visits and 5 phone calls in attempting to locate juvenile.

e. Certifications for Murder

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

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

- 2) **Detention** of person pending hearing:

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

B. THE REQUIRED STUDY, EVALUATION, AND INVESTIGATION

TFC 54.02(d): “Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.”

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

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

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

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

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

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

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

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

included in an appeal of a transfer order following criminal conviction.

3. Complete Diagnostic Study

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

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

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

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

4. Previous Diagnostic Studies

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

The court did not abuse its discretion in the admission of the diagnostic study that included a psychiatric evaluation conducted less than a month

before the hearing but did not include an examination by a clinical psychologist.

5. Full Investigation

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

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

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

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

6. Admissibility of Report

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

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

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

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

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

7. Disclosure of the Report

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

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

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

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

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

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

8. Privilege Against Compelled Self-Incrimination

a) K.W.M. v. State, 598 S.W.2d 660 (Tex.Civ.App. - Houston [14th Dist.] 1980): Court rejected the argument that ordering a psychiatric examination is in violation of a child’s 5th amendment privilege against

compelled self-incrimination. A certification proceeding is not an adjudication of the child's guilt or innocence and therefore the child's Fifth Amendment rights are not in issue. Second, 54.02(d) does not require the court to order the child to discuss his or her involvement in the alleged crime with the examiner but merely 'the circumstances of the alleged offense.' No self-incriminatory statements are required by 54.02(d) and any given must be preceded by the warnings in 51.09(b) [custodial statements] to be used against the child in any subsequent trial.

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

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

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

9. Right to Counsel

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

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

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

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

10. Use of Examination Outside the Certification Process

a) Part of the rationale of the Court of Criminal Appeals decision in Hidalgo is that constitutional rights are not implicated when the examination report is used only at the certification hearing and not at a juvenile adjudication hearing or a criminal trial. In *Cantu v. State*, 994 S.W.2d 721 (Tex.App. - Austin 1999), pet. dismissed, ___ S.W.3d ___, 2000 WL 567107 (Tex.Crim.App. 2000), Appellant was convicted of first degree murder in criminal court after certification. At the penalty phase, the psychiatrist testified based on the juvenile certification examination and the jury assessed punishment at 40 years. The Court of Appeals held that the Fifth and Sixth Amendments require that the doctor should have warned appellant that he has a right to remain silent and that any statements he makes can be used against him or her in subsequent criminal proceedings. In the absence of such warnings, the results of the examination are admissible only in certification proceedings. NOTE: The Court of Criminal Appeals has granted the State’s petition for discretionary review in the case.

11. Mental Health Privilege Claim

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

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

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

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

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

C. THE TRANSFER HEARING

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

1. Evidence

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

b. *B.L.C. v. State*, 543 S.W.2d 151 (Tex.Civ.App. - Houston [14th Dist.] 1976, writ ref'd n.r.e.): Juvenile claimed confession was improperly admitted because of 51.095 violations. Appellate court said 51.095 restrictions do not apply to transfer hearings.

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

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

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

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

f. *In the Matter of S.J.M.*, 922 S.W.2d 241 (Tex.App. - Houston[14th Dist.] 1996): Constitutional right of confrontation of witnesses does not

apply at a certification hearing. No error in admitting into evidence the confessions of co-respondents that implicated the juvenile respondent.

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

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

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

3. Grand Jury Criterion

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

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

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

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

4. Joinder of Respondents

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

5. Consular Notification

- a. The Vienna Convention on Consular Relations provides for notification to consular officials when a foreign national has been taken into custody if the person arrested requests notification and requires arresting officials to notify the foreign national of his or her rights under the Convention.
- b. *Melendez v. State*, 4 S.W.3d 437 (Tex.App. – Houston [1st Dist] 1999): Juvenile argued that juvenile court lacked jurisdiction to transfer appellant to criminal court because he was not notified that he had a right under the Convention to have consular officials of El Salvador notified of his arrest. Court of Appeals rejected that argument on the ground that even if the Convention had been violated, that condition would not deprive the juvenile court of jurisdiction to certify.

6. Right to Counsel

- a. TFC 51.10 (b)(1) gives a juvenile a mandatory, unwaivable right to counsel for discretionary transfer proceedings.
- b. *In the Matter of D.L.J.*, 981 S.W.2d 815 (Tex.App. - Houston[1st Dist.] 1998): Juvenile’s attorney was not present for part of the certification hearing. Court of Appeals held that the denial of the right to counsel was structural error that is per se reversible - no showing of harm is required.

D. TRANSFER FINDINGS AND ORDER

1. Requirements

- a. TFC 54.02(a) requires:
 - 1) Child must be alleged to have committed a **felony** offense
 - 2) **15 years or older** at time of commission of felony
 - * 1995 amendments: **14 or older** at time of commission of capital felony, first degree felony, or aggravated controlled substance felony
 - 3) **no adjudication** hearing concerning offense has been held
 - 4) **probable cause** to believe child before court committed offense
 - 5) because of the **seriousness** of the offense alleged or the **background** of the child the **welfare of the community requires criminal proceedings**

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

- b. **No Adjudication Hearing**

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

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

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

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

c. Probable Cause

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

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

3) Requirement is **mandatory**

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

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

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

d. Evidentiary Basis for Determination

- 1) The juvenile court is permitted to base its probable cause determination on **hearsay evidence** of the commission of the offense and the respondent’s involvement in it.
 - In the Matter of D.W.L., 828 S.W.2d 520 (Tex.App. - Houston [14th Dist.] 1992)
 - Edwards v. State (UNPUBLISHED Dallas 1991, dismissed w.o.j.): Hearsay testimony by investigating officers sufficient.
 - In the Matter of K.R.B. UNPUBLISHED San Antonio 1996)
- 2) Sutton v. State (UNPUBLISHED Dallas 1992): Court may terminate hearing after evidence produced from which the juvenile court can rationally conclude that respondent committed offense alleged.
- 3) In the Matter of B.N.E., 927 S.W.2d 271 (Tex.App. – Houston [1st Dist.] 1996): Juvenile court can determine probable cause **without hearing alibi evidence**.
- 4) In the Matter of D.L.N., 930 S.W.2d 253 (Tex.App. – Houston [14th Dist.] 1996): Juvenile court may make the certification finding of probable cause based on the **law of parties** - a showing of personal commission of the offense by the respondent is not required.
- 5) In the Matter of D.D.A. (UNPUBLISHED Ft. Worth 1995): Juvenile court can base finding of probable cause on the

uncorroborated testimony of an accomplice because a grand jury could indict under such circumstances. Whether there is sufficient corroboration of the accomplice's testimony to convict is a separate question that must be addressed by the criminal court.

e. Community Welfare Requires Criminal Proceedings

- 1) TFC 54.02(a)(3): Juvenile court must find that “because of the **seriousness of the offense alleged** or the **background of the child** the welfare of the community requires criminal proceedings.”
- 2) In the Matter of A.T.S., 694 S.W.2d 252 (Tex.App. – Fort Worth 1985): **Reversed** a transfer on a burglary where juvenile had **no prior record except truancy**. Public protection and juvenile's rehabilitation served by retaining case in juvenile system.
- 3) In the Matter of C.C.G., 805 S.W.2d 10 (Tex.App. – Tyler 1991, error denied): **Transfer can be based on the seriousness of the offense alone.**
- 4) Appellate Review
 - a) Court's finding of fact that welfare of community requires criminal proceedings is subject to appellate **review on legal and factual sufficiency** bases.
 - b) Claim of factual insufficiency requires appellate court to evaluate all the evidence and to uphold factual finding unless it is “so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust.”
 - Quinones v. State (UNPUBLISHED Austin 1998): Factual sufficiency upheld where juvenile stabbed his mother to death and showed no remorse.
 - c) Claim of legal insufficiency requires appellate court to consider only that evidence that supports the juvenile court's finding to determine whether that finding has rational support in the evidence.
 - d) If juvenile prevails on claim of legal sufficiency, he/she is not thereafter subject to being transferred for that

offense.

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

2. Criteria for Transfer

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

- 1) whether the alleged offense was against **person or property**, with greater weight in favor of transfer given to offenses against the person;
- 2) whether the alleged offense was committed in an **aggressive and premeditated** manner;
- 3) whether there is evidence on which a **grand jury** may be expected to return an indictment;
- 4) the **sophistication and maturity** of the child;
- 5) the record and **previous history** of the child; and
- 6) 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.

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

c. Finding on each criterion is not required

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

d. Sufficiency of Evidence to Support Criteria

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

3. Statement of Reasons

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

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

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

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

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

4. Sending Diagnostic Study to Criminal Prosecutor

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

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

E. TRANSFERRING FEWER THAN ALL OFFENSES ALLEGED

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

petition.”

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

2. Multiple offenses alleged in transfer petition

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

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

NOTE: Reversed by Court of Criminal Appeals

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

d. The nonsuit solution

- 1) **R.T. v. State**, 764 S.W.2d 588 (Tex.App. - Dallas 1989): Reversed a transfer order because juvenile court retained jurisdiction over two arson offenses that were alleged in the transfer petition without any showing that juvenile court had exercised jurisdiction over them.
- 2) In **R.T.** on remand and upon the State’s motion, the juvenile court nonsuited the arson counts over which it had originally

retained jurisdiction. Thereafter, when the juvenile court transferred all remaining offenses to the criminal district court, it completely waived its jurisdiction because it did not retain jurisdiction of any part of the case. *Turner v. State*, 796 S.W.2d 492 (Tex.App. - Dallas 1990)

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

e. Legislative Overruling Of Richardson

- 1) TFC54.02(g) was amended in 1995: “If the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile **court shall either retain or transfer all offenses relating to a single transaction**. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.
- 2) *Ex parte Allen*, 618 S.W.2d 357 (Tex.Crim.App. 1981): Prosecutor can charge any offense supported by probable cause provided only that the offense arose out of a criminal transaction that was certified by the juvenile court.
- 3) **Juvenile court certifies a transaction, not a specific statutory offense**. Court may transfer or retain different transactions.

F. MANDATORY TRANSFER

1. If, after transfer but prior to becoming 17 years old, the transferred juvenile commits a felony, the new offense is still a juvenile offense.
 - a. Prior to 1995, if juvenile officials wish to certify the new offense to criminal court, an entirely new discretionary transfer proceeding had to be conducted, with a new study and investigation.
 - b. TFC 54.02(m) and (n), 1995 amendments, created a mandatory

certification procedure whereby a new offense committed by a certified juvenile under 17 is “automatically” transferred to criminal court for a more comprehensive disposition = “once certified, always certified.”

2. Scope of Mandatory Transfer

a. Requirements

- 1) Child was **previously transferred** to criminal court and
- 2) Has allegedly committed **any new felony*** before 17th birthday.

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

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

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

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

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

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

a. Detention Options

- 1) Child can be detained in the certified juvenile detention facility

until the certification order is entered.

- 2) Child can continue to be incarcerated on the previous charge while mandatory transfer proceedings are pending in juvenile court.
- 3) If the child is on adult community supervision, the child may be detained in the certified juvenile detention center.
- 4) If a community supervision revocation warrant has been issued, the child may be detained in the county jail under authority of that warrant.
- 5) If the child is free on bond in the criminal case, he may be detained in the juvenile detention center.
- 6) If bond is revoked or terminated, may be detained in the county jail in the previous criminal case.

b. Petition and hearing required

- 1) Petition should allege:
 - a) prior viable transfer order
 - cause number and date of prior transfer order
 - that none of 4 negating conditions exist
 - b) new felony offense.
- 2) Relief prayed for in petition should clearly indicate that the prosecutor is seeking to invoke the mandatory transfer procedure.
- 3) If the prayer includes discretionary transfer, then the certification report in Section 54.02 (d) will be required.

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

d. Summons

- 1) TFC 54.02(n) excuses the requirement of TFC 54.02(b) that the summons must state that the purpose of the hearing is to consider discretionary transfer to criminal court.
- 2) Subsection (n) provides that “it is sufficient that the summons provide **fair notice** that the purpose of the hearing is to consider mandatory transfer to criminal court.”

e. Proof Required

- 1) State must prove:
 - a) the prior transfer order

b) that none of the four negating conditions in TFC 54.02(m)(1) exist

c) New felony offense*

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

G. POST-TRANSFER PROCEEDINGS

1. Examining Trials

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

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

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

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

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

2. Transfer Order

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

- 1) In the absence of such evidence, the resulting criminal conviction will be reversed on direct appeal.
 - Whytus v. State, 624 S.W.2d 290 (Tex.App. – Dallas 1981)
 - Ellis v. State, 543 S.W.2d 135 (Tex.Crim.App. 1976)
- 2) CCP 4.18 (added in 1995) makes it the obligation of the criminal defendant to make a claim of underage as a defense to criminal prosecution - that he was under 17 at the time of the offense and no certification proceedings occurred. Failure to raise the claim in a timely fashion will result in its forfeiture.

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

- 1) Darnell v. State (UNPUBLISHED Houston [14th Dist.] 1991): Sufficient if papers in criminal case show a juvenile court transfer order that is valid on its face.
- 2) Cornealius v. State, 870 S.W.2d 169 (Tex.App. – Houston [14th Dist. 1994): Juvenile court corrected transfer order by substituting name of one complainant for another. Court of Appeals characterized change as judicial, not clerical, and error could not, therefore, be corrected by nunc pro tunc order. But correction was made before the grand jury returned an indictment in transferred case, so “the criminal district court could not acquire jurisdiction over the juvenile. Therefore, at the time [the] juvenile court corrected its order, it still retained plenary power over this cause.”
- 3) Youngs v. State (UNPUBLISHED Houston [14th Dist.] 1999): juvenile court transferred 3 separate cases to criminal court. The criminal court clerk placed 2 orders under the file number for the other. Appellate court held that criminal court had acquired jurisdiction by the certification.

3. **Prosecution Only for Transaction Transferred**

a. Juvenile court waives jurisdiction only with respect to conduct and a

criminal court has jurisdiction to adjudicate only for the same conduct for which the juvenile court transferred jurisdiction.

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

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

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

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

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

- 4) The Allen principle deals with the underlying conduct (the criminal transaction) for which a child is transferred to criminal court.
 - a) Criminal court is not restricted to the particular offense label that juvenile court placed on the conduct.

- b) *Hamilton v. State* (UNPUBLISHED San Antonio 1995): Conviction for capital murder affirmed even though juvenile court certified only murder - same criminal transaction.
 - c) *Brosky v. State*, 915 S.W.2d 120 (Tex.App. – Fort Worth 1996, pet. ref'd): State may, after certification, replace an overt act alleged in certification petition for engaging in organized criminal activity with a different overt act arising out of the same conspiracy.
- 5) The prosecutor in criminal court may charge any offense that can be proved so long as it is based on conduct from the criminal transaction for which the juvenile court has ordered the respondent transferred.

4. **Juvenile Detention Credit on Criminal Sentence**

- a. *Ex parte Green*, 688 S.W.2d 555 (Tex.Crim.App. - 1985): Court of Criminal Appeals held that under CCP 42.03, Sec.2(a), a transferred juvenile is entitled to receive credit on any prison sentence for the time spent in juvenile detention pending certification.
- b. In *Ex parte Gomez*, 15 S.W.3d 103 (Tex.Crim.App. 2000): Court of Criminal Appeals held that a certified juvenile is entitled under that same provision to receive on any prison sentence credit for good conduct while detained in the juvenile detention facility.

5. **Relationship of Appeal to Criminal Proceedings**

- a. TFC 56.01(c)(1): When a juvenile is transferred to criminal court, he is entitled to appeal the transfer proceedings to the appropriate Court of Appeals if the offense was committed before January 1, 1996.
 - 1) TFC 56.01(g): Pendency of an appeal does not prevent the criminal prosecution from proceeding at its normal pace.
 - 2) *L.L.S. v. Wade*, 565 S.W.2d 251 (Tex.Civ.App. – Dallas 1978): Appellate court will not order criminal court to await outcome of appeal before proceeding with criminal trial.
 - 3) If the defendant is convicted for a transferred offense and later the appellate court on immediate appeal reverses the transfer order on direct appeal, the conviction will be set aside and the case returned to the juvenile court.

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

- 1) The scope of the post-conviction appeal is the same as the scope of the pre-1996 immediate appeal.
- 2) The appeal is plenary and not restricted to “jurisdictional” issues. CCP 44.47

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