PRETRIAL PROCEEDINGS

I. Petition and Answer

Family Code § 53.04. COURT PETITION; ANSWER. (a) If the preliminary investigation, required by Section 53.01 of this code results in a determination that further proceedings are authorized and warranted, a petition for an adjudication or transfer hearing of a child alleged to have engaged in delinquent conduct or conduct indicating a need for supervision may be made as promptly as practicable by a prosecuting attorney who has knowledge of the facts alleged or is informed and believes that they are true.

(b) The proceedings shall be styled "In the matter of _____."

(c) The petition may be on information and belief.

(d) The petition must state:

(1) with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts;

(2) the name, age, and residence address, if known, of the child who is the subject of the petition;

(3) the names and residence addresses, if known, of the parent, guardian, or custodian of the child and of the child's spouse, if any;

(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; and

(5) if the child is alleged to have engaged in habitual felony conduct, the previous adjudications in which the child was found to have engaged in conduct violating penal laws of the grade of felony.

(e) An oral or written answer to the petition may be made at or before the commencement of the hearing. If there is no answer, a general denial of the alleged conduct is assumed.

II. Timing

A. Service of Summons

Family Code § 53.07. SERVICE OF SUMMONS. (a) If a person to be served with a summons is in this state and can be found, the summons shall be served upon him personally at least two days before the day of the adjudication hearing. If he is in this state and cannot be found, but his address is known or can with reasonable diligence be ascertained, the summons may be served on him by mailing a copy by registered or certified mail, return receipt requested, at least five days before the day of the hearing. If he is outside this state but he can be found or his address is known, or his whereabouts or

address can with reasonable diligence be ascertained, service of the summons may be made either by delivering a copy to him personally or mailing a copy to him by registered or certified mail, return receipt requested, at least five days before the day of the hearing.

(b) The juvenile court has jurisdiction of the case if after reasonable effort a person other than the child cannot be found nor his post-office address ascertained, whether he is in or outside this state.

(c) Service of the summons may be made by any suitable person under the direction of the court.

(d) The court may authorize payment from the general funds of the county of the costs of service and of necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing.

(e) Witnesses may be subpoenaed in accordance with the Texas Code of Criminal Procedure, 1965.

B. Time Set for Hearing

1. Child in Detention

Family Code § 53.05. TIME SET FOR HEARING. (a) After the petition has been filed, the juvenile court shall set a time for the hearing.

(b) The time set for the hearing shall not be later than 10 working days after the day the petition was filed if:

(1) the child is in detention; or

(2) the child will be taken into custody under § 53.06(d) of this code.

2. Child not in Detention

a. Constitutional Right to Speedy Trial

b. Non-binding Rules of Judicial Administration

C. Attorney's Time to Prepare

Family Code § 51.10. RIGHT TO ASSISTANCE OF ATTORNEY; COMPENSATION. (a) A child may be represented by an attorney at every stage of proceedings under this title, including:

(1) the detention hearing required by § 54.01 of this code;

(2) the hearing to consider transfer to criminal court required by §54.02 of this code;

(3) the adjudication hearing required by § 54.03 of this code;

(4) the disposition hearing required by §54.04 of this code;

(5) the hearing to modify disposition required by §54.05 of this code;

(6) hearings required by Chapter 55 of this code;

(7) habeas corpus proceedings challenging the legality of detention resulting from action under this title; and

(8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title.

(b) The child's right to representation by an attorney shall not be waived in:

(1) a hearing to consider transfer to criminal court as required by Section 54.02 of this code;

(2) an adjudication hearing as required by Section 54.03 of this code;

(3) a disposition hearing as required by Section 54.04 of this code;

(4) a hearing prior to commitment to the Texas Youth Commission as a modified disposition in accordance with Section 54.05(f) of this code; or

(5) hearings required by Chapter 55 of this code.

(c) If the child was not represented by an attorney at the detention hearing required by Section 54.01 of this code and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court shall order the retention of an attorney according to Subsection (d) or appoint an attorney according to Subsection (f).

(d) The court shall order a child's parent or other person responsible for support of the child to employ an attorney to represent the child, if:

(1) the child is not represented by an attorney;

(2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

(A) has not been waived under Section 51.09 of this code; or

(B) may not be waived under Subsection (b) of this section.

(e) The court may enforce orders under Subsection (d) by proceedings under Section 54.07 or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under Section 54.07.

(f) The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if:

(1) the child is not represented by an attorney;

(2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child; and

(3) the child's right to representation by an attorney:

(A) has not been waived under Section 51.09 of this code; or

(B) may not be waived under Subsection (b) of this section.

(g) The juvenile court may appoint an attorney in any case in which it deems representation necessary to protect the interests of the child.

(h) Any attorney representing a child in proceedings under this title is entitled to 10 days to prepare for any adjudication or transfer hearing under this title.

D. Computation of Time

Government Code § 311.014. COMPUTATION OF TIME. (a) In computing a period of days, the first day is excluded and the last day is included.

(b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

(c) If a number of months is to be computed by counting the months from a particular day, the period ends on the same numerical day in the concluding month as the day of the month from which the computation is begun, unless there are not that many days in the concluding month, in which case the period ends on the last day of that month.

III. Procedure and Evidence

Family Code § 51.17. Procedure and Evidence

(a) Except for the burden of proof to be borne by the state in adjudicating a child to be delinquent or in need of supervision under Section 54.03(f) or otherwise when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title.

(b) Discovery in a proceeding under this title is governed by the Code of Criminal Procedure and by case decisions in criminal cases.

(c) Except as otherwise provided by this title, the Texas Rules of Evidence apply to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title.

(d) When on the motion for appointment of an interpreter by a party or on the motion of the juvenile court, in any proceeding under this title, the court determines that the child, the child's parent or guardian, or a witness does not understand and speak English, an interpreter must be sworn to interpret for the person as provided by Article 38.30, Code of Criminal Procedure.

(e) In any proceeding under this title, if a party notifies the court that the child, the child's parent or guardian, or a witness is deaf, the court shall appoint a qualified interpreter to interpret the proceedings in any language, including sign language, that the deaf person can understand, as provided by Article 38.31, Code of Criminal Procedure.

(f) Any requirement under this title that a document contain a person's signature, including the signature of a judge or a clerk of the court, is satisfied if the document contains the signature of the person as captured on an electronic device or as a digital signature. Article 2.26, Code of Criminal Procedure, applies in a proceeding held under this title.

(g) Articles 21.07, 26.07, 26.08, 26.09, and 26.10, Code of Criminal Procedure, relating to the name of an adult defendant in a criminal case, apply to a child in a proceeding held under this title.

(h) Articles 57.01 and 57.02, Code of Criminal Procedure, relating to the use of a pseudonym by a victim in a criminal case, apply in a proceeding held under this title.

(i) Except as provided by Section 56.03(f), the state is not required to pay any cost or fee otherwise imposed for court proceedings in either the trial or appellate courts.

IV. Objection to Jurisdiction Because of Age

§ 51.042. Objection to Jurisdiction Because of Age of the Child

(a) A child who objects to the jurisdiction of the court over the child because of the age of the child must raise the objection at the adjudication hearing or discretionary transfer hearing, if any.

(b) A child who does not object as provided by Subsection (a) waives any right to object to the jurisdiction of the court because of the age of the child at a later hearing or on appeal.

V. Admonishments

A Family Code Rules

Family Code § 54.03. Adjudication Hearing

(a) A child may be found to have engaged in delinquent conduct or conduct indicating a need for supervision only after an adjudication hearing conducted in accordance with the provisions of this section.

(b) At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if he is not already represented; and

(6) the child's right to trial by jury.

(c) Trial shall be by jury unless jury is waived in accordance with Section 51.09. If the hearing is on a petition that has been approved by the grand jury under Section 53.045, the jury must consist of 12 persons and be selected in accordance with the requirements in criminal cases. Jury verdicts under this title must be unanimous.

(d) Except as provided by Section 54.031, only material, relevant, and competent evidence in accordance with the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure, may be considered in the adjudication hearing. Except in a detention or discretionary transfer hearing, a social history report or social service file shall not be viewed by the court before the adjudication decision and shall not be viewed by the jury at any time.

(e) A child alleged to have engaged in delinquent conduct or conduct indicating a need for supervision need not be a witness against nor otherwise incriminate himself. An extrajudicial statement which was obtained without fulfilling the requirements of this title or of the constitution of this state or the United States, may not be used in an adjudication hearing. A statement made by the child out of court is insufficient to support a finding of delinquent conduct or conduct indicating a need for supervision unless it is corroborated in whole or in part by other evidence. An adjudication of delinquent conduct or conduct indicating a need for supervision cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the child with the alleged delinquent conduct or conduct indicating a need for supervision; and the corroboration is not sufficient if it merely shows the commission of the alleged conduct. Evidence illegally seized or obtained is inadmissible in an adjudication hearing.

(f) At the conclusion of the adjudication hearing, the court or jury shall find whether or not the child has engaged in delinquent conduct or conduct indicating a need for supervision. The finding must be based on competent evidence admitted at the hearing. The child shall be presumed to be innocent of the charges against the child and no finding that a child has engaged in delinquent conduct or conduct indicating a need for supervision may be returned unless the state has proved such beyond a reasonable doubt. In all jury cases the jury will be instructed that the burden is on the state to prove that a child has engaged in delinquent conduct or is in need of supervision beyond a reasonable doubt. A child may be adjudicated as having engaged in conduct constituting a lesser included offense as provided by Articles 37.08 and 37.09, Code of Criminal Procedure.

(g) If the court or jury finds that the child did not engage in delinquent conduct or conduct indicating a need for supervision, the court shall dismiss the case with prejudice.

(h) If the finding is that the child did engage in delinquent conduct or conduct indicating a need for supervision, the court or jury shall state which of the allegations in the petition were found to be established by the evidence. The court shall also set a date and time for the disposition hearing.

(i) In order to preserve for appellate or collateral review the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence.

B. Parallel Criminal Court Rules

Code of Criminal Procedure Art. 26.13. Plea of Guilty

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

(1) the range of the punishment attached to the offense;

(2) the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. Provided that the court shall inquire as to the existence of any plea bargaining agreements between the state and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea. Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere;

(3) the fact that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the defendant before he may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial;

(4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law;

(5) the fact that the defendant will be required to meet the registration requirements of Chapter 62, if the defendant is convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter; and

(6) the fact that it is unlawful for the defendant to possess or transfer a firearm or ammunition if the defendant is convicted of a misdemeanor involving family violence, as defined by Section 71.004, Family Code.

(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.

(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

(d) The court may make the admonitions required by this article either orally or in writing. If the court makes the admonitions in writing, it must receive a statement signed by the defendant and the defendant's attorney that he understands the admonitions and is

aware of the consequences of his plea. If the defendant is unable or refuses to sign the statement, the court shall make the admonitions orally.

(e) Before accepting a plea of guilty or a plea of nolo contendere, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.

(f) The court must substantially comply with Subsection (e) of this article. The failure of the court to comply with Subsection (e) of this article is not grounds for the defendant to set aside the conviction, sentence, or plea.

(g) Before accepting a plea of guilty or a plea of nolo contendere and on the request of a victim of the offense, the court may assist the victim and the defendant in participating in a victim-offender mediation program.

(h) The court must substantially comply with Subsection (a)(5). The failure of the court to comply with Subsection (a)(5) is not a ground for the defendant to set aside the conviction, sentence, or plea.

(i) Notwithstanding this article, a court shall not order the state or any of its prosecuting attorneys to participate in mediation, dispute resolution, arbitration, or other similar procedures in relation to a criminal prosecution unless upon written consent of the state.

C. Court of Criminal Appeals Cases

DAVID JOHN BESSEY, Appellant v. THE STATE OF TEXAS
NO. PD-1401-06
COURT OF CRIMINAL APPEALS OF TEXAS
239 S.W.3d 809; 2007 Tex. Crim. App. LEXIS 1630
November 14, 2007, Delivered
NOTICE: PUBLISH

PRIOR HISTORY: [*1]
ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS, UPSHUR COUNTY.
Bessey v. State, 199 S.W.3d 546, 2006 Tex. App. LEXIS 6805 (Tex. App. Texarkana, 2006)
CASE SUMMARY
PROCEDURAL POSTURE: Defendant pled guilty, and a jury found him guilty and sentenced him to life for each of three counts of sexual assault and to 20 years' imprisonment for injury to a child. The trial judge ordered that the sentences be served consecutively. The Sixth Court Of Appeals, Upshur County, Texas, affirmed, holding that the trial court's incomplete admonishment could not be raised for the first time on appeal. Defendant sought further review.

OVERVIEW: Defendant argued on appeal that the trial court failed to properly admonish

him regarding the consequences of his plea, specifically the sex-offender registration requirement. The court of appeals acknowledged that the trial court had failed to fully comply with the requirements of Tex. Code Crim. Proc. Ann. art. 26.13, but held that such error had to be preserved in the trial court through an objection or a motion for new trial. On further review, the court rejected the reasoning of the court of appeals and held that a defendant's right to be properly admonished did not have to be raised at trial to be preserved. However, the court found that the failure to admonish defendant as to sex offender registration was harmless error under Tex. R. App. P. 44.2(b). The court reasoned that the State presented substantial evidence of guilt and that the omitted admonition regarding the sex-offender registration requirement did not apply to or affect defendant, given that defendant would not be eligible for parole until serving 100 years of the sentence.

OUTCOME: The court affirmed the decision but not the reasoning of the court of appeals.

OPINION
The issue in this case is whether an appellant may raise the issue of improper admonishments regarding a plea of guilty without having made an objection or raising the issue at trial. Appellant was charged by indictment with three counts of sexual assault and one count of injury to a child. 1 Appellant initially pled not guilty, but changed his plea to guilty after the jury had been sworn. The trial court admonished Appellant regarding the punishment range for the offenses and the effects a guilty plea might have on a non-citizen, but failed to fully admonish him regarding the consequences of his guilty plea. The jury found Appellant guilty on all counts, and Appellant appealed. The court of appeals affirmed the conviction, holding that the trial court's incomplete admonishment could not be raised for the first time on appeal. Bessey v. State, 199 S.W.3d 546, 552 (Tex. App.-- Texarkana 2006). [*2] We granted review to clarify this area of the law. We affirm the decision, but not the reasoning of the court of appeals.

FOOTNOTES
1 The indictment contained ten counts, six of which were abandoned by the State.

FACTS
Appellant was charged with three counts of aggravated sexual assault of a child, a first-degree felony, and one count of injury to a child, a second-degree felony. Prior to accepting Appellant's pleas, the trial court admonished Appellant as to the range of punishment for his charges and the effects a guilty plea might have on a non-citizen. Appellant chose to remain silent during the arraignment proceedings, so the trial court entered not guilty pleas on Appellant's behalf. After the jury was sworn and empaneled, Appellant changed his plea to guilty for each of the counts. The trial court accepted Appellant's pleas, and the issue of punishment was submitted to the jury. The jury found appellant guilty on all counts and sentenced him to imprisonment for life and a $ 10,000 fine for each count of sexual assault and to twenty years' imprisonment and a $ 10,000 fine for the count of injury to a child. The trial judge ordered that the sentences be served consecutively.

Appellant raised [*3] several points of error on appeal, including that the trial court failed to properly admonish him regarding the consequences of his plea, specifically the sex-offender registration requirement. The court of appeals acknowledged that the trial court had failed to fully comply with the requirements of Texas Code of Criminal Procedure Article 26.13, 2 but held that such error must be preserved in the trial court by raising an objection or in a motion for new trial. The court of appeals overruled the point of error and affirmed the conviction, holding that Appellant had not preserved the issue for appellate review. Bessey, 199 S.W.3d at 552. Appellant filed a petition for discretionary review. We granted review to determine whether an appellant may raise the issue of improper admonishments regarding a plea of guilty for the first time on appeal, without objecting or raising the issue at trial.

FOOTNOTES
2 Subsequent references to "Article" or "Articles" refer to the Texas Code of Criminal Procedure.

ANALYSIS
The court of appeals noted the trial court's error in failing to properly admonish Appellant, but held that failure to comply with Article 26.13 may not be raised for the first time on appeal. HN1 Article 26.13 [*4] requires that, prior to accepting a plea of guilty or nolo contendere, the court shall admonish the defendant of five things: (1) the range of punishment attached to the offense, (2) certain aspects of the law on plea-bargain agreements, (3) the effect that a plea-bargain agreement may have on the right of appeal, (4) the effect that a conviction might have on a non-citizen, and (5) the fact that a defendant will have to register as a sex offender if convicted of, or placed on deferred adjudication for, any of the sexual offenses listed in Chapter 62 of the Code of Criminal Procedure.

Appellant asserts that a defendant need not object at trial to preserve admonishment error. The State responds that the court of appeals correctly held that Appellant did not preserve the issue for appeal. The State further argues that the duty to register as a sex offender is a collateral consequence of Appellant's guilty pleas, and the trial court's failure did not render his pleas involuntary. 3 Finally, the State argues that any error was harmless.

FOOTNOTES
3 We have previously addressed both of these arguments. HN2 Sex-offender registration is not a collateral consequence of a defendant's guilty plea, rather it [*5] is a direct, non-punitive consequence. Anderson v. State, 182 S.W.3d 914, 918 (Tex. Crim. App. 2006). Additionally, failure to admonish an appellant as to the sex offender registration requirement does not render his plea involuntary. Id. (citing Mitschke v. State, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004)).

PRESERVATION OF ERROR

HN3Errors may be raised for the first time on appeal if the complaint is that the trial court disregarded an absolute or systemic requirement or that the appellant was denied a waivable-only right that he did not waive. Mendez v. State, 138 S.W.3d 334, 342 (Tex. Crim. App. 2004), Marin v. State, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993). A defendant's right to be properly admonished is a waivable-only right. This is because the court has a statutory duty to properly admonish defendants as described by Article 26.13. "A law that puts a duty on the trial court to act sua sponte, creates a right that is waivable only. It cannot be a law that is forfeited by a party's inaction." Mendez, 138 S.W.3d at 343. Thus, a court's failure to properly admonish a defendant cannot be forfeited and may be raised for the first time on appeal unless it is expressly waived.

The court [*6] of appeals based its holding on a failure to admonish case decided by the Texarkana Court of Appeals, Rhea v. State. 181 S.W.3d 478, 484 (Tex. App.--Texarkana 2005, pet. ref'd). In Rhea, the appellant appealed his conviction for sexual assault, contending that the trial court had committed reversible error by failing to admonish him as required by 26.13 and specifically by failing to admonish him regarding the sex-offender registration requirement. Id. at 483. The Rhea court held that complaints about failure to admonish must be preserved in accordance with Texas Rule of Appellate Procedure 33.1. However, as we explained above, HN4a defendant's right to be properly admonished need not be raised at trial to be preserved. "[W]e think it far more consistent with the overall structure of our adversary system that litigants not be required by Rule [33.1(a)] 4 to do more for the preservation of their complaints on appeal than they must do at trial to secure benefits of the law to which they are entitled." Marin, 851 S.W.2d at 278; see also Mendez, 138 S.W.3d at 343 (quoting this passage from Marin). The defendant need make no request at trial for the implementation of his right to proper admonition. [*7] Thus, he need not act at trial to preserve his complaint of a failure to admonish. Appellant is entitled to assert his claim on appeal regarding the trial court's failure to properly admonish him, despite not having made the claim in the trial court.

FOOTNOTES

4 Marin discussed the predecessor to Rule 33.1(a), Rule 52(a). Rule 52(a) was rewritten and renumbered as 33.1(a) in 1997, but its requirements did not change in any way that is material to this case. See Mendez, 138 S.W.3d at 343.

HARMLESS ERROR

HN5A trial court's failure to properly admonish a defendant is subject to the harm analysis of Rule of Appellate Procedure 44.2(b): "Any other [than constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." 5 In applying Rule 44.2(b) to the failure to give an admonition, the court considers the record as a whole to determine whether, in this particular case, the error affected substantial rights. Anderson v. State, 182 S.W.3d 914, 918 (Tex. Crim. App. 2006). If it did, it is not harmless error. In Anderson, we considered the strength of the evidence of guilt; whether the record indicates that the appellant was aware of the requirement; and [*8] whether the omitted admonition actually applied to the appellant's situation. Id. at 919-921.

FOOTNOTES

5 As the dissent correctly points out, our custom normally is to remand the case to the court of appeals for a harm analysis. However, because of the unique circumstances of the type of admonishment error, and the manner in which Appellant has brought the appeal, we feel that judicial economy directs us to proceed to perform our own harm analysis. See McDonald v. State, 179 S.W.3d 571 (Tex. Crim. App. 2005).

In the case before us, the State presented substantial evidence of guilt. The victim testified as to the events, and the State introduced a video of Appellant engaging in the charged acts. The State also presented 404(b) evidence regarding other children who had allegedly been abused by Appellant. Those children testified, and the State produced video evidence of Appellant engaging in sexual conduct with those children. The defense presented no evidence that Appellant was not guilty, but tried to mitigate the damaging effect of the evidence. The defense counsel said in his opening statements at punishment that the evidence would show that Appellant was guilty, but that he hoped the jury would [*9] take into account the possibility of rehabilitation. Although there was significant evidence of guilt, that alone does not support a finding that Appellant's decision to plead guilty would not have changed if he had been properly admonished.

We also searched the record for any indication that Appellant was aware of the requirement, despite the trial court's failure to properly admonish him. If an appellant was already aware of the registration requirement, the effect of the court's error on his decision to plead guilty would be much less. However, here there is no indication in the record that Appellant was aware of the registration requirement. And, as we stated in Burnett v. State, 88 S.W.3d 633, 638 (Tex. Crim. App. 2002), a silent record supports the inference that the appellant did not know the consequences of his plea. Although there is nothing to suggest that Appellant knew about the registration requirement, he has not claimed at any point in his appeal that his guilty plea was involuntary due to the court's failure to admonish him that he would be required to register as a sex offender.

Finally, we looked at the record to determine whether the omitted admonition actually applied [*10] to Appellant's situation. In some failure to admonish cases, the omitted admonition does not affect the appellant. For example, when a court has failed to admonish a defendant on the immigration consequences of a conviction, we have held that the error was harmless where the record showed that the appellant was a U.S. citizen because that particular admonition does not apply to that appellant. Anderson, 182 S.W.3d at 919. In this case, the omitted admonition regarding the sex-offender registration requirement does apply to Appellant in that he was charged with a an offense for which a person is subject to registration. However, based on the cumulation of the sentences in this case, the omitted admonition regarding the sex-offender registration requirement does not apply to or affect Appellant. Because the jury sentenced Appellant to the maximum sentence for each offense and the judge ordered that the sentences be served consecutively, Appellant will not even be eligible for parole until he has served 100 years of his sentence. As a result, it appears that Appellant may never be released from prison and thus would not be subject to the sex-offender registration requirement as mandated [*11] by Article 26.13(a)(5). Therefore, Appellant was not harmed by the trial

court's failure to inform him of the registration requirement.

Considering the record as a whole, we have fair assurance that no substantial right was affected by the trial court's error in failing to admonish Appellant regarding the sex-offender registration requirement. By the standard of Rule of Appellate Procedure 44.2(b), the error was harmless. 6

FOOTNOTES
6 Effective September 2005, the 79th Legislature amended Article 26.13(h) which now states, "[t]he court must substantially comply with Subsection (a)(5). The failure of the court to comply with Subsection (a)(5) is not a ground for the defendant to set aside the conviction, sentence, or plea." The legislature noted that the change in law applies only to pleas entered on or after the effective date of the Act, September 1, 2005. See Section 4.03 of Acts 2005, 79th Leg., ch 1008. Appellant's appeal is governed by the old statute, which stated that "[b]efore accepting a plea of guilty or nolo contendere from a defendant described by Subsection (a)(5), the court shall ascertain whether the attorney representing the defendant has advised the defendant regarding registration [*12] requirements under Chapter 62." We do not address the proper harm analysis under the current 26.13(h) for a failure to admonish regarding sex-offender registration.

CONCLUSION

HN6On appeal, an appellant may raise the issue of improper admonishments regarding a plea of guilty without having made an objection or raising the issue at trial. However, such an error is subject to a harm analysis. After considering the record, we determine that no substantial right was affected by the trial court's error in failing to admonish this Appellant. By the standard of Rule of Appellate Procedure 44.2(b), the error was harmless. The judgment, but not the reasoning, of the court of appeals judgment is affirmed.

Meyers, J.

Delivered: November 14, 2007

Publish

DISSENT BY: Johnson, J., filed a concurring and dissenting opinion in which Womack, J., joined.

DISSENT

CONCURRING AND DISSENTING OPINION

I agree that an appellant may raise the issue of improper admonishments regarding a plea of guilty without having made an objection or raising the issue at trial. The purpose of the admonition at issue here is to make sure that the defendant knows about the registration

requirement. Only a defendant who already knew about the registration requirement, and thus would not need the admonition, would be in a position to object to the absence of the admonition. However, a person who did not already know about the registration requirement would not know that a required admonition had been erroneously omitted and would, therefore, not object to its absence. I therefore join the Court's opinion as to its discussion of preservation of error.

The court of appeals erred when it held that appellant had not preserved error as to the inadequate admonition. The proper response by this Court is to remand the cause to the court of appeals and let it consider, in the first instance, the next step in the process-analysis of the harm that may have resulted from the trial court's failure to properly admonish appellant. It may seem to some to be inefficient to remand when this Court can itself consider that issue, but the role of this Court is to review decisions of the next lower court. In such circumstances as these, there was no decision as to the issue of harm, thus no decision on that issue for this Court to review. For this reason, I respectfully dissent to the Court's failure to remand this cause to the court of appeals.

Filed: November 14, 2007

VI. Motions

A. "Not your everyday Motions."

1. List of Motions printed in this paper

    a. Chapter 55 Motions
    b. Motion for Deferred along with Deferred Representations
    c. Expert Witness Motion
    d. Outcry
    e. 404 b, etc.
    f. Motion in Limine
    g. Deposition
    h. Rape Shield in Camera Motion
    i. Jury Trial Election

2. List of Motions reprinted with various statutes and cases

    a. Chapter 55 Motions (Family Code Sections 55.01-55.61)

    b. Motion for Deferred along with Deferred Representations

Family Code § 53.03. Deferred Prosecution

(a) Subject to Subsections (e) and (g), if the preliminary investigation required by Section 53.01 of this code results in a determination that further proceedings in the case

are authorized, the probation officer or other designated officer of the court, subject to the direction of the juvenile court, may advise the parties for a reasonable period of time not to exceed six months concerning deferred prosecution and rehabilitation of a child if:

(1) deferred prosecution would be in the interest of the public and the child;

(2) the child and his parent, guardian, or custodian consent with knowledge that consent is not obligatory; and

(3) the child and his parent, guardian, or custodian are informed that they may terminate the deferred prosecution at any point and petition the court for a court hearing in the case.

(b) Except as otherwise permitted by this title, the child may not be detained during or as a result of the deferred prosecution process.

(c) An incriminating statement made by a participant to the person giving advice and in the discussions or conferences incident thereto may not be used against the declarant in any court hearing.

(d) The juvenile board may adopt a fee schedule for deferred prosecution services and rules for the waiver of a fee for financial hardship in accordance with guidelines that the Texas Juvenile Probation Commission shall provide. The maximum fee is $ 15 a month. If the board adopts a schedule and rules for waiver, the probation officer or other designated officer of the court shall collect the fee authorized by the schedule from the parent, guardian, or custodian of a child for whom a deferred prosecution is authorized under this section or waive the fee in accordance with the rules adopted by the board. The officer shall deposit the fees received under this section in the county treasury to the credit of a special fund that may be used only for juvenile probation or community-based juvenile corrections services or facilities in which a juvenile may be required to live while under court supervision. If the board does not adopt a schedule and rules for waiver, a fee for deferred prosecution services may not be imposed.

(e) A prosecuting attorney may defer prosecution for any child. A probation officer or other designated officer of the court:

(1) may not defer prosecution for a child for a case that is required to be forwarded to the prosecuting attorney under Section 53.01(d); and

(2) may defer prosecution for a child who has previously been adjudicated for conduct that constitutes a felony only if the prosecuting attorney consents in writing.

(f) The probation officer or other officer designated by the court supervising a program of deferred prosecution for a child under this section shall report to the juvenile court any violation by the child of the program.

(g) Prosecution may not be deferred for a child alleged to have engaged in conduct that:

(1) is an offense under Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or

(2) is a third or subsequent offense under Section 106.04 or 106.041, Alcoholic Beverage Code.

(h) If the child is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision that violates Section 28.08, Penal Code, deferred prosecution under this section may include:

(1) voluntary attendance in a class with instruction in self-responsibility and empathy for a victim of an offense conducted by a local juvenile probation department, if the class is available; and

(2) voluntary restoration of the property damaged by the child by removing or painting over any markings made by the child, if the owner of the property consents to the restoration.

(i) The court may defer prosecution for a child at any time:

(1) for an adjudication that is to be decided by a jury trial, before the jury is sworn;

(2) for an adjudication before the court, before the first witness is sworn; or

(3) for an uncontested adjudication, before the child pleads to the petition or agrees to a stipulation of evidence.

(j) The court may add the period of deferred prosecution under Subsection (i) to a previous order of deferred prosecution, except that the court may not place the child on deferred prosecution for a combined period longer than one year.

(k) In deciding whether to grant deferred prosecution under Subsection (i), the court may consider professional representations by the parties concerning the nature of the case and the background of the respondent. The representations made under this subsection by the child or counsel for the child are not admissible against the child at trial should the court reject the application for deferred prosecution.

c. Expert Witness Motion

Texas Code of Criminal Procedure Art. 39.14. Discovery

(a) Upon motion of the defendant showing good cause therefor and upon notice to the other parties, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated

documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted shall not extend to written communications between the State or any of its agents or representatives or employees. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in the presence of a representative of the State.

(b) On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

d. Outcry

i. The Statute

Family Code § 54.031. Hearsay Statement of Child Abuse Victim

(a) This section applies to a hearing under this title in which a child is alleged to be a delinquent child on the basis of a violation of any of the following provisions of the Penal Code, if a child 12 years of age or younger is the alleged victim of the violation:

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Prohibited Sexual Conduct); or

(3) Section 43.25 (Sexual Performance by a Child).

(b) This section applies only to statements that describe the alleged violation that:

(1) were made by the child who is the alleged victim of the violation; and

(2) were made to the first person, 18 years of age or older, to whom the child made a statement about the violation.

(c) A statement that meets the requirements of Subsection (b) of this section is not

inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the hearing begins, the party intending to offer the statement:

(A) notifies each other party of its intention to do so;

(B) provides each other party with the name of the witness through whom it intends to offer the statement; and

(C) provides each other party with a written summary of the statement;

(2) the juvenile court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child who is the alleged victim testifies or is available to testify at the hearing in court or in any other manner provided by law.

ii. Case Law Interpreting the Statute

IN THE MATTER OF Z. L. B.

NO. 01-1209

SUPREME COURT OF TEXAS

102 S.W.3d 120; 2003 Tex. LEXIS 29; 46 Tex. Sup. J. 512

March 13, 2003, Delivered

SUBSEQUENT HISTORY: [**1] As Corrected March 21, 2003.

PRIOR HISTORY: ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS.
In re Z.L.B., 56 S.W.3d 818, 2001 Tex. App. LEXIS 5906 (Tex. App. Dallas, 2001)
CASE SUMMARY
PROCEDURAL POSTURE: The Texas Court of Appeals, Fifth District, reversed juvenile defendant's adjudication of delinquency for engaging in delinquent conduct by engaging in sexual contact with a child. The court of appeals held that the trial court erred in permitting a daycare director to testify as an outcry witness. The State petitioned for review, which the instant court granted.

OVERVIEW: The victim was defendant's five-year-old brother. At trial, the prosecution called the daycare director as a witness, but defendant objected to the daycare director's testimony on the basis that the victim had made an earlier outcry to his mother. The issue

in this case was which party bore the burden to produce evidence of an earlier statement when defendant claimed that the daycare director was not the "first person" to whom a sufficient statement was made. The court of appeals placed this burden on the prosecution. The instant court concluded that once the prosecution laid the initial predicate to establish an outcry witness, the burden shifted to defendant to prove that the victim made an earlier statement to another individual. The instant court was persuaded that the outcry statute should be interpreted no differently in a juvenile trial than in an adult criminal trial. Defendant had the burden to introduce evidence that the victim's statement to his mother was more than just a general allusion to abuse. Since defendant failed to introduce such evidence, the trial court did not abuse its discretion in allowing the daycare director to testify as the outcry witness.

OUTCOME: The judgment of the court of appeals was reversed, and the case was remanded to the court of appeals for further proceedings.

OPINION
PER CURIAM

HN1In the trial of a juvenile for certain sexual or assaultive offenses, the Texas Family Code makes an "outcry" exception to the hearsay rule for "statements that describe the alleged violation that: (1) were made by the child who is the alleged victim of the violation; and (2) were made to the first person, 18 years of age or older, to whom the child made a statement about the violation." TEX. FAM. CODE § 54.031(b); see also TEX. CODE CRIM. PROC. art. 38.072 § 2(a)(containing a nearly identical provision applicable in adult criminal proceedings). We must decide who bears the burden to produce evidence of an earlier statement when the defendant claims that the prosecution's proffered outcry witness was not the "first person" to whom a sufficient statement was made. The court of appeals placed this burden on the prosecution. 56 S.W.3d 818. We hold that HN2once the prosecution has laid the initial predicate to establish an [**2] outcry witness, the burden shifts to the defendant to prove that the child made an earlier statement to another individual. Because the defendant in this case failed to introduce [*121] evidence of an earlier statement, we reverse the court of appeals' judgment.

In 1999, five-year-old J.M. reported to his daycare director that his twelve-year-old brother Z.L.B. was "touching his privates" and that J.M. "wanted him to stop." The daycare director, Gail Sullivan, contacted Child Protective Services (CPS), which in turn contacted the police department. After the police questioned him, Z.L.B. provided a written confession stipulating that he had "pulled his [brother's] pants down" and "touched his brother's privates four or five times in the closet and living room" and that he was "sorry about [his] actions."

The Dallas County criminal district attorney subsequently charged Z.L.B. with engaging in delinquent conduct by engaging in sexual contact with a child. At trial, which was to the court, the prosecution called Sullivan as a witness. Z.L.B. objected to Sullivan's outcry testimony on the basis that J.M. had made an earlier outcry to his mother. The prosecutor agreed that J.M. may have [**3] made an earlier statement to his mother, but

argued that the mother would not be an appropriate outcry witness as she "did nothing and was adverse to the State." The judge permitted the director to testify, but stated that "to the extent that [defense counsel is] able to establish at some later point that this wasn't an outcry statement, that it wasn't the first statement made, then I will deal with that. And if I need to, I will disregard it."

The defendant then took Sullivan on voir dire. Sullivan testified: "I asked [J.M.] if he had told mommy. And he said 'yes.' And I said 'then what did mommy do?' and he said 'nothing.'" This was the only evidence of an earlier outcry in the record. After finding the allegations against Z.L.B. to be true, the trial court made an adjudication of delinquency. On disposition, the judge assigned Z.L.B. to two years' intensive-supervision probation in his grandfather's custody. The judge further ordered Z.L.B. to have no contact with J.M. or other young children and to participate in community service and in sex offender counseling.

Z.L.B. appealed his adjudication. The court of appeals held that the trial court erred in permitting Sullivan to [**4] testify as the outcry witness. 56 S.W.3d at 823. Specifically, the court held that "by failing to counter appellant's objection with evidence showing appellant's mother could not be the outcry witness, the State failed to meet its burden of establishing compliance with the outcry statute." Id. at 822.

HN3 Ordinarily, the statements that J.M. made to his daycare director would be inadmissible hearsay at trial. TEX. R. EVID. 802. However, our statute makes an "outcry" exception to the hearsay rule for the first report of sexual abuse that the child makes to an adult. TEX. FAM. CODE § 54.031(b)(applicable in the trial of a juvenile); TEX. CODE CRIM. PROC. art. 38.072 § 2(a)(applicable in the trial of an adult). 1 A majority of states have enacted similar hearsay exceptions for a child's out-of- court statement about sexual abuse. See Buckley v. State, 758 S.W.2d 339, 342 (Tex. App.-Texarkana 1988), aff'd, 786 S.W.2d 357 (Tex. Crim. App. 1990). By allowing testimony only from the "first person" that the child told, the Texas statute strikes a balance "between the [**5] necessity of introducing [*122] the child's statements through an adult witness and the necessity of avoiding the dangers implicit in hearsay itself." Garcia v. State, 792 S.W.2d 88, 93 (Tex. Crim. App. 1990)(Clinton, J., dissenting).

FOOTNOTES

1 Before the outcry exception was added to the statute, outcry testimony was sometimes admitted through either the "excited utterance" hearsay exception, TEX. R. EVID. 803(2), or the common-law "hue and cry" rule. See Buckley v. State, 758 S.W.2d 339, 345 (Tex. App.-Texarkana 1988)(Cornelius, C.J., concurring), aff'd, 786 S.W.2d 357 (Tex. Crim. App. 1990).

In applying the outcry exception to the trial of an adult, the Court of Criminal Appeals has held that the outcry statement must be one that "in some discernible manner describes the alleged offense." Garcia v. State, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990). It also

"must be more than words which give a general allusion that something in the area of child abuse was [**6] going on." Id. The court went on to note that by adding the outcry exception to the statute, the Legislature "was obviously striking a balance between the general prohibition against hearsay and the specific societal desire to curb the sexual abuse of children." Id. The court concluded that "the societal interest in curbing child abuse would hardly be served if all that 'first person' had to testify to was a general allegation from the child that something in the area of child abuse was going on at home." Id.

In this case, there is some indication that J.M. may have told his mother about the abuse, making her the appropriate outcry witness. However, the record does not show what J.M. actually said to her; we only know that he told his daycare director that he already "had told mommy." Without more information, we cannot know what J.M. actually said to his mother. His statement may have been as vague as that he "wanted [Z.L.B.] to stop," like he first told Sullivan, or it could have included specific details about Z.L.B.'s conduct. Without evidence of the contents of J.M.'s statement to his mother we cannot know if she would have been a proper outcry witness.

The court [**7] of appeals in this case put the burden to establish the contents of that statement on the prosecution. It held that "the State failed to establish the daycare director was a qualified outcry witness" because the prosecutor "failed to counter appellant's objection with evidence showing appellant's mother could not be the outcry witness." 56 S.W.3d at 822. This approach contradicts the scheme laid out by the Court of Criminal Appeals. See Garcia, 792 S.W.2d at 91. In Garcia, the defendant also objected to a witness's outcry testimony, alleging that the child had made an earlier statement to her teacher. Id. At trial, the child was asked, "What did you tell your teacher there in the classroom?" Id. She answered, "Well, I told her what happened." Id. The Court of Criminal Appeals concluded that the "general phrases in evidence . . . apparently did not, in context, and in the trial court's view, amount to more than the general allusion heretofore condemned." Id. The court also noted that "the State did lay a proper predicate" for its witness's outcry testimony, and that the defendant therefore had the burden to "rebut this predicate" by [**8] introducing evidence to show that the child had made a sufficient first outcry to the teacher. Id.

In Hayden v. State, 928 S.W.2d 229, 231 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd), a CPS caseworker testified as the outcry witness even though the child testified that "the first person [she] told" was her school counselor. Id. The court noted that "although [the counselor] was the first person the complainant told about the sexual abuse, there is no evidence that the complainant described to her the details of the alleged abuse." Id. The court cited Garcia for the proposition that "where the record is void of specific details of statements made by the complainant to an individual, such individual cannot be an outcry witness under article 38.072." Id. Consequently, the court held that "the trial court [*123] did not abuse its discretion by allowing [the caseworker] to testify as an outcry witness under article 38.072." Id.

We are persuaded that HN4 the outcry statute should be interpreted no differently in a

juvenile trial than in an adult criminal trial. Therefore, the defendant in this case had the burden to introduce evidence that J. [**9] M.'s statement to his mother was more than just a general allusion to abuse. Since the defendant failed to introduce such evidence, the trial court did not abuse its discretion in allowing Sullivan to testify as the outcry witness. The court of appeals erred in holding to the contrary. Accordingly, pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure, without hearing oral argument, the Court grants the state's petition for review, reverses the court of appeals' judgment, and remands the case to that court for further proceedings.

e. 404b, etc.

f. Motion in Limine

g. Deposition

Code of Criminal Procedure Art. 39.02. Witness Depositions

Depositions of witnesses may be taken by either the state or the defendant. When a party desires to take the deposition of a witness, the party shall file with the clerk of the court in which the case is pending an affidavit stating the facts necessary to constitute a good reason for taking the witness's deposition and an application to take the deposition. On the filing of the affidavit and application, and after notice to the opposing party, the court shall hear the application and determine if good reason exists for taking the deposition. The court shall base its determination and shall grant or deny the application on the facts made known at the hearing. This provision is limited to the purposes stated in Article 39.01.

h. Rape Victim In Camera Motion

Rule 412 Evidence of Previous Sexual Conduct in Criminal Cases

(a) Reputation or Opinion Evidence. --In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) Evidence of Specific Instances. --In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

(A) that is necessary to rebut or explain scientific or medical evidence offered by the

State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) Procedure for Offering Evidence. --If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) Record Sealed. --The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) Sexual Conduct of Child as Defense. --[Deleted by Texas Court of Criminal Appeals, Misc. Docket No. 06-101, effective January 1, 2007.]

i. Jury Trial Election

Family Code § 54.04. Disposition Hearing

(a) 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, but only if the child so elects in writing before the commencement of the voir dire examination of the jury panel. If a finding of delinquent conduct is returned, the child may, with the consent of the attorney for the state, change the child's election of one who assesses the disposition.

B. Defense Forms

Chapter 55 Motion

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

MOTION for CHAPTER 55 RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent, by and through his/her attorney of record Kimberly McCary, and files this Motion for Chapter 55 Relief and in support thereof would show unto the Court as follows:

Respondent is alleged to have committed delinquent conduct. Respondent's attorney asserts that: 1) Respondent may be in need of mental health services available under Chapter 55 of the Texas Family Code (hereinafter FC); 2) that Respondent may be unfit to proceed as a result of mental illness or mental retardation, and/or that 3) Respondent may not be responsible for his/her alleged conduct as a result of mental illness or retardation.

CHECK ALL RELIEF REQUESTED IN THIS MATTER

_____*I. Mental Illness Determination*

Under §55.11 FC, reprinted below, Respondent's attorney asserts that there is a possibility that Respondent suffers a mental illness, disease or condition, other than epilepsy, senility, alcoholism, or a mental deficiency that either (a) substantially impairs

his/her thoughts, perception of reality, emotional process or judgment or (b) grossly impairs his/her behavior as demonstrated by recent disturbed behavior.

§ 55.11. MENTAL ILLNESS DETERMINATION; EXAMINATION. (a) On a motion by a party, the juvenile court shall determine whether probable cause exists to believe that a child who is alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision has a mental illness. In making its determination, the court may:

(1) consider the motion, supporting documents, professional statements of counsel, and witness testimony; and

(2) make its own observation of the child.

(b) If the court determines that probable cause exists to believe that the child has a mental illness, the court shall temporarily stay the juvenile court proceedings and immediately order the child to be examined under Section 51.20. The information obtained from the examination must include expert opinion as to whether the child has a mental illness and whether the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code. If ordered by the court, the information must also include expert opinion as to whether the child is unfit to proceed with the juvenile court proceedings.

(c) After considering all relevant information, including information obtained from an examination under Section 51.20, the court shall:

(1) if the court determines that evidence exists to support a finding that the child has a mental illness and that the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code, proceed under Section 55.12; or

(2) if the court determines that evidence does not exist to support a finding that the child has a mental illness or that the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code, dissolve the stay and continue the juvenile court proceedings.

Added by Acts 1999, 76th Leg., ch. 1477, § 14, eff. Sept. 1, 1999.

II. Unfitness to Proceed Determination

Under §55.31 FC, reprinted below, Respondent's attorney asserts that there is a possibility that Respondent lacks the capacity to understand the proceedings in this Court or to assist in his own defense.

§ 55.31. UNFITNESS TO PROCEED DETERMINATION; EXAMINATION. (a) A child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long

as such incapacity endures.

(b) On a motion by a party, the juvenile court shall determine whether probable cause exists to believe that a child who is alleged by petition or who is found to have engaged in delinquent conduct or conduct indicating a need for supervision is unfit to proceed as a result of mental illness or mental retardation. In making its determination, the court may:

(1) consider the motion, supporting documents, professional statements of counsel, and witness testimony; and

(2) make its own observation of the child.

(c) If the court determines that probable cause exists to believe that the child is unfit to proceed, the court shall temporarily stay the juvenile court proceedings and immediately order the child to be examined under Section 51.20. The information obtained from the examination must include expert opinion as to whether the child is unfit to proceed as a result of mental illness or mental retardation.

(d) After considering all relevant information, including information obtained from an examination under Section 51.20, the court shall:

(1) if the court determines that evidence exists to support a finding that the child is unfit to proceed, proceed under Section 55.32; or

(2) if the court determines that evidence does not exist to support a finding that the child is unfit to proceed, dissolve the stay and continue the juvenile court proceedings.

Acts 1973, 63rd Leg., p. 1460, ch. 544, § 1, eff. Sept. 1, 1973. Amended by Acts 1995, 74th Leg., ch. 262, § 47, eff. May 31, 1995. Redesignated from V.T.C.A., Family Code § 55.04(a) and (b) and amended by Acts 1999, 76th Leg., ch. 1477, § 14, eff. Sept. 1, 1999.

III. Lack of Responsibility Determination

Under §55.51 FC, reprinted below, Respondent's attorney asserts that there is a possibility that the Respondent is not responsible for the conduct made the basis of the above cases in that he/she could not appreciate its wrongfulness or conform his/her conduct to the law's requirements at the time of the alleged offense.

§ 55.51. LACK OF RESPONSIBILITY FOR CONDUCT DETERMINATION; EXAMINATION. (a) A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or mental retardation, the child lacks substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law.

(b) On a motion by a party in which it is alleged that a child may not be responsible as a result of mental illness or mental

retardation for the child's conduct, the court shall order the child to be examined under Section 51.20. The information obtained from the examinations must include expert opinion as to whether the child is not responsible for the child's conduct as a result of mental illness or mental retardation.

(c) The issue of whether the child is not responsible for the child's conduct as a result of mental illness or mental retardation shall be tried to the court or jury in the adjudication hearing.

(d) Lack of responsibility for conduct as a result of mental illness or mental retardation must be proved by a preponderance of the evidence.

(e) In its findings or verdict the court or jury must state whether the child is not responsible for the child's conduct as a result of mental illness or mental retardation.

(f) If the court or jury finds the child is not responsible for the child's conduct as a result of mental illness or mental retardation, the court shall proceed under Section 55.52.

(g) A child found to be not responsible for the child's conduct as a result of mental illness or mental retardation shall not be subject to proceedings under this title with respect to such conduct, other than proceedings under Section 55.52.

Acts 1973, 63rd Leg., p. 1460, ch. 544, § 1, eff. Sept. 1, 1973. Amended by Acts 1995, 74th Leg., ch. 262, § 47, eff. May 31, 1995. Renumbered from V.T.C.A., Family Code § 55.05 and amended by Acts 1999, 76th Leg., ch. 1477, § 14, eff. Sept. 1, 1999.

Therefore, to address the issues raised herein, Respondent's attorney requests that the Court order that Respondent be examined by an appropriate expert, including a physician, psychiatrist, or psychologist, as provided by §51.20 of the Texas Family Code.

WHEREFORE, PREMISES CONSIDERED, Respondent requests that this Court grant this Motion and prays for all further relief to which he/she may be entitled.

Respectfully submitted,

_____

Kimberly McCary
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

NOTICE OF HEARING

A hearing on the above motion has been set for _____.

_____
Judge Presiding/Clerk of the Court

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was served on the attorney for the State of Texas and on this _____ day of _____, 2008, via hand delivery.

_____
Kimberly McCary

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

ORDER

On the date set forth below, the foregoing Motion was duly presented to the Court, and after consideration thereof, it is the opinion of the Court that the Motion is**:**

(WITH/WITHOUT) merit, and it is therefore (GRANTED/ DENIED). If GRANTED, the Court further ORDERS: that _____ shall conduct the evaluation. The parent/guardian SHALL/SHALL NOT be responsible for repaying the court for the cost of the evaluation.

IF GRANTED, THE PROCEEDINGS ARE HEREBY STAYED.

ENTERED this _____ day of _____, 2008.

_____
Judge Presiding

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

MOTION FOR DEFERRED PROSECUTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent, by and through his attorney of record, Kimberly McCary, and files this Motion for Deferred Prosecution and in support thereof would respectfully show unto the Court as follows:

According to Article 53.03 of the Texas Family Code (FC), the court may defer prosecution for a child at any time:

(1) for an adjudication that is to be decided by a jury trial, before the jury is sworn;

(2) for an adjudication before the court, before the first witness is sworn; or

(3) for an uncontested adjudication before the child pleads to the petition or agrees to a stipulation of evidence.

According to the late Professor Robert Dawson ***(Texas Juvenile Law, 6th Edition, page 65),*** this section of the Family Code recognizes the power of the juvenile court to grant deferred prosecution independently of the prosecutor's wishes "without seeking or obtaining prosecutorial approval."

Per 2005 legislative changes to the juvenile deferred prosecution statute, "in deciding whether to grant deferred prosecution…the court may consider professional

representations by the parties concerning the nature of the case and the background of the respondent. The representations made under this section by the child or counsel for the child are not admissible against the child at trial should the court reject the application for deferred prosecution." See FC 53.03(k).

Respondent's case fits into one of the three criteria of §53.03 listed above. Respondent prays that the Court grant his/her request for deferred prosecution.

WHEREFORE, PREMISES CONSIDERED, Respondent requests that this Court grant this Motion and prays for all further relief to which he/she may be entitled.

Respectfully submitted,

_____

Kimberly McCary
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

NOTICE OF HEARING

This Motion is set for hearing on: _____.

_____

Kimberly McCary

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____ day of _____ 200__, via _____.

_____

Kimberly McCary

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

ORDER

On the date set forth below, the foregoing Motion was duly presented to the Court, and after consideration thereof, it is the opinion of the Court that the Motion is:

(WITH/WITHOUT) merit, and it is therefore (GRANTED/ DENIED).

ENTERED this _____ day of _____, 200__.

_____
Judge Presiding

Deferred Representations

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

DEFERRED PROSECUTION REPRESENTATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent, by and through his attorney of record, Kimberly McCary, and files this/these Deferred Prosecution Representation(s) and in support thereof would respectfully show unto the Court as follows:

Per 2005 legislative changes to the juvenile deferred prosecution statute, "in deciding whether to grant deferred prosecution…the court may consider professional representations by the parties concerning the nature of the case and the background of the respondent. The representations made under this section by the child or counsel for the child are not admissible against the child at trial should the court reject the application for deferred prosecution." See FC 53.03(k).

Respondent hereby submits the attached representation(s).

Respectfully submitted,

_____

Kimberly McCary
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____ day of _____ 200__, via

_____ Hand Delivery

_____ Fax Transmission

_____ Delivery to District Attorney's Office.

_____
Kimberly McCary

Expert Witness Motion

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

MOTION TO PRODUCE WITNESS LIST RELATING TO OPINIONS AND EXPERT TESTIMONY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent, by and through his/her attorney of record, Kimberly McCary, and respectfully moves this Court instruct the prosecutor in this case to disclose to Respondent, pursuant to Article 39.14 of the Texas Code of Criminal Procedure, the name and address and telephone number of each person the State may use at trial to present evidence under Rules 702, 703, and 705 of the Texas Rules of Evidence, the existence of which is known, or by the exercise of due diligence may become known to said district attorney, or any expert witness with whom the State has consulted regarding this case.

Pursuant to Rule 705(a), Respondent requests disclosure, prior to trial, of the underlying facts or data which any expert witness referred to above may have reviewed.

Respectfully submitted,

Kimberly McCary
Attorney for Respondent
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____ day of _____, 2008, via _____.

_____
Kimberly McCary

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

ORDER

On the date set forth below, came on to be heard Respondent on the above Motion. After considering the same, the Court hereby

_____ Denies the Motion.

_____ Grants the Motion and makes the following Orders:

_____
_____.

Signed this ____ day of _____, 2008.

_____
Judge Presiding

Outcry Motion (Use with Caution)

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

MOTION FOR STATE TO DESIGNATE OUTCRY WITNESS and MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent by and through his/her attorney of record, Kimberly McCary, and respectfully moves this Court to order the State of Texas to designate its Outcry Witness and to conduct a Motion in Limine. In support of this Motion, Respondent would respectfully show unto the Court as follows:

I.

Pursuant to Article 38.072 of the Texas Code of Criminal Procedure (CCP), "outcry" hearsay statements are generally admissible against an accused. That statute is mirrored in the Juvenile Justice Code. See §54.031 of the Texas Family Code (FC) below.

> § 54.031. HEARSAY STATEMENT OF CHILD ABUSE VICTIM.
>
> (a) This section applies to a hearing under this title in which a child is alleged to be a delinquent child on the basis of a violation of any of the following provisions of the Penal Code, if a child 12 years of age or younger is the alleged victim of the violation:
>
> (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
> (2) Section 25.02 (Prohibited Sexual Conduct); or
> (3) Section 43.25 (Sexual Performance by a Child).
>
> (b) This section applies only to statements that describe the alleged violation that:
>
> (1) were made by the child who is the alleged victim of the violation; and

(2) were made to the first person, 18 years of age or older, to whom the child made a statement about the violation.

(c) A statement that meets the requirements of Subsection (b) of this section is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the hearing begins, the party intending to offer the statement:

(A) notifies each other party of its intention to do so;

(B) provides each other party with the name of the witness through whom it intends to offer the statement; and

(C) provides each other party with a written summary of the statement;

(2) the juvenile court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child who is the alleged victim testifies or is available to testify at the hearing in court or in any other manner provided by law.

Added by Acts 1985, 69th Leg., ch. 590, § 3, eff. Sept. 1, 1985. Amended by Acts 1995, 74th Leg., ch. 76, § 14.31, eff. Sept. 1, 1995.

The Texas Supreme Court has held that the outcry statute should be interpreted no differently in a juvenile trial than in an adult criminal trial. ***In the Matter of ZLB, 102 SW3d 120, 123, March 13, 2003.***

Under both the CCP and FC, certain facts and procedures must be met before such a statement may be admitted.

The fact criteria are that the statement must have been made by the child against whom the alleged offense was committed and must have been made to the first person, 18 years of older, other than the accused, to whom the statement was made. See §38.072 Sec 2(a), CCP and FC reprinted above. Texas case law requires that more than a general statement regarding the alleged offense must be given and that the statement must offer details which would single out the offense. See e.g. Garcia v. State, 792 S.W.2d 88, Tex. Crim. App. However, the State may not compare statements made by the child to different adults and then seek to offer the most detailed or damaging version. See Reed v.

State 974 S.W.2d 838. Respondent requests that this Court Order the State of Texas to designate its outcry witness in this case.

Procedurally, the State of Texas, according to §38.072 Sec. 2 (b) CCP and FC reprinted above, must take certain procedural steps in order for an outcry statement, even if properly designated, to be admitted into evidence over a hearsay objection. Specifically, the State must given proper notice as well as certain information to the Respondent. After the notice requirements have been met, Respondent requests a Motion in Limine pursuant to §38.072Sec. 2(b) and FC reprinted above, seeking a ruling from the Court as to whether the statement is "reliable based on the time, content, and circumstances of the statement", AND, a decision as to whether the child will be testifying or is available to testify.

WHEREFORE, PREMISES CONSIDERED, Respondent requests that the Court grant the relief requested in this Motion and to order such other relief as may be deemed equitable and necessary.

Respectfully submitted,

_____

Kimberly McCary
Attorney for Respondent
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on _____, 200____, via _____.

_____

Kimberly McCary

404(b) etc.

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

REQUEST FOR NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND EVIDENCE OF CONVICTION UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLE 37.07

TO THE DENTON COUNTY DISTRICT ATTORNEY'S OFFICE:

I.

Pursuant to Rule 404(b) of the Texas Rules of Criminal Evidence, and, if applicable, Article 38.37 of the Code of Criminal Procedure (relating to sexual and assaultive offenses), Respondent requests the state to give reasonable notice in advance of trial of its intent to introduce in its case-in-chief evidence of crimes, wrongs, or acts other than that arising in the same transaction.

II.

Pursuant to Article 37.07, § 3(g) of the Texas Code of Criminal Procedure, Respondent requests that the state give reasonable notice of intent to introduce against the Respondent evidence of an extraneous crime or bad act at the disposition phase of the trial.

III.

Request is made for the State to give the required notice at least ten days prior to the commencement of trial.

The requested notice and opportunity to investigate the proposed evidence is an essential part of Respondent's right to a fair trial, effective representation by counsel, and

constitutional due process pursuant to provisions of Article I, Sections 10 and 19 of the Constitution of the State of Texas, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

IV.

If applicable, Respondent requests notice of the State's intent to impeach following witness(es) as is provided by Rule 609: _____

Respectfully submitted,

Kimberly McCary
P.O. Box 493
Lewisville, TX 75067
(972) 436-3574
Fax No.(972) 436-0122

By:_____
Kimberly McCary
State Bar No. 00787224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____ day of _____, 200____, via

_____ Hand Delivery

_____ Fax Transmission

_____ Delivery to District Attorney's Office.

_____
Kimberly McCary

Motion in Limine

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

RESPONDENT'S OMNIBUS MOTION IN LIMINE and CORRESPONDING ORDERS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent, by and through his attorney of record, Kimberly McCary, and files this Omnibus Motion in Limine and in support thereof would respectfully show unto the Court as follows:

A. EXTRANEOUS OFFENSES

Prior to the State offering any evidence of extraneous offenses of the accused, Respondent requests a hearing out side of the presence of the jury wherein:

1. The Court makes a finding that the State has given Respondent reasonable notice in advance of trial of its intent to introduce such evidence;

   (GRANTED/DENIED).

2. The Court shall, pursuant to Texas Rules of Evidence (hereinafter "TRE") 404(b) determine whether such evidence is being offered apart from the purpose of proving the character of the Respondent in order to show that he acted in conformity therewith on the occasion in question;

   (GRANTED/DENIED).

3. If the Court makes a finding that the evidence is not intended to show character conformity, that it "has a tendency to make the existence of any

fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence," TRE 401;

(GRANTED/DENIED).

4. The extraneous offense admitted is relevant to a contested issue;

(GRANTED/DENIED).

5. The court conducts the balancing test required by TRE 403;

(GRANTED/DENIED).

6. The Court finds that the jury could reasonably find beyond a reasonable doubt that the Respondent committed the extraneous offense, as case law requires; and

(GRANTED/DENIED).

7. If any extraneous offense is admitted, Respondent requests a limiting instruction as to each such offense and a charge that the jury must find the extraneous offense "true" beyond a reasonable doubt.

(GRANTED/DENIED).

B. CHILD WITNESSES

1. Respondent seeks an Order from the Court prohibiting the State of Texas from coddling its child witnesses in front of the jury before, during or after their testimony. It is improper to provide such support for a child testifying because that support sends a message to the jury that the child is "victimized, vulnerable, and inherently trustworthy."

(GRANTED/DENIED).

2. Texas Rule of Evidence 601 sets forth a presumption of incompetence of child witnesses. Respondent requests that each child witness called by the State be shown – out side the presence of the jury -- to have the ability to "possess sufficient intellect to relate transactions with respect to which they are interrogated" prior to him or her giving testimony before the jury.

(GRANTED/DENIED).

3. Case law dictates that, while a child witness need not take an oath prior to testifying, he or she must be "able to understand the moral responsibility to tell the truth." See ***Hollinger v. State, Texas Court of Appeals, Twelfth District, Tyler, 911 S.W.2d 35***, citing the Texas Court of Criminal Appeals' decision in ***Watson v. State 596 S.W.2d 867***.

Respondent requests that each child witness called in this case be shown – out side the presence of the jury -- to have the ability to understand the moral responsibility to tell the truth prior to him or her giving testimony before the jury.

(GRANTED/DENIED).

4. Pursuant to the reading of Family Code Section 51.03(c) and Penal Code Section 8.07(a), concurrent jurisdiction exists in the juvenile court and the adult criminal court over a child who commits perjury or aggravated perjury. Respondent requests that any child testifying in this case be informed – outside the presence of the jury – of the consequences of committing perjury and of that child's right to an attorney prior to giving testimony that might subject him or her to the charge of perjury for testimony given in this instant trial or in any prior proceeding.

ORDER AS TO PERJURY ADMONISHMENT: (GRANTED/DENIED).

ORDER AS TO RIGHT TO AN ATTORNEY: (GRANTED/DENIED).

C. OUTCRY STATEMENT

Pursuant to Article 38.072 of the Texas Code of Criminal Procedure (CCP), "outcry" hearsay statements are generally admissible against an accused. That statute is mirrored in the Juvenile Justice Code. See §54.031 of the Texas Family Code (FC) below.

> § 54.031. HEARSAY STATEMENT OF CHILD ABUSE VICTIM.
>
> (c) This section applies to a hearing under this title in which a child is alleged to be a delinquent child on the basis of a violation of any of the following provisions of the Penal Code, if a child 12 years of age or younger is the alleged victim of the violation:
>
> (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
> (2) Section 25.02 (Prohibited Sexual Conduct); or
> (4) Section 43.25 (Sexual Performance by a Child).
>
> (d) This section applies only to statements that describe the alleged violation that:
>
> (1) were made by the child who is the alleged victim of the violation; and
> (2) were made to the first person, 18 years of age or older, to whom the child made a statement about the violation.
>
> (c) A statement that meets the requirements of Subsection (b) of this section is not inadmissible because of the hearsay rule if:
> (1) on or before the 14th day before the date the hearing begins, the party intending to offer the statement:
> (A) notifies each other party of its intention to do so;
> (B) provides each other party with the name of the witness through whom it intends to offer the statement; and
> (C) provides each other party with a written summary of the statement;
> (2) the juvenile court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and
> (3) the child who is the alleged victim testifies or is available to testify at the hearing in court or in any other manner provided by law.

```
Added by Acts 1985, 69th Leg., ch. 590, § 3, eff. Sept. 1, 1985.
Amended by Acts 1995, 74th Leg., ch. 76, § 14.31, eff. Sept. 1, 1995.
```

The Texas Supreme Court has held that the outcry statute should be interpreted no differently in a juvenile trial than in an adult criminal trial. ***In the Matter of ZLB, 102 SW3d 120, 123, March 13, 2003.***

Under CCP §38.072Sec. 2(b) and §54.031 FC reprinted above, the Court must determine whether the purported outcry statement is "reliable based on the time, content, and circumstances of the statement", AND, make a decision as to whether the child will be testifying or is available to testify.

Prior to the State offering any outcry evidence against the accused, Respondent requests a hearing out side of the presence of the jury wherein the Court makes the findings set forth directly above.

(GRANTED/DENIED).

D. PURPORTED CONFESSION:

If applicable, prior to the State offering any evidence of any statement of the accused, Respondent requests a hearing out side of the presence of the jury wherein the Court rules on Respondent's Motion to Suppress that may be filed in this matter.

(GRANTED/DENIED).

Prayer: Respondent prays for the specific relief set forth above and for any other relief to which he might be entitled.

Respectfully submitted,

_____

Kimberly McCary
Attorney for Respondent
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____day of _____, 2008, via _____.

_____
Kimberly McCary

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

O R D E R

On the _____ day of _____, 2008, came on to be considered Respondent's Omnibus Motion in Limine. The Court makes and hereby enters the Orders that are set forth above.

_____
JUDGE PRESIDING

Deposition

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

APPLICATION AND AFFIDAVIT TO TAKE DEPOSITION TESTIMONY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the above-named Respondent, by and through his attorney of record Kimberly McCary, and files this Application to Take Deposition Testimony pursuant to Article 39.02 of the Texas Code of Criminal Procedure, and in support would show:

1. Respondent desires to take the deposition of _____.

2. As stated in the attached affidavit, set forth below and fully incorporated herein, there are sufficient facts necessary to constitute a good reason for the taking of the deposition.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that the Court grant his Application to Take Deposition Testimony.

Respectfully submitted,

Kimberly McCary
P.O. Box 493
Lewisville, Texas 75067
Tel: (972) 436-3574
Fax: (972) 436-0122

By:_____

Kimberly McCary
State Bar No. 00787224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on _____, 2008, a true and correct copy of the above and foregoing document was served on the Denton County District Attorney's Office via _____.

_____
Kimberly McCary

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF _____ §

After being placed under oath, _____made the following affirmation:

"I am of sound mind, over the age of eighteen (18) years, capable of making this affidavit and personally acquainted with the facts herein stated.

“I am the parent of the Respondent herein.

“My son is charged with _____My son’s attorney intends to set his case for trial.

"The reasons which support the taking of a deposition of the Proposed Deponent are as follows: _____.

"The statements contained within the Application to Take Deposition are true and within my information and belief."

_____

_____, Affiant

Sworn to and subscribed before me on this _____ day of _____, 2008.

_____

NOTARY PUBLIC

ORDER FOR A SETTING

A hearing on the above motion is set for _____, 2008, at _____(a.m./p.m.).

_____

Judge Presiding/Court Coordinator

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

O R D E R

On the ____ day of _____, 2008, came on to be considered Respondent's Application and Affidavit to Take Deposition Testimony, and said motion is hereby

(Granted) (Denied)

_____

JUDGE PRESIDING

Rape Shield in Camera Motion

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

MOTION FOR IN CAMERA HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the above-named Respondent, by and through his/her attorney of record, Kimberly McCary, and respectfully files this Motion for in camera hearing and in support thereof would show as follows:

Respondent stands charged with the offense of sexual assault as prohibited by §22.011 of the Texas Penal Code. Respondent intends to illicit evidence of the previous sexual conduct of the alleged victim. This intention implicates Rule 412 of the Texas Rules of Evidence (TRE), the "rape shield" law, reprinted below.

Rule 412 EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

(a) *Reputation or Opinion Evidence.* --In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) *Evidence of Specific Instances.* --In a prosecution for sexual assault oraggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) *Procedure for Offering Evidence.* --If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) *Record Sealed.* --The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

Respondent asserts that the rape shield rules should not prohibit his intended questioning because nothing in TRE 412 limits "the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years of age or older as a defense to sexual assault. See TRE 412(e). However, Respondent seeks an in camera hearing pursuant to TRE 412 (a)-(c) as an argument in the alternative for the admissibility of evidence of the previous sexual conduct of the alleged victim.

WHEREFORE, PREMISES CONSIDERED, Respondent prays for the relief requested in the Motion and for any other relief to which he might be entitled.

Respectfully submitted,

Kimberly McCary

Attorney for Respondent
SBN 00787224
P.O. Box 493
Lewisville, TX 75067
972/436-3574
Fax No. 972/436-0122

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____ day of _____, 2008, via _____.

_____
Kimberly McCary

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

ORDER

On the date set forth below, came on to be heard Respondent on the above Motion. After considering the same, the Court hereby

_____ Denies the Motion.

_____ Grants the Motion and makes the following Orders:

_____

_____.

Signed this ____ day of _____, 2008.

_____
Judge Presiding

Jury Trial Election

CAUSE NO. JV-_____

IN THE MATTER OF	**§**	**IN THE COUNTY COURT AT LAW NO #1**
	§	
	§	**OF DENTON COUNTY TEXAS**
	§	
_____, Respondent	**§**	**SITTING AS A JUVENILE COURT**

ELECTION AT DISPOSITION PHASE

I.

The instant matter involves a Determinate Sentence petition. If a finding of delinquent conduct has been made by the trier of fact in the adjudication portion of this matter, Respondent elects to have the jury determine disposition. See Family Code §54.04(a).

II.

Pursuant to the above Family Code provision, Respondent preserves his/her right to seek the consent of the State to change his/her election after any finding of "true".

III.

This written election is being filed prior to the commencement of voir dire examination.

Respectfully submitted,

Kimberly McCary
P.O. Box 493
Lewisville, TX 75067
(972) 436-3574
Fax No.(972) 436-0122

By:_____
Kimberly McCary
State Bar No. 00787224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served on the assistant district attorney representing the State of Texas herein on this _____ day of _____, 2008, via

_____ Hand Delivery

_____ Fax Transmission

_____ Delivery to District Attorney's Office.

_____
Kimberly McCary