

THE NUTS & BOLTS OF DETERMINATE SENTENCING

32ND ANNUAL JUVENILE LAW CONFERENCE

February 24-27, 2019

Determinate Sentencing

What is it?

- Hybrid or blended system.
- Provides expanded punishment options for certain felony offenses to bridge gap between regular delinquency proceedings and certification.
- Child is charged by petition in juvenile court; punishment is in the juvenile system with possible transfer to adult system.

Determinate Sentencing

- No age restrictions specified; the general age requirements under TFC apply (acts committed age 10-16).
- Must have grand jury approval or a waiver (pursuant to TFC 51.09).
- Applies only to offenses listed in TFC 53.045 or to habitual felony conduct as defined in TFC 51.031.

Offenses Eligible for D.S.

TFC 53.045 - Enumerated offenses:

- Murder, Capital Murder, Manslaughter,
- Aggravated Kidnapping, Sexual Assault, Aggravated Sexual Assault,
- Aggravated Assault, Aggravated Robbery,

Offenses Eligible for D.S.

- Injury to a Child, Elderly, or Disabled Individual (if punishable for felony other than a state jail),
- Felony Deadly Conduct involving discharging a firearm,
- Certain offenses involving Controlled Substances,

Offenses Eligible for D.S.

- Criminal Solicitation, Indecency with a Child, Criminal Solicitation of a Minor,
- Criminal Attempt – if offense attempted was murder, capital murder, or a CCP art. 42A.054 offense (formerly 42.12 “3g”),

Offenses Eligible for D.S.

- Arson – if bodily injury or death,
- Intoxication Manslaughter, and
- Conspiracy to commit any of the above offenses.

Offenses Eligible for D.S.

- EXCEPTION - see TFC 53.045(e)
 - When respondent and victim are 3 years or less apart in age, determinate sentence may not be used for the following offenses:
 - PC 22.011(a)(2) Sexual Assault
 - PC 22.021(a)(1)(B) & (2)(B) Aggravated Sexual Assault

Habitual Felony Conduct 51.031

- In addition to the enumerated offenses, TFC 53.045 provides another manner in which a child may be eligible for D.S. – Habitual Felony Conduct.
- Defined in TFC Sec. 51.031.

Habitual Felony Conduct 51.031

- **Habitual Felony Conduct – defined as conduct violating a felony, other than a state jail, if:**
 - Child has two final prior adjudications (“final” meaning probation or TJJD commitment and all appeals exhausted), and
 - Second previous adjudication is for conduct that occurred after the date that first previous adjudication became final, and
 - Became final **BEFORE** the child committed the new offense.

Determinate Sentence Procedure

- **Prosecutor’s discretion.**
- **Once decision is made, prosecutor must file a petition (in compliance with TFC 53.04 and 53.045) that either alleges one of the enumerated offenses OR habitual felony conduct.**

Determinate Sentence Procedure

- **Prosecutor must present petition to the grand jury for a vote.**
- **Presented in same manner as an indictment and requires finding of probable cause and a vote of at least nine members to approve.**

Grand Jury Approval

- The grand jury presentation is limited to approval or disapproval of the petition for determinate sentencing.
- This is not an indictment.

Grand Jury Approval

- If grand jury fails to approve, prosecutor can:
 - Proceed with ordinary delinquency petition, or
 - Re-present to the same or subsequent grand jury (need new evidence), or
 - Seek certification of child if eligible.

Grand Jury Approval

- Note: A disapproval by grand jury for determinate sentencing is DIFFERENT from a grand jury rejection after asking for an Advisory Opinion under TFC 53.035, which actually bars filing a petition.
- Disapproval for determinate sentencing does NOT bar prosecution...it just bars determinate sentencing.

Grand Jury Approval

- If petition is approved, it is “returned” by grand jury to appropriate district court (like an indictment).
- The approval is then certified by the district clerk in writing and forwarded to the juvenile court and entered in the record.

Waiver of Grand Jury Approval

- The child and child’s attorney can waive approval by grand jury.
- Waiver must be done in compliance with TFC 51.09.

Amending Approved Petition

- If the amendment is not “material” (for example: charging additional or different offenses), then no need to re-present to grand jury.
- If amendment is “material” then State should either present an amended petition to GJ or obtain a waiver from child and attorney.

D.S. Adjudication Hearings

- Cannot be heard by a referee or master (TFC 54.10(e)).
- Cannot be heard by Constitutional County Court (TFC 51.04(c)) even if that judge is an attorney. Must have another court designated by juvenile board to hear D.S. cases (district, county court at law).

Jury Trials – D.S. Adjudication TFC 54.03

- Right to a jury trial - TFC 54.03(c)
- Can waive jury - TFC 51.09
- For bench trials, Judge may not view social history prior to conclusion of adjudication hearing – TFC 54.03(d)
- For jury trials, jury may never see social history at any time – TFC 54.03(d)

Jury Trials – D.S. Adjudication TFC 54.03

- Jury of 12 persons selected just like in criminal cases – TFC 54.03(c)
- Ten peremptory challenges per side
- If multiple respondents, each respondent gets six, and the State gets six challenges per respondent – CCP 35.15(b)

Jury Trials – D.S. Adjudication TFC 54.03

- Unanimous verdict by proof beyond a reasonable doubt.
- If multiple paragraphs in the petition, judge or jury must find for the State on at least one covered offense OR must find alleged offense true and the habitual offender paragraphs true in order to have determinate sentence adjudication.

D.S. Disposition Hearings

- Child has right to a jury at the disposition hearing (unlike indeterminate sentencing).
- However, child must request jury disposition in writing prior to commencement of voir dire.
- Child can change election thereafter only with consent of prosecutor.

D.S. Disposition Hearings Evidence – TFC 54.04

- Jury may not see the social history (only admissible in judge disposition).
- Unadjudicated extraneous offenses are admissible in jury disposition for offenses after September 1, 2007, in accordance with CCP 37.07.

**D.S. Disposition Findings
TFC 54.04**

- Prior to adjudication, State must give notice of intent to seek Deadly Weapon finding by:
 - Alleging a DW offense in petition, or
 - Alleging a homicide, or
 - Sending written notice to defense counsel.
- It is a special issue that must be proven by a reasonable doubt.

**D.S. Disposition Findings
TFC 54.04**

- DW finding requires personal use of the deadly weapon by Respondent.
- Must include DW finding in the Order of Disposition and specify whether it was a firearm.
- Should include a finding regarding time credit already served in all TDCJ commitment orders after June 8, 2007 – TFC 54.052.

**D.S. Disposition Findings
TFC 54.04**

- Must be finding that child is in need of rehabilitation, or that the protection of the public or the child requires that disposition be made (just like indeterminate).
- This finding is required for both probation and for TDCJ commitment.

D.S. Disposition Options

- No disposition necessary,
- Probation (with possible transfer to criminal court for completion of term of probation), or
- Commitment to TJJD (with possible transfer to TDCJ).

D.S. Punishment Ranges TFC 54.04(d)(3)

- For Capital felony, first degree felony, and Aggravated Controlled Substance felony: 40 year maximum
- For second degree felony: 20 year maximum
- For third degree felony: 10 year maximum

D.S. Probation – TFC 54.04(q)

- If judge/jury assesses punishment of 10 years or less, then may probate for a period not to exceed 10 years.
- Judge determines length of probation.
- Prior to expiration, judge may extend probation for any length of time not to exceed a total probationary period of 10 years.

D.S. Probation – TFC 54.04(q)

- No minimum length of probation (except certain sex offenses), so judge can discharge child at any time.
- If probation is revoked, the judge can lower the sentence but may not raise it – TFC 54.05(j).
- Probation begins in the juvenile system and automatically expires on the child's 19th birthday unless previously transferred to criminal court.

**D.S. Probation Transfer
TFC 54.051**

- On Motion of State.
- No probation violation needed.
- Must be heard prior to 19th birthday (18th birthday for offenses committed before Sept. 1, 2011).

**D.S. Probation Transfer
TFC 54.051**

- Same procedures as a Modification Hearing under TFC 54.05.
- If transferred, occurs on 19th birthday.
- If not transferred, court specifies a discharge date (on or before 19th birthday).

**D.S. Probation Transfer
TFC 54.051**

- If transferred, child is placed on Community Supervision for remainder of sentence under terms consistent with original juvenile court order.
- Probation time in juvenile system counts toward early discharge minimums in CCP.
- Once transferred, the Criminal Court disposes of probation violations, including juvenile violations not discovered prior to child's 19th birthday.

**D.S. Probation Transfer
TFC 54.051**

- Sex offender registration authority transfers to the criminal court regarding deferred registration and/or excusing further compliance.
- No right to jury.
- Decision not appealable.

**D.S. Probation Transfer
TFC 54.051**

- Child's obligation to pay restitution transfers with the probation.
- Parent's obligation to pay restitution does not transfer & expires on child's 19th birthday.
- CCP 42A.054 restrictions (prohibiting judge from using regular probation for certain offenses) and CCP 42A.053 minimum periods of supervision DO NOT apply.

Probation Revocation / Hearing to Modify – TFC 54.05

- Same procedures as revocation of indeterminate probation.
- Upon revocation, judge can impose any sentence, up to the original one.
- Criminal court handles revocation after transfer. Can impose any sentence up to original one – and is NOT subject to the minimum sentences in the CCP.

D.S. TJJD Commitments

- Judge or Jury, as appropriate, determines the length of sentence – up to 10, 20, or 40 years, depending on the offense.
- There is no minimum sentence length.
- Child begins sentence in TJJD, with possibility of transfer to TDCJ for completion of sentence.

D.S. Minimum Lengths of Stay

- TJJD is authorized (per HRC 61.081(f)) to release a Child to parole, without court approval, at any time after the Child has completed the Child's minimum length of stay:
 - 10 years – Capital Murder
 - 3 years – first degree felonies & agg. controlled substance felonies
 - 2 years – second degree felonies
 - 1 year – third degree felonies

D.S. Minimum Lengths of Stay

- **Exceptions:**
 - For offenses committed on or after Sept. 1, 2005, TJJD may release a Child to parole, without court approval, at any time during the last 9 months of the Child's sentence, even though the Child has not satisfied the minimum length of stay. HRC 61.081(i)

D.S. Minimum Lengths of Stay

- **Exceptions:**
 - TJJD may petition the committing Court for early release of the Child to parole prior to the expiration of the minimum length of stay. TFC 54.11
 - Hearing is required.

End of TJJD Control

- **Once Child is committed to TJJD, Child is subject to TJJD control until:**
 - Completion of sentence.
 - Transfer of Child by committing Court to TDCJ after request by TJJD and transfer hearing. TFC 54.11
 - Automatic transfer of Child to TDCJ parole at Child's 19th birthday. HRC 61.084(g)

TJJD to TDCJ Transfers TFC 54.11

- At any time after Child's 16th birthday (and before the 19th birthday), TJJD can petition the committing Court to transfer the Child to TDCJ to serve the remainder of the D.S. if:
 - Child has not completed the D.S. and
 - Child's conduct indicates that the welfare of the community requires a transfer.

TJJD to TDCJ Transfer Hearings Procedure – TFC 54.11

- "Red Packet" generated by TJJD.
- Decision to seek transfer to TDCJ in TJJD's discretion.
- Hearing prompted by letter from TJJD ED to committing Court requesting hearing.
- Hearing must be held within 60 days of receipt of letter requesting.

TJJD to TDCJ Transfer Hearings Procedure – TFC 54.11

- Notice of hearing to all persons listed in TFC 54.11(b)(1)-(6): Child, Parents or Guardians, TJJD, Prosecutor, Victim or Victim's family, any other person who filed written request to be notified of a transfer hearing.
- However, failure to give notice to anyone other than the Child and the prosecutor will NOT affect validity of the hearing if those persons whereabouts are unknown and reasonable efforts were made to locate them.

TJJD to TDCJ Transfer Hearings Procedure – TFC 54.11

- Child entitled to attorney.
- TJJD is represented by local prosecutor.
- Court must appoint *Guardian ad litem* if parent doesn't appear.
- No right to jury.

TJJD to TDCJ Transfer Hearings Procedure – TFC 54.11

- Court can consider written reports from:
 - Probation officers,
 - Professional court employees,
 - Professional consultants, and
 - Employees of TJJD.
- Court can also consider witness testimony.

TJJD to TDCJ Transfer Hearings Procedure – TFC 54.11

- Child's attorney is entitled to access to all written matter to be considered by the Court – at least 5 days prior to the hearing.
- Child's attorney can examine witnesses, present evidence, and argue.
- Indigent Child is entitled to appointment of mental health expert if makes required showing to justify the appointment.

TJJD to TDCJ Transfer Hearings Procedure – TFC 54.11

- Hearing is open to the public unless waived by Child with consent of Child's attorney and the Court.
- Hearing must be recorded by a court reporter or by audio or video.
- Record must be retained for two years.

TJJD to TDCJ Transfer Hearing

- In making the transfer determination, the Court may consider:
 - The experiences and character of the Child, both before and after commitment to TJJD,
 - The nature of the committing offense,
 - The manner in which the offense was committed,

TJJD to TDCJ Transfer Hearings

- Considerations, cont.
 - The ability of the Child to contribute to society,
 - The protection of the victim & victim's family,
 - The recommendations of TJJD and the prosecutor,
 - The best interest of the Child,
 - And anything else relevant to the issue.

TJJD to TDCJ Transfer Hearings

- If Court transfers Child to TDCJ, it is to “serve the remainder” of original D.S.
- Credit is given for all time served pursuant to TFC 54.052
- If Court declines to transfer, Child goes back to TJJD.
- D.S. offenders must be transferred to Adult Parole on 19th birthday if not previously discharged or transferred to TDCJ.

TJJD to TDCJ Transfer Hearings

- No requirement for findings of fact and conclusions of law.
- The decision is appealable under TFC 56.01(c)(2). Abuse of discretion standard.
- Appeal does not suspend the order or release the Child (unless the Court orders release), although the appellate court can set bond.

Automatic Transfer to TDCJ Parole – HRC 61.084(g)

- A Child who has not completed the Child’s D.S. AND has not been either paroled or transferred prior to the Child’s 19th birthday, shall be transferred by TJJD to TDCJ parole on the child’s 19th birthday to serve the remainder of the D.S.

Early Release Prior to Minimum Length of Stay

- An early release hearing is authorized under TFC 54.11 (Release or Transfer Hearing).
- Allows TJJD to petition committing Court for release of a Child on parole prior to completing the statutory minimum length of stay.
- Works procedurally the same way as a transfer hearing except prosecutor may have a conflict with TJJD's request.
- NOT appealable.

Parole

- TJJD may not release a Child from parole unless entire sentence is satisfied.
- If prior to the Child's 19th birthday, the Child is granted parole, the Child is released on TJJD parole. Once Child is 19 and the Child still has not completed D.S., Child is transferred to Adult parole.
- Adult parole time = original sentence, less time in TJJD, less time in detention, AND less time on TJJD parole.

Parole

- If transferred to Adult parole, the Adult parole revocation procedures apply.
- If revoked after transfer to Adult parole, the Child may be required to serve remainder of D.S. in TDCJ.



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