CHAPTER 38 EVIDENTIARY STATUTES EVERY LAWYER SHOULD KNOW FOR TRIAL AND APPEAL

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THIRTY-THIRD ANNUAL JUVENILE LAW CONFERENCE
SPONSORED BY THE JUVENILE SECTION OF THE STATE BAR OF TEXAS
FEBRUARY 2020

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Lane has tried more than one hundred criminal cases to jury verdict or mistrial, including two capital murder-death penalty cases, and twenty-five juvenile jury trials. He has been attorney of record in more than eight-five appeals, approximately fifteen involving juvenile respondents. Lane was a member of the Committee for Death Penalty Approved Counsel for the Second Administrative District of Texas from 2012-2019.

His short story, *Bouquet by Numbers* was the winner of the 2012 Texas Bar Journal short story fiction contest, and another, *Boxes*, was named a finalist in the 2017 contest. His short fiction has also appeared in online publications and short story anthologies. He holds a B.A. degree in Government from Sam Houston State University (1981), and a J.D. from South Texas College of Law (1985).

Lane is licensed by the State Bar of Texas (1985), and is a member of their Criminal and Juvenile Sections. He is also licensed in the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, and Federal District Courts for the Southern, Western and Northern Districts of Texas. He is a member of the Texas Criminal Defense Lawyers Association, Brazos County Bar Association (President, 2012), and the American Board of Trial Advocates.

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I. Chapter 38 Evidentiary Statutes Involving Forensic Analysis and Testimony

Art. 38.41. Certificate of Analysis

Sec. 1. A certificate of analysis that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the results of the analysis.

Sec. 3. A certificate of analysis under this article must contain the following information certified under oath:

(1) the names of the analyst and the laboratory employing the analyst;

(2) a statement that the laboratory employing the analyst is accredited by a nationally recognized board or association that accredits crime laboratories;

(3) a description of the analyst's educational background, training, and experience;

(4) a statement that the analyst's duties of employment included the analysis of physical evidence for one or more law enforcement agencies;

(5) a description of the tests or procedures conducted by the analyst;

(6) a statement that the tests or procedures used were reliable and approved by the laboratory employing the analyst; and

(7) the results of the analysis.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a certificate of analysis under this article is to be introduced, the certificate must be filed with the clerk of the court and a copy must

be provided by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the opposing party. The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of the court and provides a copy of the objection by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the offering party.

Sec. 5. A certificate of analysis is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CERTIFICATE OF ANALYSIS

BEFORE ME, the undersigned authority, personally appeared _____, who being duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

I am employed by the _____, which was authorized to conduct the analysis referenced in this affidavit. Part of my duties for this laboratory involved the analysis of physical evidence for one or more law enforcement agencies. This laboratory is accredited by _____.

My educational background is as follows: (description of educational background)

My training and experience that qualify me to perform the tests or procedures referred to in this affidavit and determine the results of those tests or procedures are as follows: (description of training and experience)

I received the physical evidence listed on laboratory report no. _____ (attached) on the ___ day of _____, 20___. On the date indicated in the laboratory report, I conducted the following tests

or procedures on the physical evidence: (description of tests and procedures)

The tests and procedures used were reliable and approved by the laboratory. The results are as indicated on the lab report.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of _____, 20___.

_____
Notary Public, State of Texas

TEX. CODE CRIM. PROC. art. 38.41 (Enacted 2003, last amended 2013).

Art. 38.42. Chain of Custody Affidavit

Sec. 1. A chain of custody affidavit that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the chain of custody of physical evidence without the necessity of any person in the chain of custody personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the chain of custody.

Sec. 3. A chain of custody affidavit under this article must contain the following information stated under oath:

(1) the affiant's name and address;
(2) a description of the item of evidence and its container, if any, obtained by the affiant;
(3) the name of the affiant's employer on the date the affiant obtained custody of the physical evidence;
(4) the date and method of receipt and the name of the person from whom or location from which the item of physical evidence was received;

(5) the date and method of transfer and the name of the person to whom or location to which the item of physical evidence was transferred; and

(6) a statement that the item of evidence was transferred in essentially the same condition as received except for any minor change resulting from field or laboratory testing procedures.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a chain of custody affidavit under this article is to be introduced, the affidavit must be filed with the clerk of the court and a copy must be provided by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the opposing party. The affidavit is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the affidavit with the clerk of the court and provides a copy of the objection by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the offering party.

Sec. 5. A chain of custody affidavit is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CHAIN OF CUSTODY AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared _____, who being by me duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

My address is _____.

On the ___ day of _____, 20___, I was employed by _____.

On that date, I came into possession of the physical evidence described as follows: (description of evidence)

I received the physical evidence from _____ (name of person or description of location) on the ___ day of _____, 20___, by (method of receipt).

This physical evidence was in a container described and marked as follows: (description of container)

I transferred the physical evidence to _____ (name of person or description of location)

on the ___ day of _____, 20___, by (method of delivery).
During the time that the physical evidence was in my custody, I did not make any changes or alterations to the condition of the physical evidence except for those resulting from field or laboratory testing procedures, and the physical evidence or a representative sample of the physical evidence was transferred in essentially the same condition as received.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of _____, 20___.

_____
Notary Public, State of Texas

TEX. CODE CRIM. PROC. art. 38.42 (Enacted 2003, last amended 2013).

Key cases: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.E.2d 314 (2009); *Williams v. State*, 585 S.W.3d 478 (Tex. Crim. App. 2019); *Deener v. State*, 214 S.W.3d 522 (Tex. App. – Dallas 2006, pet. ref'd) (art. 38.42).

Williams v. State, 585 S.W.3d 478 (Tex. Crim. App. 2019) was decided October 9, 2019 and arose from a failure to stop and render aid prosecution involving a vehicular-pedestrian fatality. A blood draw search warrant was obtained by law enforcement. The draw was analyzed twice, once by the Brazoria County Crime Laboratory and the second time by a private forensic laboratory – NMS Labs ("NMS") located in Pennsylvania. The defendant was found to have a cocktail of various drugs by the NMS laboratory, including THC (delta-9 metabolite), carisoprodol (Soma), methamphetamine and amphetamine.

Fifty days out from trial the State filed an affidavit attested to by the Assistant Laboratory Director at NMS, Adams. Adams attested as follows: (1) Adams was employed by NMS Labs; (2) NMS was accredited by the American Board of Forensic Toxicology; (3) Adams was familiar with NMS's standard operating procedures; (4) Adams' duties as an Assistant Laboratory Director included the analysis of evidence "for one or more law enforcement agencies"; (5) Adams' curriculum vitae, which was attached to the affidavit, accurately reflected her educational background; (6) she had "reviewed the data from the tests or procedures on the toxicological evidence" from Williams's case; and (7) the attached lab report represented "an accurate record of the tests or procedures performed on the ... evidence received by this laboratory and are reliable and approved by NMS Labs." Fifteen pages of records from NMS were attached to the Adams affidavit.

Defendant did not file an objection to the supporting affidavit, and the affidavit was offered, along with the attached NMS toxicology records, at his trial. No other sponsoring witness for the NMS records was available. The defense objected to the admission of the records confrontation grounds based on the fact Adams, as opposed to the analyst who tested the sample at NMS, signed the affidavit. Defendant argued confrontation required substantial compliance at a minimum contain attestation by the analyst performing the testing.

The Fourteenth Court of Appeals held "[a]bsent a more specific requirement in the statute that the affiant be the certifying analyst, the Certificate of Analysis substantially complies with the requirements of [A]rticle 38.41." Thus "appellant was required to file a written objection at least ten days before the beginning of trial." *Williams v. State*, 531 S.W.3d 902 (Tex. App. – Houston [14th Dist.] 2017) *affirmed on other grounds* 585 S.W.3d 478 (Tex. Crim. App. 2019). The Texas Court of Criminal Appeals ("CCA") granted the defendant/appellant's petition for discretionary review.

The CCA majority initially discussed procedural default. The State argued because the affidavit and attached NMS records were timely filed (more than twenty days before trial), and no timely objection (not less than ten days before trial) was filed, any objection was waived. However, the CCA chose not to address procedural default because the supporting affidavit substantially complied with the statute's requirements.

Specifically, the CCA found substantial compliance with the statute is achieved when the substantive requirements of Article 38.41, Section 3 are met.

The CCA majority opinion held that in relation to the supporting affidavit in Article 38.41 that substantial compliance requires the affidavit be certified under oath, "but does not require that oath to be given by any particular individual." *Williams* 585 S.W.3d at 485.

The opinion gives expansive construction of the statute, holding, "It seems to us that any person or group of persons with knowledge of the analyst, laboratory, and forensic testing procedures and results could truthfully swear to any or all of the information that Section 3 requires." *Id.*

The majority opinion conceded that the affidavit was facially defective under Section 3 because Adams' education and experience, and not the analyst, were described in the supporting affidavit. However, the majority decided the defendant's confrontation rights were not violated because he had an opportunity to object to the defect prior to trial and did not. *Id.* at 486-87.

Presiding Judge Keller concurred in the judgment, but would have decided the case on procedural default grounds.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.E.2d 314 (2009), was not cited in the *Williams* opinion. Logically, *Melendez-Diaz* should end confrontation clause objections of the kind urged in *Williams*, *i.e.* a defendant laying behind the log and waiting to urge a confrontation clause objection after the deadline has passed for objection. From the *Melendez-Diaz* majority opinion:

> In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. *See, e.g.*, Tex. Code Crim. Proc. Ann., Art. 38.41, § 4 (Vernon 2005); Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. States are free to adopt procedural rules governing objections.

Id. at 325-27 (citations omitted [except for Texas statute]) (emphasis added); *see also, Bullcoming v. New Mexico*, 564 U.S. 647, 666-67, 131 S.Ct. 2705, 2718, 180

L.Ed. 610 (2011) ("Furthermore, notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories."). *See also, Deener,* 214 S.W.3d at 528 (applying same procedural default analysis to art. 38.42).

Takeaway for prosecutors: Use of this method of proving forensic analysis can make your work life easier. Although certain types of forensic results are probably better left for live, in-person testimony (DNA comparison evidence, for example), for confirmation of a positive drug urinalysis in modification or revocation proceedings this statute is likely underutilized.

Takeaway for defense counsel: Use it or lose it. Assert objection as required by the statute including state and federal constitutional confrontation provisions at least ten days before trial.

Art. 38.076. Testimony of Forensic Analyst by Video Teleconference

(a) In this article, "forensic analyst" has the meaning assigned by Section 4-a, Article 38.01.

(b) In a proceeding in the prosecution of a criminal offense in which a forensic analyst is required to testify as a witness, any testimony of the witness may be conducted by video teleconferencing in the manner described by Subsection (c) if:

(1) the use of video teleconferencing is approved by the court and all parties;
(2) the video teleconferencing is coordinated in advance to ensure proper scheduling and equipment compatibility and reliability; and
(3) a method of electronically transmitting documents related to the proceeding is available at both the location at which the witness is testifying and in the court.

(c) A video teleconferencing system used under this article must provide an encrypted, simultaneous, compressed full motion video and interactive communication of image and sound between the judge, the attorney representing the state, the attorney representing the defendant, and the witness.

TEX. CODE. CRIM. PROC. art. 38.076 (Enacted 2019).

Art. 38.072 is a new statute. It was introduced by Senator Juan "Chuy" Hinojosa as Senate Bill (SB) 1125 in the Eighty-Sixth (2019) Legislature. The Bill Analysis to the bill included the following as justifying the legislation: "There have

been calls to allow forensic analysts to provide testimony by means of video teleconferencing technology to give these analysts more time to focus on that casework. S.B. 1125 seeks to provide for that authorization under certain circumstances." Bill Analysis, S.B. 1125, Acts 2019, 86th R.S., ch. 976 General and Special Laws of Texas.

Takeaway for defense counsel: Consider agreeing with teleconferenced testimony unless are attacking something unrelated to the underlying science, unless completely prepared to take on the analyst on their turf. Ask yourself: Am I really prepared to take this analyst live with a jury in the box on the science?

II. Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.37. Evidence of Extraneous Offenses or Acts

* * *

Sec. 2. [(b)] Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and
(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

> Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

(Enacted 1995, last amended 2013).

Key cases: *Belcher v. Texas*, 474, S.W.3d 840 (Tex. App. – Tyler 2015, no pet.); *Robisheaux v. State*, 483 S.W.3d 205 (Tex. App. – Austin 2016, pet. ref'd).

The case most often cited following the 2013 amendment to Article 38.37(b) of the Texas Code of Criminal Procedure allowing character propensity evidence in the prosecution of cases covered in section one of the statute is *Belcher*. *Robisheaux*, decided less than four months after *Belcher*, provides a deeper and more through analytical dive into the issue of due process as balanced against the protections and justification for propensity evidence covered by the statute.

In *Belche*r, the child-complainant was referred to in the opinion by their initials H.C. Before trial, the State gave notice that the defendant's daughter had outcried to her second-grade teacher that her father had been doing "sex things" with her. The daughter also outcried that defendant had sexually abused her younger sister, who was severely disabled and non-verbal. *Id*. at 843.

The Tyler Court of Appeals held Article 38.37 violated neither due process, nor Rule 403 of the Texas Rules of Evidence. The Tyler Court of Appeals, while acknowledging the prejudicial nature of the evidence, decided the probative value of the extraneous assaultive evidence was very high because of the strength and nature of the credibility attack against H.C. This attack came primarily through the testimony of H.C.'s own mother that H.C. told a lot of lies, and the mother did not initially believe H.C.'s outcry. In finding the trial court did not abuse its discretion, the Court of Appeals wrote: "The extraneous offense evidence was highly prejudicial principally because it was especially probative of [defendant's] propensity to sexually assault children." *Id.* at 848.

All intermediate courts of appeals have now considered facial and, in some cases, but not all, as applied due process challenges. These courts have uniformly held the statute constitutional under due process, analogizing it to Federal Rule of Evidence 414 which provides "the court may admit evidence that the defendant committed any other child molestation" to be considered "on any matter to which it is relevant" in the case on trial. FED. R. EVID. 414(a).

Texas courts of appeal so holding by district: **First Court of Appeals**: *Buxton v. State*, 526 S.W.3d 666, 685-89 (Tex. App. – Houston [1st Dist.] 2017, pet. ref'd); **Second Court of Appeals**: *Perez v. State*, 562 S.W.3d 676, 686-88 (Tex. App. – Ft. Worth 2018, pet. ref'd) (see discussion below); **Third Court of Appeals**: *Robisheaux v. State*, 483 S.W.3d 205, 209-13 (Tex. App. – Austin 2016, pet. ref'd); **Fourth Court of Appeals**: *Burke v. State*, No. 04-16-00220-CR, 2017 WL 1902064 at *2 (Tex. App. – San Antonio May 10, 2017, pet. ref'd) (not designated for publication); **Fifth Court of Appeals**: *Mayes v. State*, No. 05-16-00490-CR, 2017 WL 2255588 at *18-19 (Tex. App. – Dallas May 23, 2017, pet. ref'd) (not designated for publication), *cert. denied*, 139 S.Ct. 77 (2018); **Sixth Court of** Ap**peals**: *Harty v. State*, 552 S.W.3d 928, 933-34 (Tex. App. – Texarkana 2018, no pet.); **Seventh Court of Appeals**: *Bezerra v. State*, 485 S.W.3d 133, 139-40 (Tex. App. – Amarillo 2016, pet. ref'd), *cert. denied*, 137 S.Ct. 495, 196 L.Ed.2d 404 (2016); **Eighth Court of Appeals**: *Carrillo v. State*, No. 08-14-00174-CR, 2016 WL 4447611 at *8-9 (Tex. App. – El Paso Aug. 24, 2016, no pet.) (not designated for publication); **Ninth Court of Appeals**: *Holcomb v. State*, No. 09-16-00198-CR, 2018 WL 651228 at *2 (Tex. App. – Beaumont Jan. 31, 2018, pet. ref'd) (not designated for publication); **Tenth Court of Appeals**: *Gates v. State*, No. 10-15-00078-CR, 2016 WL 936719 at *4 (Tex. App. – Waco Mar. 10, 2016, pet. ref'd) (not designated for publication); **Twelfth Court of Appeals**: *Belcher*, 474 S.W.3d at 843-47; **Thirteenth Court of Appeals**: *Chaisson v. State*, No. 13-16-00548-CR, 2018 WL 1870592 at *4-5 (Tex. App – Corpus Christi April 19, 2018, pet. ref'd); **Fourteenth Court of Appeals**: *Harris v. State*, 475 S.W.3d 395, 400-03 (Tex. App. – Houston [14th Dist.] 2015, pet ref'd).

Takeaway for defense counsel: Assert "as applied" due process claims to propensity evidence sought to be introduced at trial, especially in a juvenile prosecution. A facial due process challenge is not going be viable under the current state of the law. No intermediate COA has considered an "as applied" constitutional due process challenge to this statute in a juvenile trial setting. Be creative. Use the juvenile's age, the circumstances of the extraneous and charged offense, and the wording of the propensity instruction in the charge as a basis for the "as applied" challenge. Make the case that the justifications for this statutory permitted evidence are different in a juvenile prosecution. Make the trial judge engage in a Rule 403 balancing analysis or get on the record the judge will not do so. Argue that unless rigorous application of the Rule 403 factors is used, the statute loses due process protection. Object to the character/propensity instruction given at the time the evidence is received and at formal charge conference on the same grounds.

Takeaway for prosecutors: Powerful evidence. But do you need it? If so, could you live with a Rule 404(b)(2) limited purpose admission and instruction? Is the need for the evidence great enough to justify the risk at trial and appeal if trial counsel properly preserves error? *See, e.g. In re T.V.T.*, __ S.W.3d __, No. 14-18-00807, 2019 WL 6974971 (Tex. App. – Houston [14th Dist.] December 19, 2019) (not yet released for publication) (reversing juvenile aggravated sexual assault adjudication on as applied due process challenge to application of statute to thirteen-year-old juvenile respondent on basis that children under fourteen years of age cannot consent to sex); *see, also, In re B.W.*, 313 S.W.3d 818 (Tex. 2010) (holding child under fourteen, because they were legally unable to consent to sex, could not be adjudicated for prostitution).

Art. 38.071. Testimony of child who is victim of offense

> Sec. 3. (a) On its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. To the extent practicable, only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons necessary to operate the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but the court shall attempt to ensure that the child cannot hear or see the defendant. The court shall permit the attorney for the defendant adequate opportunity to confer with the defendant during cross-examination of the child. On application of the attorney for the defendant, the court may recess the proceeding before or during cross-examination of the child for a reasonable time to allow the attorney for the defendant to confer with defendant.
>
> (b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into

> consideration the interests of the child, the rights of the defendant, and any other relevant factors.

(Enacted 1983, last amended 2011).

Key cases: *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 666 (1990); *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011).

The State of Maryland used a statutory procedure for child witnesses to testify by closed circuit television in child abuse cases almost identical to the method contained in Article 38.071, Section 3. The challenged statute required "that the testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." SCOTUS found a defendant's confrontation rights were not violated:

Craig at 841, 110 S.Ct at 3161.

> [we] have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial.

Craig at 847-48, 110 S.Ct. 3164.

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e.,

more than "mere nervousness or excitement or some reluctance to testify,"

Craig at 855-56, 110 S.Ct. 3169; *see also*, *Lopez v. State*, 2008 WL 5423104 (Tex. App. – Austin December 31, 2008, pet. ref'd) (not designated for publication) (a good post-*Crawford* analysis on Article 38.071, Section 3, the need for the alternative method of child testimony provided the section, with empirically based studies on both sides.)

Coronado, a post-*Crawford* CCA case held the videotape procedures in Article 38.071 Section 2, including use of written interrogatories instead of live testimony and cross-examination do not satisfy confrontation clause requirements and are unconstitutional.

Takeaway for prosecutors: Prosecutors, you will need to have particularized evidence of trauma if the child testifies live to use the Texas closed circuit television alternative. That testimony needs to include evidence that is tied to the defendant or juvenile respondent on trial.

Takeaway for defense counsel: Depending on circumstances, consider adding, along with other state and federal constitutional objections, that the ordering of testimony outside the courtroom is a judicial comment on weight of the evidence under TEX. CODE CRIM. PROC. sec. 38.05.

Art. 38.072. Hearsay Statement of Certain Abuse Victims

* * *

Sec. 2. (a) This article applies only to statements that:
(1) describe:
(A) the alleged offense; or
(B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:
(i) described by Section 1;
(ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and

(iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;

(2) were made by the child or person with a disability against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

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

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:
(A) notifies the adverse party of its intention to do so;
(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and
(C) provides the adverse party with a written summary of the statement;
(2) the trial 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 or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

TEX. CODE CRIM. PROC. art. 38.072 (Enacted 1985, last amended 2011).

Key case (discernable manner): *Garcia v. State*, 792 SW.2d 88 (Tex. Crim. App. 1990*).*

The statute conceptually operates as a statutory exception to the hearsay rule. The statute has been interpreted as meaning "the outcry witness must be the first person, 18 years or older, to whom the child makes a statement that <u>in some discernable manner</u> describes the alleged offense." *Garcia*, 792 S.W.2d at 91 (emphasis added). "Discernable manner" must be "more than words which give a general allusion that something in the area of child abuse was going on." *Id.*

*Garci*a was criticized last year by the Fort Worth Court of Appeals. That Court focused on *Garcia* and the burden of proof concerning outcry and the effect on underdeveloped evidentiary records:

> In *Garcia*, the majority of the court held that the trial court did not abuse its discretion by admitting the hearsay testimony of the State's designated outcry witness instead of considering the seven-year-old complainant's first grade teacher to be the "first person" because the complainant had only told her teacher that something had happened at home and that it had to do with child abuse. The record was void of any specific details as to what the complainant and her teacher talked about and as to any description of the alleged offenses by the complainant to her teacher. The court concluded that the complainant's statements to her teacher constituted nothing more than a general allusion, while her statements to the State's designated outcry witness contained details of the alleged offenses.

Espinoza v. State, 571 S.W.3d 427, 433 (Tex. App. – Ft. Worth 2019, pet. ref'd) (citing *Garcia* at 89-91).

The Fort Worth COA in *Espinoza* went on to note the dissenting opinion of Judge Sam Houston Clinton in *Garcia*, in which he argued that the *Garcia* majority opinion in that case contorted the burden of the requirement that the State designate and establish the predicate for the outcry witness planned to be offered. In his view, this contortion arose when a defendant faced an outcry notice designating someone who potentially was not the first person to whom the child made a statement about the offense. *Id.* at 432 (citing *Garcia* at 94-95 (Clinton, J. dissenting)).

This was precisely the issue in *Espinoza* where there was very little evidence concerning outcry. The State had designated the CAC forensic examiner, but at the Article 38.072 hearing some evidence pointed to the child complainant's adult sister and emergency room personal as the potential outcry witnesses. *Id.* at 432-33, n.10. The COA, however, decided that in the absence of other evidence, the trial court did not abuse its discretion in admitting the outcry testimony from the CAC forensic examiner. "[U]nder *Garcia* and in the absence of any such clarification, we are forced to conclude that the record fails to establish any clear abuse of discretion in the trial court's determination that [CAC forensic interviewer] was the appropriate outcry witness." *Id.* at 433.

Preservation of error takeaway: Defense counsel has the practical burden to develop evidence that someone other than the designated outcry witness is the proper witness for this category of essentially hearsay testimony in order to preserve appellate review.

Key case (multiple outcry evidence): *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App. – Texarkana 2000, pet. ref'd).

Article 38.072 has been described as "event-specific, not person-specific." This rhetorical phrase is popularly used in both trial courts and appellate courts when describing the statute in multiple event prosecutions. The phrase seems to have been first used in *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App. – Texarkana 2000, pet. ref'd). ("Because of the way in which the statute is written, an outcry witness is not person-specific, but event-specific"). *Broderick* observed the contours of the phrase:

> Before more than one outcry witness may testify, however, the outcry must be about different events, and not simply a repetition of the same event as related by the victim to different individuals. From a careful reading of the outcry witness statute, we conclude that there may be two proper outcry witnesses if they each testify about different events, but there may be only one outcry witness to the victim's statement about a single event.

Id. (emphasis added).

In practice, identifying the proper outcry witness in multiple event cases is a challenge. *See e.g. Hernandez v. State*, No. 02-14-00262, 2016 WL 4903206 (Tex. App. – Ft. Worth September 15, 2016) (not designated for publication). In *Hernandez*, the State sought, and the trial court admitted, testimony from three witnesses – the child complainant's mother, an investigator, and a CAC forensic examiner concerning what the COA decided were two events. The COA decided the investigator, not the CAC examiner, was the proper outcry witness as to the second event, *Id.* at *12-13, but found the error harmless. *Id.* at *13-14.

Multiple outcry evidence takeaway: Do not be overanxious to use the CAC forensic interviewer as the outcry witness, especially in multiple event allegations. Sometimes forcing the facts to fit in a manner to use the forensic examiner as the outcry witness will just not work. Instead use the safest outcry witness if there is some real dispute.

Art. 38.074. Testimony of child in prosecution of offense

Sec. 1. In this article:

(1) “Child” has the meaning assigned by Section 22.011(c), Penal Code.

(2) “Support person” means any person whose presence would contribute to the welfare and well-being of a child.

Sec. 2. This article applies to the testimony of a child in any hearing or proceeding in the prosecution of any offense, other than the testimony of a child in a hearing or proceeding in a criminal case in which that child is the defendant.

Sec. 3. (a) A court shall:

(1) administer an oath to a child in a manner that allows the child to fully understand the child's duty to tell the truth;

(2) ensure that questions asked of the child are stated in language appropriate to the child's age;

(3) explain to the child that the child has the right to have the court notified if the child is unable to understand any question and to have a question restated in a form that the child does understand;

(4) ensure that a child testifies only at a time of day when the child is best able to understand the questions and to undergo the proceedings without being traumatized, including:

(A) limiting the duration of the child's testimony;

(B) limiting the timing of the child's testimony to the child's normal school hours; or

(C) ordering a recess during the child's testimony when necessary for the energy, comfort, or attention span of the child; and

(5) prevent intimidation or harassment of the child by any party and, for that purpose, rephrase as appropriate any question asked of the child.

(b) On the motion of any party, or a parent, managing conservator, guardian, or guardian ad litem of a child or special advocate for a child, the court shall allow the child to have a toy, blanket, or similar comforting item in the child's possession while testifying or allow a support person to be present in close proximity to the child during the

child's testimony if the court finds by a preponderance of the evidence that:

(1) the child cannot reliably testify without the possession of the item or presence of the support person, as applicable; and
(2) granting the motion is not likely to prejudice the trier of fact in evaluating the child's testimony.

(c) A support person who is present during a child's testimony may not:

(1) obscure the child from the view of the defendant or the trier of fact;
(2) provide the child with an answer to any question asked of the child; or
(3) assist or influence the testimony of the child.

(d) The court may set any other conditions and limitations on the taking of the testimony of a child that it finds just and appropriate, considering the interests of the child, the rights of the defendant, and any other relevant factors.

(Enacted 2011).

Key cases: *In the Matter of D.T.C.*, 30 S.W.3d 43 (Tex. App. – Houston [14th Dist.] 2000, no pet.) (Adult volunteer in courtroom during child complainant's testimony); *Lambeth v. State*, 523 S.W.3d 244 (Tex. App. – Beaumont 2017, no pet.) (service dog with child-complainant during testimony).

In *D.T.C.*, the COA rejected a defense contention that a necessity showing was required before a child advocate volunteer could be allowed to stand next to child-complainant while they testified. The COA pointed to the statute which provides, "any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during [her] testimony" in finding that the trial court was not required to make a finding of necessity. The COA reminded that the child testified live. *D.T.C.* at 47-48.

Lambeth involved a service dog sitting with the child-complainant during testimony. The COA determined the trial court made implicit findings that the service dog was a "comfort item" under the statute, though not specifically mentioned by the statute. The COA found the jury knew the dog was present

during the testimony of the child-complainant and was harmless under non-constitutional standards.

Takeaway: Defense lawyers, make a record of what the comfort item is, and viewed from the jury's standpoint, why the item whether a parent, other individual, doll, or service dog is a non-verbal credibility comment in favor of the child-complainant testifying. Object on state and federal due process grounds, and be as fact specific as possible. After the child's testimony, consider renewing the objection and point out anything that happened that is not reflected in the written record cannot reflect. Consider including a request for mistrial. Additionally, if the trial court says anything to the jury about the comfort item, object as a comment on the weight of the evidence.

III. Chapter 38 Family Violence Evidentiary Statutes

Art. 38.371. Evidence in Prosecution of Offense Committed Against Member of Defendant's Family or Household or Person in Dating Relationship with Defendant

(a)This article applies to a proceeding in the prosecution of a defendant for an offense, or for an attempt or conspiracy to commit an offense, for which the alleged victim is a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code.

(b)In the prosecution of an offense described by Subsection (a), subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.

(c)This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.

TEX. CODE CRIM. PROC. art. 38.371 (Enacted 2015, last amended 2019).

Key case: *Gonzales v. State,* 541 S.W.3d 306 (Tex. App. – Houston [14th Dist.] 2017, no pet.).

The statute was added to Chapter 38 in 2015, effective September 1, 2015 and has been amended in both legislative sessions that followed, 2017 and 2019. The 2019 amendments from the 86th Legislature, effective in prosecutions after September 1, 2019 significantly expanded the statute. For example, previous versions of the statute were applicable to prosecutions involving specific Penal Code sections (sec. 22.01, 22.02, or 22.04). The 2019 legislative session expanded the statute's reach to include "[a]ny offense…for which the alleged victim is…a person whose relationship or association with the defendant is described by [the household, family member definitions under the Texas Family Code]."

In *Gonzales*, appellant was formally charged with an enhanced (felony) assault family violence ("AFV"). *Id.* 308. He was alleged to have assaulted his girlfriend, Patty. At trial the State introduced a prior judgment of conviction for AFV and the supporting charging instrument ("the complaint") that also named Patty as complainant. *Id.*

At trial and on appeal, the defendant did not object to admission of the judgment, but objected to the complaint because it named Patty as the complainant. The defendant argued that admitting the complaint was unnecessary because only the judgment of conviction was needed to enhance the charge to a felony. The defendant contended the prior complaint served no purpose other than to show "[T]hat if he did it once before, he probably did it again." In other words, the evidence was nothing but conformity character evidence inadmissible under Rule 404(b)(1)) and not meeting any limited purpose under Rule 404(b)(2). *Id.* at 310-11.

The COA affirmed, holding that Article 38.371 is by its own terms subject to the Rules of Evidence. *See*, Art. 38.37(b) TEX. CODE CRIM. PROC. Therefore, "[The COA] disagrees that article 38.371 conflicts with Rule 404(b), or that the State's reliance on article 38.371 to support the complaint's admission is an end-run around Rule 404(b)." *Id.* at 312. Second, the COA held the evidence was necessary to rebut the defensive theory that Patty fabricated the assault or that no assault really happened. This, according to the Court "opened the door for the State to prove that the assault happened as Patty initially alleged, but that Patty recanted her allegations out of fear of, or love for, [defendant]." *Id.* No Rule 403 analysis appears in the opinion.

In *Olmedo v State*, No. 08-18-00114-CR, 2019 WL 6271272 (Tex. App. – El Paso November 25, 2019) (not designated for publication), the latest case construing the Article 38.371 and Rule 404(b)(1) character conformity issue, the COA observed:

> We could envision several bad acts that would not be relevant for the delayed outcry and would thus be excludable. For instance, if Appellant had a prior conviction for theft, or tax evasion (or most property crimes), the State would be hard pressed to explain how that kind of bad act is relevant to explain a delayed outcry…Yet the point is that Article 38.371 would not justify the admission of every bad act that would otherwise be inadmissible under Rule 404(b).

Id. at *6.

Other cases on Article 38.371: *Espinoza v. State*, No. 05-17-00547-CR, 2018 WL 6716619 (Tex. App. – Dallas December 21, 2018, pet. ref'd) (not designated for publication); *Mapolisa v. State*, 2017 WL 2952994 (Tex. App. – Dallas 2017, pet. ref'd) (not designated for publication); *Nash v. State*, No. 02-17-00236-CR, 2018 WL 4495440 (Tex. App. – Ft. Worth September 20, 2018, pet. ref'd) (not designated for publication).

IV. Chapter 38 and the Texas Exclusionary Rule – Article 38.23 of the Texas Code of Criminal Procedure

Art. 38.23. Evidence not to be used

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(a) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

TEX. CODE CRIM. PROC. 38.23 (Enacted 1965 (codification); last amended 2013).

Key juvenile case: *Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim. App. 2002).

Gonzales involved a fifteen-year old juvenile, who, following discretionary transfer to district court, was indicted for capital murder. Following his arrest law enforcement transported him to a designated juvenile processing center as required by Section 52.02(a) of the Juvenile Justice Code. ("A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025 [.]"). After arrival, an inculpatory written statement was given otherwise complying with Section 51.095(a) of the Juvenile Justice Code, written about below.

The juvenile defendant filed a motion to suppress the written statement based on law enforcement's failure to timely notify his parents of his detention, contending this was a violation of Section 52.02(b):

Section 52.02. Texas Family Code Release or Delivery to Court

b) A person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to:

(1) the child's parent, guardian, or custodian; and

(2) the office or official designated by the juvenile board.

§52.02(B) TEX. FAM. CODE

The trial court denied the motion, but the Houston (First) Court of Appeals reversed, finding a violation of the statute and Article 38.23. *Gonzales v. State*, 9 S.W.3d 267, 271 (Tex. App. – Houston [1st Dist.] 1999), *reversed*, 67 S.W.3d 910 (Tex. Crim. App. 2002). The CCA reversed the COA finding Article 38.23 requires a causal connection between the violation and the making of the statement. *Gonzales* 67 S.W.3d at 913. The holding was based on longstanding law

requiring a cause and effect between the law violated and the evidence sought to be suppressed citing *Roquemore v. State*, 60 S.W.3d 862 (Tex. Crim. App. 2001); *Chavez v. State*, 9 S.W.3d 817 (Tex. Crim. App. 2000); *State v. Daugherty*, 931 S.W.2d 268, 269 (Tex. Crim. App. 1996); *Johnson v. State*, 871 S.W.2d 744, 750 (Tex. Crim. App. 1994).

Presiding Judge Keller dissented, arguing the case should be reversed without remand to the trial court. Presiding Judge Keller's legal position was more practical:

> The question here is whether the Legislature intended Article 38.23 to supersede the directives of §51.095 because of a violation of §52.02(b). Practical problems that will arise if we so interpret Article 38.23 are relevant to this determination. And these potential problems lend further support to the idea that the purpose of the notice provision is to allay a parent's concern over the unexplained absence of his child rather than to allow the parent to interfere with custodial interrogation.

Gonzales at 917 (Keller, P.J., dissenting).

Takeaway for defense counsel: Section 52.02(b) and Art. 38.23(a) can be legitimately used to exclude juvenile statements otherwise complying with Section 51.095 of the Juvenile Justice Code, but juvenile defense counsel must establish causation.

For example, in a suppression hearing based on this theory, a parent or guardian should be called to testify that they were not notified of the juvenile being taken into custody until after the statement was given, and that if notified they would have contacted the juvenile, juvenile services, law enforcement, or even a lawyer immediately. Additionally, if notified they would have advised the juvenile not to provide the statement. It would also be helpful to establish that the juvenile has some history, in the parent or guardian's experience, of listening to their advice.

This kind of causal testimony has worked. *State v. Simpson*, 105 S.W.3d 238, 242-43 (Tex. App. – Tyler 2013, no pet.) (affirming suppression of statement that "[we] also cannot say with any degree of certainty, after examining the record before us, that Appellee would have still chosen to confess his crime if his parents had been promptly notified and he had access to them, and possibly to counsel."). It has also not worked. *In re CM.*, No. 10-10-00421-CV, 2012 WL 57940 (Tex.

App. – Waco February 22, 2012, no pet.) (not designated for publication) (Causal connection not made when record showed: "[Guardian] testified that if they had been able to speak with C.M. they would have advised him not to make any statements prior to him speaking with an attorney. [Guardian] opined that C.M. would have heeded his advice because he had been in trouble with the law previously. However, when later recalled as a witness, [Guardian] stated that he was unsure whether C.M. would have listened to his advice or not."

Takeaway for prosecutors: Teach (preach) to law enforcement: Just contact the parents.

Key cases in search and seizure by school personnel: *New Jersey v. T.L.O.*, 469 U.S. 325, 327, 105 S.Ct. 733, 735, 83 L.Ed.2d 720 (1985); *State v. Coronado*, 835 S.W.2d 636 (Tex. Crim. App. 1992).

In *T.L.O.* a teacher discovered two girls smoking in a lavatory in violation of a school rule. The school's principal demanded to look in T.L.O.'s purse and removed a package of cigarettes which uncovered rolling papers. The discovery of the rolling papers prompted a more thorough search of the purse which produced marijuana, a pipe, empty plastic bags, money, a list of students, and information that implicated T.L.O. in marijuana dealing. *T.L.O.*, 469 U.S. at 328, 105 S.Ct. at 735-36.

T.L.O. established school administrators are state actors for constitutional protections. *Id.* at 334-337, 105 S.Ct. at 737-740. SCOTUS also established the two-pronged test for searches on school grounds: A search of a student by a teacher or school official is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated, or is violating, either the law or the rules of the school. Second, a court must determine whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.* 742-43.

In *Coronado*, the CCA was confronted with a case involving a search of a public school student's car in the school parking lot, uncovering cocaine. *Coronado*, 835 S.W.2d at 637. The trial court denied a motion to suppress, and the COA affirmed. The CCA reversed, finding, that under the Fourth Amendment and Art. 38.23(a) that the search and seizure were unlawful. *Id.* at 641-42. The student had been initially detained on school grounds at the request of school administrators for being untruthful about his reasons for leaving school. A sheriff's deputy, essentially acting in a SRO role, and the school official who first

interrogated and later accompanied the student to his car, where the principal "demanded [the student] open the truck at my request." *Id.* at 639.

The CCA decided this did not meet the second prong of *T.L.O.*:

> [W]e find no connection whatsoever between [The principal's] original stop of appellant to determine whether appellant was skipping school, and the unproductive, progressively intrusive searches culminating in the search of appellant's vehicle. In other words, the search of appellant's vehicle was not reasonably related in scope to the circumstances which justified [the principal's] initial interference with appellant which was to determine whether appellant was skipping school. Indeed, the search of appellant's vehicle was excessively intrusive in light of the infraction of attempting to skip school. Therefore, the evidence was obtained in violation of the Fourth Amendment and should have been suppressed pursuant to Tex. Code Crim. Proc. Ann. art. 38.23(a).

Id. at 641.

Other cases construing Fourth and Fourteenth Amendment protections involving search and seizure by school officials: *In re S.R.M.*, 338 S.W.3d 161 (Tex. App. – El Paso 2011, no pet.) (search of school locker upheld); *Matter of C.S.*, No. 14-97-0101304-CV, 1998 WL 832121 (Tex. App. – Houston [14th Dist.] December 3, 1998) (Not designated for publication) (search of backpack upheld).

V. Chapter 38 and Juvenile Custodial Statements – Section 51.095 of the Juvenile Justice Code and Article 38.22 of the Texas Code of Criminal Procedure

Section 51.095. Admissibility of a Statement of a Child

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:

(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time;

(B) and:

(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting

attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;

* * *

(5) subject to Subsection (f), the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:

(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;
(B) the recording device is capable of making an accurate recording, the operator of the device is competent to use the device, the recording is accurate, and the recording has not been altered;
(C) each voice on the recording is identified; and
(D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child made under this subdivision.

(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:
(1) the statement does not stem from interrogation of the child under circumstance described by Subsection (d); or
(2) without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is:
(A) voluntary and has a bearing on the credibility of the child as a witness; or
(B) recorded by an electronic recording device, including a device that records images, and is obtained:
(i) in another state in compliance with the laws of that state or this state; or

(ii) by a federal law enforcement officer in this state or another state in compliance with the laws of the United States.

* * *

(d) Subsections (a)(1) and (a)(5) apply to the statement of a child made:

(1) while the child is in a detention facility or other place of confinement;

(2) while the child is in the custody of an officer; or

(3) during or after the interrogation of the child by an officer if the child is in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state.

(e) A juvenile law referee or master may perform the duties imposed on a magistrate under this section without the approval of the juvenile court if the juvenile board of the county in which the statement of the child is made has authorized a referee or master to perform the duties of a magistrate under this section.

(f) A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.

§ 51.095 TEX. FAM. CODE (Enacted 1997, last amended 2011).

Art. 38.22 of the Texas Code of Criminal Procedure

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

* * *

(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:

(1) only voices that are material are identified; and
(2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

* * *

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof.

Art. 38.22 TEX. CODE CRIM. PROC. (Enacted 1965 (codification); Last amended 2017).

Key cases juvenile custody issue: *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 2406, 180 L.Ed.2d 310 (2011); *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. – Austin 1999, pet. den'd); *In re D.A.R.*, 73 S.W.3d 505, 510 (Tex. App. – El Paso 2002, no pet.).

In *J.D.B.* SCOTUS wrote:

Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative,

> or even a significant, factor in every case It is, however, a reality that courts cannot simply ignore.
>
> * * *
>
> A child's age is far 'more than a chronological fact. It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

564 U.S. 261, 271-72, 131 S.Ct. at 2402-03, 180 L.Ed.2d 310 (2011) (citing *Stansbury v. California*, 511 U.S. 318, 325, 114 S.Ct. 1526, 128 L.Ed. 293 (1994); *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) and *Youngblood v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (Breyer, J., dissenting)) (emphasis added).

Texas law is arguably more expansive on the juvenile custody issue than what the SCOTUS has determined to be constitutionally required under *J.D.B. v. North Carolina*, but the reasoning is logically similar: *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. – Austin 1999, pet. denied); *In re D.A.R.*, 73 S.W.3d 505, 510 (Tex. App. – El Paso 2002, no pet.); *In re V.P.*, 55 S.W.3d 25, 31 (Tex. App. – Austin 2001, pet. denied).

In construing Article 38.22 of the Texas Code of Criminal Procedure, the CCA has recognized four factors relevant to determining [adult] custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant. *Dowthitt,* 931 S.W.2d at 254. However, "factors two and four have become irrelevant except to the extent that they may be manifested in the words or actions of law enforcement officials; the custody determination is based entirely upon objective circumstances." *Id.*

The inquiry in juvenile cases, as in adult cases, is highly fact specific, and arguably more difficult when a juvenile is involved. Application has varied widely depending on circumstances. For example, *In re J.W.*, 196 S.W.3d 327 (Tex. App. – Dallas 2006, no pet.) the Dallas COA stated the legal standard:

> [C]ourts ask whether, based on the objective circumstances, a reasonable child of the same age would believe his or her freedom of movement was significantly restricted. Id. Factors relevant to the

> question of whether a child was in custody include whether there was probable cause to arrest, the focus of the investigation, the officer's subjective intent, and the child's subjective beliefs.
>
> The COA in *J.W.* then applied the law to the facts:
>
> At the time of the questioning [at a high school football stadium aisle], J.W. was standing above Simmons on the walkway in the stands next to the second officer; Officer Simmons was standing below J.W. on the field with two school administrators. Although Officer Simmons testified that J.W. was not free to leave, he did not communicate that to J.W. Further, although he told J.W. he believed the camera might be stolen, he did not accuse J.W. of theft. Finally, because Officer Simmons had not determined whether the camera was stolen, he did not have probable cause to arrest J.W.
>
> As for J.W., he was not arrested, handcuffed, or restrained in any way. He was not placed in a patrol car or taken to the police station for questioning. He never asked to go home or asked for his mother or an attorney. Rather, he answered Officer Simmons's questions and turned over the camera.
>
> Considering all the circumstances objectively, we conclude a reasonable sixteen-year-old in J.W.'s circumstances would have felt able to end the questioning, particularly since the officers did nothing to restrain or restrict appellant's movement. Because we conclude appellant was not in custody during the questioning, the trial court did not err in admitting the challenged statements. Issue three is without merit.

Id. at 33.

Contrast that application to the stationhouse questioning in the case *In re M.G.* from the Waco Court of Appeals. *In re M.G.*, No. 10-09-00037-CV, 2010 WL 3292711 (Tex. App. – Waco August 11, 2010, no pet.) (not designated for publication). In that case, an eleven-year-old was interviewed at a CAC called Scotty's House in Bryan, Texas. Following the CAC interview, at a detective's request, he was transported to the police station by his mother. The COA found the trial court improperly denied a motion to suppress the juvenile's inculpatory

statement there, found harm, and remanded the case for a new trial. 2010 WL 3292711 at *6. The COA recited the facts on the custody issue were as follows:

> [The] Detective had asked M.G.'s mother, who is also the mother of the alleged victim, if she would mind bringing M.G. to Scotty's House and then from Scotty's House to the police department. But [the] Detective never directly asked M.G. whether he was willing to talk to her until he was already at the police department. At that time, M.G. had just finished being interviewed at Scotty's House. Furthermore, once M.G. was at the police department and agreed to talk to [the] Detective, at [the] Detective[‘s] suggestion, he was isolated from his mother and then led through the detectives' area to an interview room, where he sat alone with [the] Detective. The room was small. [The] Detective sat very close to M.G. while questioning him and appeared to be, at least in part, between M.G. and the door. [The] Detective never informed him of any of his rights under the Texas Family Code, and she was not sure if she told him that he was free to leave. Instead, [the] Detective made it clear that M.G. was the focus of the investigation involving the sexual assault of his brother. Despite M.G.'s denials, [the] Detective repeatedly asked M.G. if he had sexually assaulted his brother. At some point, M.G. became teary-eyed. Nevertheless, [the] Detective continued to press him for truthful statements, telling him that she knew that he was not being completely honest during the Scotty's House interview. She also stressed to him several times that they had found a shirt in his bedroom with potential DNA evidence on it and brought his mother into the interview room, not for M.G.'s benefit, but only to allow [the] Detective to take DNA cheek swabs from him. After all this, M.G. finally gave a statement inculpating himself in the sexual assault.
>
> Based on the circumstances outlined above, we conclude that a reasonable eleven-year-old child would have believed that his freedom of movement had been significantly restricted at some point after [The] Detective began to press M.G. for a truthful statement.

Id. at *5-6 (citing *In re M.R.R.*, 2 S.W.3d 319, 324 (Tex. App. – San Antonio 1999, no pet.).

Key cases voluntariness of confession: *Gallegos v. Colorado*, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *In re R.J.H.*, 79 S.W.3d 1 (Tex. 2002).

In *Gallegos*, a fifteen-year-old, was arrested for murder. SCOTUS gave the following timeline:

> A jury found him guilty, the crucial evidence introduced at the trial being a formal confession which he signed on January 7, 1959, after he had been held for five days during which time he saw no lawyer, parent or other friendly adult. [After] petitioner's arrest on January 1, the following events took place. His mother tried to see him on Friday, January 2, but permission was denied, the reason given being that visiting hours were from 7 p.m. to 8 p.m. on Monday and Thursday. From January 1 through January 7, petitioner was in Junvenile [*sic*] Hall, where he was kept in security, though he was allowed to eat with the other inmates. He was examined by the police in Juvenile Hall January 2, and made a confession which an officer recorded in longhand. On January 3, 1959, a complaint was filed against him in the Juvenile Court by the investigating detectives.

Id. at 50, 82 S.Ct. at 1210.

SCOTUS cited two elements necessary for a confession to be voluntary. First, some procedural safeguards; "Confessions obtained by 'secret inquisitorial processes' are suspect." *Id.* at 50-51. (citing *Chambers v. Florida*, 309 U.S. 227, 237, 60 S.Ct. 472, 477 84 L.Ed. 716 (1940)). "Second is the element of compulsion which is condemned by the Fifth Amendment." *Id.* (citing *Brown v. Mississippi*, 297 U.S. 278, 285, 56 S.Ct. 461, 464, 80 L.Ed. 682 (1936).

In finding lack of voluntariness, SCOTUS wrote of the kind of procedural safeguards present in Section 51.095, and to a lesser extent, Article 38.22.

> [There] was here no evidence of prolonged questioning. But the five-day detention – during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult advisor – gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being

> recorded and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.
>
> * * *
>
> There is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend – all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.

Id. at 54-55; 82 S.Ct. 1212-13.

In re R.J.H. is a rare Texas Supreme Court ("SCOTX") case. 79 S.W.3d 1 (Tex. 2002). In that case, the juvenile, a sixteen-year-old, had been stopped in a car with an adult cousin. The adult was driving. The car had evidence in plain view it had been stolen, and the odor of marijuana was present. A probable cause based search revealed stolen property in the trunk. *Id.* at 3. The juvenile was cuffed and taken to a local DPS station where he later gave inculpatory statements not meeting the requirement of Sec. 51.095. He was eventually released. Several days later the juvenile called the DPS detective and made new inculpatory remarks. *Id.* at 3-4.

The juvenile's initial statement was suppressed in the trial court, but the second admitted. On appeal the COA reversed, holding the second statement was involuntary, violating the Fourteenth Amendment. *Id.* at 5. SCOTX granted review and reversed the COA, finding the second statement was voluntary pointing out that though the first statement did not meet statutory requirements, the juvenile had been given *Miranda* warnings, had his father present, and signed the first statement voluntarily, and initiated the second statement by calling the detective. *Id.* "In the final analysis, the court of appeals made the inadmissibility of R.J.H.'s written statement virtually determinative of the inadmissibility of the later statements. In so doing, the court erred. The admission of the oral statements did not violate due process." *Id.* at 9.

Takeaway for defense counsel: If defense counsel has a statement complying with Section 51.095, but an issue exists, for example, of prompt parental notice of the juvenile being taken into custody, consider Art. 38.23 and

federalizing your objection on due process grounds. When the statement does not comply with Section 51.095, still federalize with a voluntariness claim. They work hand in hand. There are many variables with juveniles when law enforcement is anxious to secure a statement. Voluntariness of any such a statement should be a threshold consideration. Ask for findings and conclusion on voluntariness required by Art. 38.22 but not by Sec. 51.095. Same for a jury instruction.

A. Possible legal issues on Sec. 51.095 and Art. 38.22 waivers

Compare the waiver requirements of Section 51.095 of the Juvenile Justice Code and Art. 38.22 of the Texas Code of Criminal Procedure.

Section 51.095(a)(5) of the Juvenile Justice Code provides:

> (a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:
>
> * * *
>
> (5) subject to Subsection (f), the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:
>
> > (A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;

TEX. FAM. CODE §51.095(a)(5)(A) (emphasis added).

Art. 38.22(b) of the Texas Code of Criminal Procedure provides:

> (b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

TEX. CODE CRIM. PROC. art. 38.22(b) (emphasis added).

The legal argument is the juvenile specific statute requires the juvenile subject of a custodial interrogation must receive not just warnings but must specifically waive "each right stated in the warning." §51.095(a)(5)(A) TEX. FAM. CODE. Conversely, Article 38.22 does not include this "each warning" language. The CCA has held Art. 38.22(b), waivers do not have to be express. *Rocha v. State*, 16 S.W.3d 1 (Tex. Crim. App. 2000).

This argument has been twice rejected by the Waco Court of Appeals. *In re. J.L*. No. 10-06-60246-CV, 2007 WL 3298920 (Tex. App. – Waco November 7, 2007, no pet.) (not designated for publication); *In re CM*., No. 10-10-00421-CV, 2012 WL 57940 (Tex. App. – Waco February 22, 2012, no pet.) (not designated for publication). Both cases cited *Marsh v. State*, 140 S.W.3d 901, 911 (Tex. App. – Houston [14th Dist.] 2004, pet. ref'd) for the proposition that Section 51.095 has been read to be consistent with Article 38.22.

APPENDIX ONE:

Chapter 38 Statutes included in Paper

APPENDIX ONE

Art. 38.41. Certificate of Analysis

Sec. 1. A certificate of analysis that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the results of the analysis.

Sec. 3. A certificate of analysis under this article must contain the following information certified under oath:

(1) the names of the analyst and the laboratory employing the analyst;

(2) a statement that the laboratory employing the analyst is accredited by a nationally recognized board or association that accredits crime laboratories;

(3) a description of the analyst's educational background, training, and experience;

(4) a statement that the analyst's duties of employment included the analysis of physical evidence for one or more law enforcement agencies;

(5) a description of the tests or procedures conducted by the analyst;

(6) a statement that the tests or procedures used were reliable and approved by the laboratory employing the analyst; and

(7) the results of the analysis.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a certificate of analysis under this article is to be introduced, the certificate must be filed with the clerk of the court and a copy must be provided by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the opposing party. The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of the court and provides a copy of the objection by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the offering party.

Sec. 5. A certificate of analysis is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CERTIFICATE OF ANALYSIS

BEFORE ME, the undersigned authority, personally appeared _____, who being duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

I am employed by the _____, which was authorized to conduct the analysis referenced in this affidavit. Part of my duties for this laboratory involved the analysis of physical evidence for one or more law enforcement agencies. This laboratory is accredited by _____.

My educational background is as follows: (description of educational background)

My training and experience that qualify me to perform the tests or procedures referred to in this affidavit and determine the results of those tests or procedures are as follows: (description of training and experience)

I received the physical evidence listed on laboratory report no. _____ (attached) on the ___ day of _____, 20___. On the date indicated in the laboratory report, I conducted the following tests or procedures on the physical evidence: (description of tests and procedures)

The tests and procedures used were reliable and approved by the laboratory. The results are as indicated on the lab report.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of _____, 20___.

_____
Notary Public, State of Texas

Art. 38.42. Chain of Custody Affidavit

Sec. 1. A chain of custody affidavit that complies with this article is admissible in evidence on behalf of the state or the defendant to establish the chain of custody of physical evidence without the necessity of any person in the chain of custody personally appearing in court.

Sec. 2. This article does not limit the right of a party to summon a witness or to introduce admissible evidence relevant to the chain of custody.

Sec. 3. A chain of custody affidavit under this article must contain the following information stated under oath:

(1) the affiant's name and address;

(2) a description of the item of evidence and its container, if any, obtained by the affiant;

(3) the name of the affiant's employer on the date the affiant obtained custody of the physical evidence;

(4) the date and method of receipt and the name of the person from whom or location from which the item of physical evidence was received;

(5) the date and method of transfer and the name of the person to whom or location to which the item of physical evidence was transferred; and

(6) a statement that the item of evidence was transferred in essentially the same condition as received except for any minor change resulting from field or laboratory testing procedures.

Sec. 4. Not later than the 20th day before the trial begins in a proceeding in which a chain of custody affidavit under this article is to be introduced, the affidavit must be filed with the clerk of the court and a copy must be provided by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the opposing party. The affidavit is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the affidavit with the clerk of the court and provides a copy of the objection by fax, secure electronic mail, hand delivery, or certified mail, return receipt requested, to the offering party.

Sec. 5. A chain of custody affidavit is sufficient for purposes of this article if it uses the following form or if it otherwise substantially complies with this article:

CHAIN OF CUSTODY AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared _____, who being by me duly sworn, stated as follows:

My name is _____. I am of sound mind, over the age of 18 years, capable of making this affidavit, and personally acquainted with the facts stated in this affidavit.

My address is _____.

On the ___ day of _____, 20___, I was employed by _____.

On that date, I came into possession of the physical evidence described as follows: (description of evidence)

I received the physical evidence from _____ (name of person or description of location) on the ___ day of _____, 20___, by (method of receipt).

This physical evidence was in a container described and marked as follows: (description of container)

I transferred the physical evidence to _____ (name of person or description of location) on the ___ day of _____, 20___, by (method of delivery).

During the time that the physical evidence was in my custody, I did not make any changes or alterations to the condition of the physical evidence except for those resulting from field or laboratory testing procedures, and the physical evidence or a representative sample of the physical evidence was transferred in essentially the same condition as received.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of _____, 20___.

_____
Notary Public, State of Texas

Art. 38.076. Testimony of Forensic Analyst by Video Teleconference

(a) In this article, "forensic analyst" has the meaning assigned by Section 4-a, Article 38.01.
(b) In a proceeding in the prosecution of a criminal offense in which a forensic analyst is required to testify as a witness, any testimony of the witness may be conducted by video teleconferencing in the manner described by Subsection (c) if:
(1) the use of video teleconferencing is approved by the court and all parties;
(2) the video teleconferencing is coordinated in advance to ensure proper scheduling and equipment compatibility and reliability; and
(3) a method of electronically transmitting documents related to the proceeding is available at both the location at which the witness is testifying and in the court.
(c) A video teleconferencing system used under this article must provide an encrypted, simultaneous, compressed full motion video and interactive communication of image and sound between the judge, the attorney representing the state, the attorney representing the defendant, and the witness.

Art. 38.37. Evidence of Extraneous Offenses or Acts

Sec. 1. (a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:

(1) if committed against a child under 17 years of age:
  (A) Chapter 21 (Sexual Offenses);
  (B) Chapter 22 (Assaultive Offenses); or
  (C) Section 25.02 (Prohibited Sexual Conduct); or
(2) if committed against a person younger than 18 years of age:
  (A) Section 43.25 (Sexual Performance by a Child);
  (B) Section 20A.02(a)(7) or (8); or
  (C) Section 43.05(a)(2) (Compelling Prostitution).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the child; and
(2) the previous and subsequent relationship between the defendant and the child.

Sec. 2. (a) Subsection (b) applies only to the trial of a defendant for:

(1) an offense under any of the following provisions of the Penal Code:
  (A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);
  (B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
  (C) Section 21.11 (Indecency With a Child);
  (D) Section 22.011(a)(2) (Sexual Assault of a Child);
  (E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);
  (F) Section 33.021 (Online Solicitation of a Minor);
  (G) Section 43.25 (Sexual Performance by a Child); or
  (H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or
(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

Art. 38.071. Testimony of Child Who is Victim of Offense

Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

(1) Section 19.02 (Murder);
(2) Section 19.03 (Capital Murder);
(3) Section 19.04 (Manslaughter);
(4) Section 20.04 (Aggravated Kidnapping);
(5) Section 21.11 (Indecency with a Child);
(6) Section 22.011 (Sexual Assault);
(7) Section 22.02 (Aggravated Assault);
(8) Section 22.021 (Aggravated Sexual Assault);
(9) Section 22.04(e) (Injury to a Child, Elderly Individual, or Disabled Individual);
(10) Section 22.04(f) (Injury to a Child, Elderly Individual, or Disabled Individual), if the conduct is committed intentionally or knowingly;
(11) Section 25.02 (Prohibited Sexual Conduct);
(12) Section 29.03 (Aggravated Robbery);
(13) Section 43.25 (Sexual Performance by a Child);
(14) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
(15) Section 43.05(a)(2) (Compelling Prostitution); or
(16) Section 20A.02(a)(7) or (8) (Trafficking of Persons).

Sec. 2. (a) The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

(b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording.

(c) A recording made under Subsection (a) of this section is not admissible into evidence unless a recording made under Subsection (b) is admitted at the same time if a recording under Subsection (b) was requested prior to the time of the hearing or proceeding.

Sec. 3. (a) On its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. To the extent practicable, only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons necessary to operate the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but the court shall attempt to ensure that the child cannot hear or see the defendant. The court shall permit the attorney for the defendant adequate opportunity to confer with the defendant during cross-examination of the child. On application of the attorney for the defendant, the court may recess the proceeding before or during cross-examination of the child for a reasonable time to allow the attorney for the defendant to confer with defendant.
(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 4. (a) After an indictment has been returned or a complaint filed, on its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact. To the extent practicable, only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact but shall attempt to ensure that the child cannot hear or see the defendant.
(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and is not altered;
(3) each voice on the recording is identified;
(4) the defendant, the attorneys for each party, and the expert witnesses for each party are afforded an opportunity to view the recording before it is shown in the courtroom;
(5) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;
(6) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time the recording was made; and
(7) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings is established at the hearing or proceeding.

(c) After a complaint has been filed or an indictment returned charging the defendant, on the motion of the attorney representing the state, the court may order that the deposition of the child be taken outside of the courtroom in the same manner as a deposition may be taken in a civil matter. A deposition taken under this subsection is admissible into evidence.

Sec. 5. (a) On the motion of the attorney representing the state or the attorney representing the defendant and on a finding by the court that the following requirements have been substantially satisfied, the recording of an oral statement of the child made before a complaint has been filed or an indictment returned is admissible into evidence if:
(1) no attorney or peace officer was present when the statement was made;
(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and has not been altered;
(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is expert in the handling, treatment, and investigation of child abuse cases, present at the hearing or proceeding, called by the state, and subject to cross-examination;
(7) immediately after a complaint was filed or an indictment returned, the attorney representing the state notified the court, the defendant, and the attorney representing the defendant of the existence of the recording;
(8) the defendant, the attorney for the defendant, and the expert witnesses for the defendant were afforded an opportunity to view the recording before it is offered into evidence and, if a proceeding was requested as provided by Subsection (b) of this section, in a proceeding conducted before a district court judge but outside the presence of the jury were afforded an opportunity to cross-examine the child as provided by Subsection (b) of this section from any time immediately following the filing of the complaint or the returning of an indictment charging the defendant until the date the hearing or proceeding begins;
(9) the recording of the cross-examination, if there is one, is admissible under Subsection (b) of this section;
(10) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;
(11) the court finds from the recording or through an in camera examination of the child that the child was competent to testify at the time that the recording was made; and
(12) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings has been established at the hearing or proceeding.

(b) On the motion of the attorney representing the defendant, a district court may order that the cross-examination of the child be taken and be recorded before the judge of that court at any time until a recording made in accordance with Subsection (a) of this section has been introduced into evidence at the hearing or proceeding. On a finding by the court that the following requirements were satisfied, the recording of the cross-examination of the child is admissible into evidence and shall be viewed by the finder of fact only after the finder of fact has viewed the recording authorized by Subsection (a) of this section if:
(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
(2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of

the child and the attorney representing the defendant, and the recording is accurate and has not been altered;
(3) every voice on the recording is identified;
(4) the defendant, the attorney representing the defendant, the attorney representing the state, and the expert witnesses for the defendant and the state were afforded an opportunity to view the recording before the hearing or proceeding began;
(5) the child was placed under oath before the cross-examination began or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully; and
(6) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings was established at the hearing or proceeding.

(c) During cross-examination under Subsection (b) of this section, to the extent practicable, only a district court judge, the attorney representing the defendant, the attorney representing the state, persons necessary to operate the equipment, and any other person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but shall attempt to ensure that the child cannot hear or see the defendant.
(d) Under Subsection (b) of this section the district court may set any other conditions and limitations on the taking of the cross-examination of a child that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 6. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article or if the court finds the testimony of the child taken under Section 2 or 5 of this article is admissible into evidence, the child may not be required to testify in court at the proceeding for which the testimony was taken, unless the court finds there is good cause.

Sec. 7. In making any determination of good cause under this article, the court shall consider the rights of the defendant, the interests of the child, the relationship of the defendant to the child, the character and duration of the alleged offense, any court finding related to the availability of the child to testify, the age, maturity, and

emotional stability of the child, the time elapsed since the alleged offense, and any other relevant factors.

Sec. 8. (a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:

(1) of emotional or physical causes, including the confrontation with the defendant; or

(2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.

(b) A determination of unavailability under this article can be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.

Sec. 9. If the court finds the testimony taken under Section 2 or 5 of this article is admissible into evidence or if the court orders the testimony to be taken under Section 3 or 4 of this article and if the identity of the perpetrator is a contested issue, the child additionally must make an in-person identification of the defendant either at or before the hearing or proceeding.

Sec. 10. In ordering a child to testify under this article, the court shall take all reasonable steps necessary and available to minimize undue psychological trauma to the child and to minimize the emotional and physical stress to the child caused by relevant factors, including the confrontation with the defendant and the ordinary participation of the witness in the courtroom.

Sec. 11. In a proceeding under Section 2, 3, or 4 or Subsection (b) of Section 5 of this article, if the defendant is not represented by counsel and the court finds that the defendant is not able to obtain counsel for the purposes of the proceeding, the court shall appoint counsel to represent the defendant at the proceeding.

Sec. 12. In this article, "cross-examination" has the same meaning as in other legal proceedings in the state.

Sec. 13. The attorney representing the state shall determine whether to use the procedure provided in Section 2 of this article or the procedure provided in Section 5 of this article.

Art. 38.072. Hearsay Statement of Certain Abuse Victims

Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age or a person with a disability:

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

(2) Section 25.02 (Prohibited Sexual Conduct);

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

(4) Section 43.05(a)(2) (Compelling Prostitution);

(5) Section 20A.02(a)(7) or (8) (Trafficking of Persons); or

(6) Section 15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), or (5) of this section.

Sec. 2. (a) This article applies only to statements that:

(1) describe:

(A) the alleged offense; or

(B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:

(i) described by Section 1;

(ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and

(iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;

(2) were made by the child or person with a disability against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

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

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

(A) notifies the adverse party of its intention to do so;

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

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

(2) the trial 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 or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Sec. 3. In this article, "person with a disability" means a person 13 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.

Art. 38.074. Testimony of Child in Prosecution of Offense

Sec. 1. In this article:

(1) "Child" has the meaning assigned by Section 22.011(c), Penal Code.

(2) "Support person" means any person whose presence would contribute to the welfare and well-being of a child.

Sec. 2. This article applies to the testimony of a child in any hearing or proceeding in the prosecution of any offense, other than the testimony of a child in a hearing or proceeding in a criminal case in which that child is the defendant.

Sec. 3. (a) A court shall:

(1) administer an oath to a child in a manner that allows the child to fully understand the child's duty to tell the truth;

(2) ensure that questions asked of the child are stated in language appropriate to the child's age;

(3) explain to the child that the child has the right to have the court notified if the child is unable to understand any question and to have a question restated in a form that the child does understand;

(4) ensure that a child testifies only at a time of day when the child is best able to understand the questions and to undergo the proceedings without being traumatized, including:

(A) limiting the duration of the child's testimony;

(B) limiting the timing of the child's testimony to the child's normal school hours; or

(C) ordering a recess during the child's testimony when necessary for the energy, comfort, or attention span of the child; and

(5) prevent intimidation or harassment of the child by any party and, for that purpose, rephrase as appropriate any question asked of the child.

(b) On the motion of any party, or a parent, managing conservator, guardian, or guardian ad litem of a child or special advocate for a child, the court shall allow the child to have a toy, blanket, or similar comforting item in the child's possession while testifying or allow a support person to be present in close proximity to the child during the child's testimony if the court finds by a preponderance of the evidence that:

(1) the child cannot reliably testify without the possession of the item or presence of the support person, as applicable; and

(2) granting the motion is not likely to prejudice the trier of fact in evaluating the child's testimony.

(c) A support person who is present during a child's testimony may not:

(1) obscure the child from the view of the defendant or the trier of fact;

(2) provide the child with an answer to any question asked of the child; or

(3) assist or influence the testimony of the child.

(d) The court may set any other conditions and limitations on the taking of the testimony of a child that it finds just and appropriate, considering the interests of the child, the rights of the defendant, and any other relevant factors.

Art. 38.371. Evidence in Prosecution of Offense Committed Against Member of Defendant's Family or Household or Person in Dating Relationship with Defendant

(a) This article applies to a proceeding in the prosecution of a defendant for an offense, or for an attempt or conspiracy to commit an offense, for which the alleged victim is a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code.

(b) In the prosecution of an offense described by Subsection (a), subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.

(c) This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.

Art. 38.23. Evidence Not to be Used

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Art. 38.22. When Statements May Be Used

Sec. 1. In this article, a written statement of an accused means:

(1) a statement made by the accused in his own handwriting; or

(2) a statement made in a language the accused can read or understand that:

(A) is signed by the accused; or

(B) bears the mark of the accused, if the accused is unable to write and the mark is witnessed by a person other than a peace officer.

Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time; and

(b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

(4) all voices on the recording are identified; and

(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

(b) Every electronic recording of any statement made by an accused during a custodial interrogation must be preserved until such time as the defendant's conviction for any offense relating thereto is final, all direct appeals therefrom are exhausted, or the prosecution of such offenses is barred by law.
(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.
(d) If the accused is a deaf person, the accused's statement under Section 2 or Section 3(a) of this article is not admissible against the accused unless the warning in Section 2 of this article is interpreted to the deaf person by an interpreter who is qualified and sworn as provided in Article 38.31 of this code.
(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:
(1) only voices that are material are identified; and
(2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent.

Sec. 4. When any statement, the admissibility of which is covered by this article, is sought to be used in connection with an official proceeding, any person who swears falsely to facts and circumstances which, if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement's meaning for the purpose of prosecution for aggravated perjury under Section 37.03 of the Penal Code. No person prosecuted under this subsection shall be eligible for probation.

Sec. 5. Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the res gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

Sec. 6. In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as

to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Sec. 7. When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement.

Sec. 8. Notwithstanding any other provision of this article, a written, oral, or sign language statement of an accused made as a result of a custodial interrogation is admissible against the accused in a criminal proceeding in this state if:

(1) the statement was obtained in another state and was obtained in compliance with the laws of that state or this state; or

(2) the statement was obtained by a federal law enforcement officer in this state or another state and was obtained in compliance with the laws of the United States.

Sec. 9. Notwithstanding any other provision of this article, no oral, sign language, or written statement that is made by a person accused of an offense listed in Article 2.32(b) and made as a result of a custodial interrogation occurring in a place of detention, as that term is defined by Article 2.32, is admissible against the accused in a criminal proceeding unless:

(1) an electronic recording was made of the statement, as required by Article 2.32(b); or

(2) the attorney representing the state offers proof satisfactory to the court that good cause, as described by Article 2.32(d), existed that made electronic recording of the custodial interrogation infeasible.

§ 51.095. Admissibility of a Statement of a Child

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:

(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time;

(B) and:

(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;

(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;

(2) the statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;

(3) the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;

(4) the statement is made:

(A) in open court at the child's adjudication hearing;

(B) before a grand jury considering a petition, under Section 53.045, that the child engaged in delinquent conduct; or

(C) at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing under Section 54.01; or

(5) subject to Subsection (f), the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:

(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;

(B) the recording device is capable of making an accurate recording, the operator of the device is competent to use the device, the recording is accurate, and the recording has not been altered;

(C) each voice on the recording is identified; and

(D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child made under this subdivision.

(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:

(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or

(2) without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is:

(A) voluntary and has a bearing on the credibility of the child as a witness; or

(B) recorded by an electronic recording device, including a device that records images, and is obtained:

(i) in another state in compliance with the laws of that state or this state; or

(ii) by a federal law enforcement officer in this state or another state in compliance with the laws of the United States.

(c) An electronic recording of a child's statement made under Subsection (a)(5) or (b)(2)(B) shall be preserved until all juvenile or criminal matters relating to any conduct referred to in the statement are final, including the exhaustion of all appeals, or barred from prosecution.

(d) Subsections (a)(1) and (a)(5) apply to the statement of a child made:

(1) while the child is in a detention facility or other place of confinement;

(2) while the child is in the custody of an officer; or

(3) during or after the interrogation of the child by an officer if the child is in the possession of the Department of Family and Protective Services and is suspected to have engaged in conduct that violates a penal law of this state.

(e) A juvenile law referee or master may perform the duties imposed on a magistrate under this section without the approval of the juvenile court if the juvenile board of the county in which the statement of the child is made has authorized a referee or master to perform the duties of a magistrate under this section.

(f) A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording

to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.

APPENDIX TWO:

Statutes included in Chapter 38 of the Texas Code of Criminal Procedure

APPENDIX TWO

Chapter 38, Texas Code of Criminal Procedure

Art. 38.01 Texas Forensic Science Commission
Art. 38.02 Effect Under Public Information Law of Release of Certain Information
Art. 38.03 Presumption of Innocence
Art. 38.04 Jury Are Judges of Facts
Art. 38.05 Judge Shall Not Discuss Evidence
Art. 38.07 Testimony in Corroboration of Victim of Sexual Offense
Art. 38.071 Testimony of Child Who is Victim of Offense
Art. 38.072 Hearsay Statement of Certain Abuse Victims
Art. 38.073 Testimony of Inmate Witnesses
Art. 38.074 Testimony of Child in Prosecution of Offense
Art. 38.075 Corroboration of Certain Testimony Required
Art. 38.076 Testimony of Forensic Analyst by Video Teleconference
Art. 38.08 Defendant May Testify
Art. 38.10 Exceptions to the Spousal Adverse Testimony Privilege
Art. 38.101 Communications by Drug Abusers
Art. 38.11 Journalist's Qualified Testimonial Privilege in Criminal Proceedings
Art. 38.111 News Media Recordings
Art. 38.12 Religious Opinion
Art. 38.14 Testimony of Accomplice
Art. 38.141 Testimony of Undercover Peace Officer or Special Investigator
Art. 38.15 Two Witnesses in Treason
Art. 38.16 Evidence in Treason
Art. 38.17 Two Witnesses Required
Art. 38.18 Perjury and Aggravated Perjury
Art. 38.19 Intent to Defraud: Certain Offenses
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Art. 38.22 When Statements May Be Used
Art. 38.23 Evidence Not to be Used
Art. 38.25 Written Part of Instrument Controls
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Art. 38.31 Interpreters for Deaf Persons
Art. 38.32 Presumption of Death
Art. 38.33 Preservation and Use of Evidence of Certain Misdemeanor Convictions
Art. 38.34 Photographic Evidence in Theft Cases
Art. 38.35 Forensic Analysis of Evidence; Admissibility