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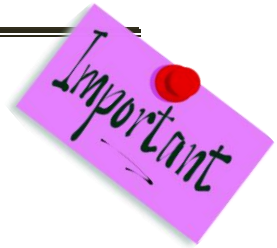
Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to email us and tell us what you think of the new format.



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EDITOR'S FOREWORD: THE HALFWAY THROUGH 2020 PANDEMIC ISSUE By Associate Judge Pat Garza

This is the August 2020 issue of the Texas Juvenile law Reporter (Newsletter). I am writing this for posterity because people reading this in the future will never grasp the enormity of the anxiety and stress, we all experienced.

January. 7 coronavirus cases in US; 9,927 cases worldwide.

The year started with fires in Australia. The fires were categorized as the worst New South Wales fires in history. A total of 25 people were killed. We almost went to war with Iran when the Islamic Revolutionary Guard Corps launched missile attacks against two Iraqi military bases housing U.S. soldiers. The attacks were in retaliation for the killing of Qasem Soleimani, an Iranian major general in Islamic Revolutionary Guard. There was something really bad going on in China, England decided to leave the European Union and Prince Harry and Meghan, the Duchess of Sussex, decided to leave England. Laker's legend Kobe Bryant, his daughter and seven others were killed in a helicopter crash in California.

February. 24 coronavirus cases in US (243% increase from the previous month); 85,967 cases worldwide

The first round of primary elections quickly divided the Democratic field. Iowa screwed up their caucus results, Cory Booker, Kamala Harris, and Andrew Yang withdrew from the Democratic primaries. President Donald Trump was acquitted of impeachment charges by the Senate, gave his state of the union speech and House Speaker Nancy Pelosi ripped up her copy of the speech after he finished. That really bad thing in China found its way into the United States. More than 80 women made allegations against former film producer Harvey Weinstein, resulting in his conviction for sex offenses and him being sentenced to prison. It triggered the #MeToo movement. Three white men kill Ahmaud Arbery, an unarmed African American man, while he was jogging just outside Brunswick, Georgia.

March. 188,724 coronavirus cases in US (786,250% increase from the previous month); 858,340 cases worldwide

The country of Italy shut down because of Covid-19, that horrible thing that started in China. I mean it literally shut down! The U.S. was just beginning to realize that Covid-19 was a worldwide pandemic that did not respect borders. A nationwide state of emergency was declared. People were dying of the disease alone, while in quarantine. Global economies were starting to recognize the potential impact of economic shutdowns due to the pandemic. Social distancing and facemasks were being recommended by disease control experts. Politics being what they were, some felt that somehow social distancing and wearing facemasks violated their "constitutional" rights. The stock market took a dive, businesses started telling people to go home and schools told their students not to return from spring break. While medical experts continued to push the importance of social distancing, washing hands and wearing facemasks, college students enjoyed their spring break with parties in Florida and other parts of the country. Then, everything came to a halt. Stores closed, airports were empty, and cruise ships were quarantined in open water. U.S. stocks recorded their worst day since 1987. The 2020 Tokyo Olympic Games were officially postponed.

April. 1,072,667 coronavirus cases in US (468% increase from previous month); 3,261,450 cases worldwide

Bernie Sanders bowed out of the democratic primary presidential race, leaving Joe Biden as the democratic nominee. As a result of the number of COVID cases, New York dealt with a serious shortage of medical supplies, hospital beds, and ventilators. For the rest of us, toilet paper disappeared. Businesses and people learned about Zoom videoconferencing. People began protesting stay at home orders, while others began having secret parties, ignoring social distancing orders. There was a report that the Supreme Leader of North Korea Kim Jong-un died, but then maybe not. The Pentagon released three Navy videos that contained UFO sightings, calling them "unidentified aerial phenomena," whatever that might mean. At the beginning of April there were 1 million coronavirus cases worldwide, by the end of April there were 1 million in the United States alone. Federal social-distancing guidelines expired, leaving it up to the states to establish social-distancing guidelines themselves. Millions of Americans were now out of work and people lined up at food banks to help feed their families.

May. 1,799,122 coronavirus cases in US (68% increase from the previous month); 6,178,860 cases worldwide

Kenya, Africa, saw the worst invasion of desert locusts in 70 years and giant Asian hornets (also known as "murder hornets") were found in Washington state. Stay home and business closure protest intensified with protesters showing up armed with AR-15 rifles. Most sporting events were cancelled. Contrary to expert advice, Memorial Day weekend prompted celebrations at beaches and parks. George Floyd Jr., an African American man was killed during an arrest by a white police officer, spawning Black Lives Matter protest all over the country. A whale was found dead in the middle of the Amazon rain forest and a monkey attacked a lab technician in India and ran away with blood samples infected with Covid-19. An asteroid named Asteroid 2020 JA passed close enough to the earth that its range was halfway to the moon. Texas's unemployment peaked at 13.5 percent. The US Congress approved an additional $600 a week to the regular state unemployment benefits and former US President Barack Obama delivered a virtual commencement address to

millions of high school seniors. The SpaceX Falcon 9 rocket launched two NASA astronauts toward the International Space Station. It was the first time in history that a commercial aerospace company had carried humans into Earth's orbit.

June. 2,635,603 coronavirus cases in US (46% increase from the previous month); 10,476,012 cases worldwide

At this point in the pandemic, the President refused to wear a face mask claiming it was just a freedom thing. The Black Lives Matters movement intensified with demonstrations in the United Kingdom, Germany, France, Brazil, Australia, South Africa, and countless other countries. Sports teams began reviewing their names or monikers for racist or stereotype origins or overtones. Throughout the south, confederate flags, statutes, and symbols of racial animus were being removed. Some cities started slashing police budgets and tightening police accountability. In Washington D.C., peaceful protesters were shot with rubber bullets, tear gas and flash bangs to clear the block for a presidential photo op. The US Supreme Court issues two major decisions this month: First, it ruled that federal civil-rights law protects gay, lesbian and transgender workers. Second, it blocked the Trump administration's attempt to end DACA, which protects immigrants, who were brought to the country as children, from deportation. A mysterious radio signal was detected coming from half a billion light-years from earth, and that repeated every 16.35 days. While back on earth, scientist found huge "blobs" near the Earth's core. All they could really say was that they were gargantuan. We experienced a massive dust cloud which traveled all the way from the Sahara Desert and Texas decided to do a "limited" reopening of businesses. The President asked the Supreme Court to shut down Obama Care and also held a political rally in Tulsa, Oklahoma, in which a little over 6,000 people showed up. A couple in St. Louis drew guns on people protesting against the mayor of the city. The couple claimed they were in fear of imminent harm from the peaceful protesters. On the last day of the month the extra $600 per week unemployment compensation previously approved by Congress ended.

July. 4,649,102 coronavirus cases in US (76% increase from the previous month); 18,300,000 cases worldwide; 442,014 cases in Texas

As of this writing, there were 718,495 reported deaths to Covid-19 worldwide, 161,248 reported deaths in the U.S., and 8,703 deaths in Texas. Just for this past July, Texas reported 252,884 new cases, with 3,315 deaths. To get an idea of the rate of acceleration at this point in time, the July new case totals were more than all of the other month's totals, combined. School districts are trying to figure out how to safely get kids back in school. Parents are wrestling with the idea of sending their kids into harm's way or keeping them at home. Governments are trying to get kids back in school so their parents can at least have an opportunity to return to work. These are tough decisions for everyone. In Texas alone, 2.8 million people have filed for unemployment benefits since March. Oh, I forgot to mention, presidential elections are less than 3 months away. From senior citizens to first graders the stress is palpable. It's just been hard to deal with everything at once!

In voting for President,
do not vote for one man or one woman.
Vote for one country!

Pat Garza

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CHAIR'S MESSAGE By Patrick Gendron

Growth, adaptation, and change are necessary for those of us that work in the juvenile justice system. Our work is child centered and children by nature are constantly growing, adapting, and changing and to work in this field we too must acclimate. Some of us, like myself, who have sat at the defense table in the juvenile courtroom on a nearly daily basis for the past 20 years can be reluctant to accept current transitions and not very good at adapting to necessary and productive change. In order to reduce juvenile crime which is the main goal of all of us involved in the juvenile system, we must open our eyes and not continue to be institutionalized by routine. It is easy for even the most well intentioned of us who work in the juvenile system to be complacent and accept ideas and ways of doing things because that is the way they have always been done.

The corona virus pandemic has forced us to operate in new and varied ways to adapt to the changes brought on by the health crisis. The pandemic has prompted us to re-evaluate how we administer our normal routine. The many negative and unexpected consequences of the pandemic have forced positive change to evolve. We should all strive to take this as an opportunity to make permanent adjustments for the better – not just simply out of necessity.

Conducting hearings via video is one of those adaptations that I was not familiar with. However, I have come to appreciate the unintended benefits of video hearings and meetings. Transportation to court hearings, probation meetings, and counseling sessions has always been a problem for a great number of families involved in the juvenile system because many do not have access to reliable transportation. Widespread internet availability coupled with nearly universal smart phone ownership (with camera capability) by all demographic groups has made video conferencing an option that was not available even a couple years ago. Even great-grandmas are social media savvy nowadays and can log in to participate in a court hearing.

We can agree that in person court hearings are preferable because of the personal interaction between all of the parties. However, the positives of a video hearing can outweigh the negatives of an in person hearing that might require hours of a family's time and further disrupt schooling and work. It is time consuming for a parent to leave work, pick up a child from school or home, drive to the juvenile center for court or a probation meeting, then drive the child back to school or home and then go back to work. Imagine doing that same task using public transportation. Many parents take off a whole day of work to go to court or to meet with a probation officer and many parents have jobs where they do not get paid if they take off any time. If parents are required to do that twice a month out of a 20 day work month it can mean a payroll reduction of 10%. Many of us who work directly in the juvenile justice system either don't see the problem, ignore the hardship, or are unwilling to help alleviate the problem. Family Code Section 51.116 (Right to Reemployment) is of little practical effect for parents who lose their jobs because of their attendance at court hearings and probation meetings. With a video hearing, a family can stop what they are doing – take 15 minutes for the hearing – and then resume their day at work, school, or home.

The juvenile system is not immune from the transition to ever increasing technologically based non-contact interpersonal communication between people. And some jurisdictions have compensated for the reduction in face time with increased telephone calls to families for detained youth and virtual visits – a practice that should continue after the pandemic because of the positive effects on the detained child's mental and general well-being.

The first action that COVID-19 forced the juvenile justice system to do was determine what actions by children encountered by law enforcement were truly worthy of arrest and/or detention. When decision makers have to worry about the spread of a respiratory disease by the introduction of a child into a detention facility, the decision to detain becomes much more weighty. Children that are normally and routinely arrested and detained might not warrant that kind of physical restriction anymore. In fact, since we are dealing with children with malleable minds might not a more discerning process take place under normal conditions anyway? Let's be realistic when dealing with children who do not have fully developed brains until they are in their early 20's. The hard science tells us that even if we choose to punish the inappropriate behavior with detention the fact is no amount of detention will change a child's mind. Detention is a temporary "fix" that might make us feel better that justice is in motion but in all reality we may be doing more harm than good. Mental health professionals have concluded that arresting a child is traumatic and counts as an Adverse Childhood Experience. The children that we generally deal with have enough ACEs to overcome without those of us tasked by society to punish and rehabilitate adding more trauma and adversity to their lives.

Juvenile officials around the state have detained far fewer children during the pandemic than pre-pandemic. That should tell us something. Under normal conditions the use of 54.01 criteria to detain has come to be used way too liberally in finding cause to detain. If there is not reason to detain during the pandemic then there is probably not sufficient grounds to detain under normal circumstances. The legal criteria of a child being a threat to themselves or others is the same – health crisis or not.

Video communication induced by the health crisis has also been used to aid in the supervision of children by juvenile probation officials. Most probation meetings can be done by phone or video conference as well which alleviates transportation difficulties. Probation officers share they miss the face to face contact but also appreciate the additional time to talk to children and get other work done at the office. Reducing unnecessary in person meetings has afforded probation officers the time and attention elsewhere in order to be more efficient. A reason for an in-person meeting would be for drug testing that can be done very quickly and with particular probation staff designated to do the testing so that there are fewer unnecessary probation officer contacts with clientele.

Counseling can also be done via video. In person counseling is optimal but counseling via video is more impactful versus no counseling at all due to missed appointments and "no shows" – which is a very common occurrence. Video counseling affords an opportunity for more counseling sessions and more consistent counseling than traditional in person sessions.

Telemedicine (seeing a health professional via video conference) has made great strides in the past few years. If primary care physicians can diagnose and treat their patients' *physical ailments* via telemedicine, then mental healthcare professionals, such as counselors and psychologists, can certainly utilize telemedicine to diagnose and treat *non-physical ailments*. Indeed, non-physical ailments affecting mental health are more conducive to proper diagnoses and treatment via telemedicine – because of the inherently communicative nature of mental health care – then those physical ailments requiring in-person examination and testing. In addition, some telehealth providers offer reduced prices for telehealth services, providing an additional benefit to parents and probation departments who bear the cost of medical care.

Another benefit of video hearings is the flexibility that is available to both the courts and the lawyers. Courts have greater flexibility to schedule matters quicker and with less notice than in the past if the hearing is done by video. It is easier to get a setting now than ever before on non-trial matters and that can be of great benefit to juvenile defense attorneys, juvenile prosecutors, probation officers, and juveniles to address urgent matters expeditiously. Also, lawyers have the ability to appear at a hearing from anywhere and can do hearings in multiple jurisdictions on the same day with video hearings. Now that courts and lawyers have had practice in doing video hearings, hopefully the practice will continue when feasible.

The positive changes brought upon by the COVID-19 health crisis should continue when things go back to "normal". Throughout the history of juvenile justice, major societal events have helped shape the practice of juvenile law. Sometimes it takes a major upheaval to shake us out of our routine and think about policy and procedure differently and provides us an opportunity to see ourselves from the vantage point of a new perspective. The one thing we must remember is that we are dealing with children. Children are special and malleable and deserve care and attention. They are not just miniature versions of adults. A lot of what has impacted them is no fault of their own and they have little control over their situation in life. Once these children land on our doorstep, it is our duty to set them on their way better than when they came into the system and with the tools to succeed.

REVIEW OF RECENT CASES By Pat Garza

By Subject Matter

By Case

RECENT CASES

APPEALS, CONFESSIONS

STATUTORY ERRORS REGARDING JUVENILE CONFESSIONS ARE SUBJECT TO A NON-CONSTITUTIONAL HARM ANALYSIS. WHEN PERFORMING THE HARM ANALYSIS, IF THE RECORD REFLECTS THAT OTHER EVIDENCE SHOWS PARTICIPATION IN THE OFFENSE, THE ERROR WILL BE CONSIDERED HARMLESS.

Coby v. State, MEMORANDUM, No. 01-18-00991-CR, 2020 WL 3867280, Tex. Juv. Rep. Vol 34 No. 3 ¶ 20-3-5 [Tex.App.—Houston (1st Dist.), 7/9/2020.

Facts: On March 12, 2015, Juan Carlos Ramirez was shot and killed during a robbery in the parking lot of a bar in downtown Houston. Ramirez's truck was stolen during the incident. Police found Ramirez's body in the parking lot, with a cell phone in his hand.

Ramirez and his friend Shu-Tin Chloe Ward had gone to the bar to see a friend perform. After the performance, they walked outside to Ramirez's pickup truck. Ward got in the truck to make a phone call, and Ramirez stood outside. Before Ward could complete the call, she heard a commotion near the truck, including voices she did not recognize. She heard Ramirez say that he would not give up his keys and that he was going to call the police. Ward attempted to lock the car and tried to call police. Before she could complete the call, someone got into the front seat of the truck, holding a gun in his hand. He lunged at her, put the gun to her head, and threatened to shoot her if she did not give him her belongings. Ward threw her phone onto the front passenger side floorboard and ran out of the truck. As she ran toward the bar for help, she heard Ramirez yell that the police were on their way. She also heard a gunshot.

Law enforcement developed a description of two suspects. They discovered that Ward's cell phone remained active and traced it to a duplex in Houston. Officers performed surveillance on the location and observed Ramirez's truck being driven by someone who matched the description of one of the suspects. After following the car and a brief chase, they arrested Coby's codefendant. Later, they approached Coby when he left the duplex. Coby fled and crawled under a nearby house. He eventually surrendered when threatened with release of a police dog.

After he was arrested, law enforcement realized that Coby was 15 years old. They took him to a magistrate judge for statutory warnings and then to the police headquarters downtown. The same detective interviewed Coby and his codefendant separately. Simultaneously, another officer attempted to notify Coby's guardian, but Coby did not give officers a working phone number for his grandmother, and searches did not recover phone numbers for her.

When interviewed, Coby confessed to the crime. He admitted that he wanted money to buy something for his girlfriend so he and his codefendant went downtown intending to rob someone. They walked by a bar and went into the parking lot. Coby held a gun to a man while his codefendant grabbed the man's car keys, but the man grabbed for the gun. The man started chasing his codefendant while Coby got in the truck and grabbed a phone belonging to the woman inside. She got out of the car and ran. Coby admitted that he shot the man.

About a month after the murder, Ward identified Coby in a photo array as the person who got into the truck. Ward also identified her cellphone, which was recovered in the front passenger seat of the truck. Forensic searching of the phone showed that two contacts had been added after the incident: "Smiley" and "Dino." Ward did not know anyone by either name. Police knew that Coby used the nickname "Smiley." Calls were made from the phone to "Smiley" on six occasions in the day after the murder. The phone's browsing history during that time also included "Ford car on Houston news" and "man shot and killed during carjacking."

Coby was indicted for capital murder. He pleaded not guilty. A jury found him guilty of the lesser-included offense of felony murder and assessed punishment at 70 years' imprisonment.

In his second issue, Coby contends that the trial court improperly overruled his motion to suppress and should not have admitted his statement for three reasons: (1) the interviewing officer did not notify Coby's grandmother; (2) Coby did not expressly waive his statutory rights by using the word "waiver" or by explicitly agreeing that he "waived his rights"; and (3) the recording device broke the recording of the statutory warnings given by the magistrate into a separate file from the statement Coby gave officers on the same digital recorder. We hold that the trial court did not err in denying Coby's motion to suppress.

Held: Affirmed

Memorandum Opinion: The admissibility of custodial statements made by a juvenile is governed by section 51.095 of the Family Code. See TEX. FAM. CODE § 51.095. Subsection 51.095(a)(5) provides that a juvenile's oral statement is admissible if these conditions are satisfied: (1) the statement is made while the child is in the custody of an officer, in a detention facility or other place of confinement, or in possession of the Department of Family and Protective Services; (2) the statement is recorded by an electronic recording device; and (3) at some time before making the statement, "the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is part of the recording, and the child knowingly,

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intelligently, and voluntarily waives each right stated in the warning." Id. § 51.095(a)(5). Section 51.095 incorporates the warnings required by Miranda, with additional safeguards in place to protect juveniles. Id. § 51.095; see Miranda v. Arizona, 384 U.S. 436, 479 (1966).

A juvenile's oral statement made as a result of custodial interrogation without the benefit of a magistrate warning is inadmissible at trial. See TEX. FAM. CODE § 51.0595(a)(5), (b)(1); see also TEX. CODE CRIM. PROC. art. 38.22 § 3. But section 51.095 does not preclude admission of a juvenile's statement if the statement does not stem from custodial interrogation. See TEX. FAM. CODE § 51.0595(b), (d); Matthews v. State, 513 S.W.3d 45, 62 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); see also Laird v. State, 933 S.W.2d 707, 713 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (discussing prior version of statute and explaining that it "allows an oral statement to be admitted if it is not in response to custodial interrogation"). Custodial interrogation is "questioning that is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way." Delacerda v. State, 425 S.W.3d 367, 386 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

Motion to Suppress Hearing

Coby's motion to suppress his statement alleged that police violated his constitutional rights and the Texas Family Code's requirements for juvenile interrogation. The court held a hearing on his motion. Officer Burrow testified that he interviewed Coby after the Houston Police Department took him into custody. Before taking Coby's statement, Officer Burrow took him before a magistrate to receive the statutorily required juvenile warnings. He took a digital audio recorder into the judge's chambers, put the timestamp information on the recording, and left Coby alone in the room with the judge to receive his warnings. The digital recorder captured the warnings the judge gave to Coby. Officer Burrow testified that he later listened to the judge's discussion with Coby and verified that the warnings were given. After Coby received the warnings from the judge, he was taken to the juvenile processing office of the Houston Police Department Homicide Division.

While Officer Burrow interviewed Coby's codefendant and then Coby, Officer Rodriguez attempted to contact Coby's grandmother. He searched databases and called the best number he could find, but she did not answer. The following day, another officer with the Houston Police Department Juvenile Division reached her.

Officer Burrow recorded his interview with Coby on the same digital recorder, and the recorder created two files. Both were timestamped showing the warnings occurred first, followed by the statement. Officer Burrow explained that when someone presses stop on the digital recorder, it automatically creates a new file, resulting in two files – the warnings and the interview.

Officer Burrow interviewed Coby for about thirty minutes, ending at 9:00 p.m. Coby then asked to call his girlfriend. Officer Burrow let Coby make the phone call on his city-issued cell phone and left the room. Coby spoke to his girlfriend, his grandmother, and at least two other people during the call. Video recording captured him making the phone call, and the judge viewed it during the motion-to-suppress hearing. During the call, Coby told his grandmother that he was taken by police to the Homicide Division. He told her that he had been making bad decisions, and he had been caught. He admitted to her that the had been out the night before near a bar downtown with his codefendant. He explained that they tried to rob a man, but the man fought back, and Coby "popped him in the chest and like five minutes later he died." Coby asked her to bring his girlfriend to court so that he could see her. He told someone else on the call that he had been caught for capital murder. He also said "that just how it goes down in the jungle."

Coby testified at the hearing, stating that he did not pay attention to the magistrate judge's warnings. He said he signed the paper that was put in front of him and claimed not to understand the warnings or that he was waiving his rights. He also testified that he only wanted to get the statement out of the way so that he could go to sleep. He said that if his grandmother told him he was under investigation for murder, he would not have given a statement.

Coby admitted that he did ask the judge some questions and that he responded to the judge's warnings. He also admitted that he talked to his grandmother on the phone, and that she first visited him three days later.

The trial court reviewed the video of the interrogation and the audio of the magistrate judge's warnings. The court denied the motion to suppress and made findings of fact and conclusions of law. The court found Officer Burrow's testimony credible and Coby's testimony not credible. The court found that Coby was taken to a magistrate judge without unnecessary delay and that he received warnings that complied with the Family Code's provisions requiring that the defendant be alone with a magistrate and that the warnings be recorded. The warnings were completely explained to Coby in a manner that ensured he understood him, and Coby told the magistrate that he understood. Coby was repeatedly told that he did not have to talk to officers. Although he did not use the word "waive," it was clear to the trial court that he chose to waive his rights.

The court found that the warnings were recorded using the same recorder that was used to record his statement, but the recording was not necessarily captured on the same drive. The court stated that it was unclear what device, such as a USB thumb drive, was used to capture the warnings, but that the

recordings were timestamped, and the court could determine that Coby received the warnings before he gave a statement. The court found that the process substantially complied with the Family Code.

The court found that Coby was taken to the homicide division of the Houston Police Department, which is a designated juvenile processing officer. Officer Burrow interviewed Coby, and Coby initiated conversation and spoke voluntarily. While the interview was happening, another officer attempted to contact Coby's grandmother but was unsuccessful.

The findings include that Coby was given water and allowed to make phone calls from the officer's cell phone. He appeared to contact his grandmother and advise her that he had been arrested. His grandmother was notified by police the next day.

The court found that Coby's statement was freely and voluntarily given after receiving the statutory warning from a magistrate judge. Coby understood his rights and voluntarily waived them. His statement was given voluntarily without threats or coercion. The court found that the Family Code was complied with in most respects except as it relates to parental notification, but the statement was not automatically inadmissible for failure to promptly notify a guardian. The court found that there was no showing of a causal connection between the lack of guardian notification and Coby's statement. There was no evidence that Coby's grandmother would have gone to the police station if she had been so notified.

Failure to Notify Guardian

First, Coby contends that the trial court erred in admitting his statement because police failed to notify his guardian before questioning him. Section 52.02(b) provides that a person taking a child into custody must promptly notify the child's parent or guardian of the person's action and a statement of the reason for taking the child into custody. TEX. FAM. CODE § 52.02(b)(1).

Even assuming the police failed to promptly notify Coby's guardian, we agree with the trial court that Coby failed to meet his burden to prove a causal connection between the failure to contact his grandmother and the making of his statement. Pham v. State, 175 S.W.3d 767, 772–73 (Tex. Crim. App. 2005) ("We have expressly held that a causal connection between a violation of section 52.02(b) and the obtaining of evidence must be shown before the evidence is rendered inadmissible.").

Coby testified at the hearing on the motion to suppress, and the trial court found that his testimony lacked credibility. He testified that he valued his grandmother's advice and that he would not have given a statement had she told him he was under investigation for murder. The trial court heard a recording of the magistrate judge informing Coby that he had been accused of evading on foot and that police wanted to talk to him about a murder. The record also reflects that Coby had been informed from the beginning of the interview with Officer Burrow that police placed him in custody to investigate a murder. At the beginning of the interview with Officer Burrow, which the trial court also watched, Coby was told that the charges would likely be capital murder. Given the evidence that Coby was told that he was being investigated for murder or capital murder before he made any inculpatory statements, Coby has not established that his grandmother telling him the same information would have been likely to change the outcome of his decision.

Waiver of Rights

Coby next contends that his statement should have been suppressed because neither he nor the magistrate judge used the word "waive" to determine whether he freely decided to speak to police.

The Family Code does not require that the defendant explicitly waive his rights. See Marsh v. State, 140 S.W.3d 901, 911 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd); see also Crenshaw v. State, No. 01-09-00791-CR, 2011 WL286126, at *11 (Tex. App.—Houston [1st Dist.] Jan. 27, 2011, pet. ref'd) (mem. op., not designated for publication). The question is not whether a defendant explicitly waived his Miranda rights, but whether he did so knowingly, intelligently, and voluntarily. Joseph v. State, 309 S.W.3d 20, 25, (Tex. Crim. App. 2010). We consider the totality of the circumstances to determine whether he did so. Id.

The totality of the circumstances surrounding the interrogation shows that Coby knowingly, intelligently, and voluntarily waived his rights. The magistrate judge repeatedly explained Coby's rights. The record reflects that the magistrate judge told Coby:

You may remain silent and not make any statement at all. That means, just because they want to talk to you doesn't mean you have to talk to them. If they want to ask you questions, doesn't mean you have to answer their questions. If you want to, that's fine. If you don't want to, that's fine too. It's your right, not theirs.

The judge told Coby that if he chose to speak to police, his words could later be used as evidence if he were charged with a crime. The judge explained Coby's right to a lawyer before or during questioning, and he informed Coby that if he could not afford a lawyer, a lawyer would be appointed to represent him without cost. He told Coby that he could stop talking to the police during an interview if he changed his mind, became tired, or decided to stop. The judge reiterated, "Just because you start answering questions doesn't mean you have to continue answering questions." The judge asked Coby if he understood, and Coby responded affirmatively, including that he had no questions. The judge relayed additional information about what would happen next, and he repeated the warnings a third time, including: "You'll have to make the decision and you're going to have to tell them yes,

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I'll answer the questions, no, I won't, or I want to talk to a lawyer first."

The record also reflects that after Coby left the judge's chambers, he initiated the conversation with Officer Burrow by asking what would likely happen to him. The officer responded that it was Coby's decision. The officer reminded Coby that the judge had read him his legal warnings.

The record supports the trial court's conclusion that Coby knowingly, intelligently, and voluntarily waived his rights, and gave a statement.

Recording of the magistrate judge's warning and the custodial statement

Finally, Coby argues that the trial court erred in denying his motion to suppress because there was a break in the recording between the magistrate judge's warnings and his digitally recorded statement.

Section 51.095(a)(5)(A) notes that the magistrate judge's warning should be "a part of the recording" when taken as a warned, custodial statement. See TEX. FAM. CODE § 51.095(a)(5)(A) ("[B]efore 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."). Article 38.22 of the Code of Criminal Procedure requires that police record a defendant's oral custodial statement, and that "prior to the statement but during the recording the accused is given the warnings ... and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning." TEX. CODE CRIM. PROC. art. 38.22 § 3(a)(1–2).

Coby argues that because the digital recorder used by officers separated the magistrate judge's warnings into a distinct audio file from the subsequent recording of the custodial statement, the trial court should have deemed them inadmissible. The State argues that the trial court's ruling should be upheld because the evidence shows substantial compliance with the requirements of Section 51.095(a)(5)(A) given that the warnings and interview occurred on the same digital device and timestamps show the warnings occurred consecutively.

We need not decide whether the audio recorder's separation of the warning and statement into two files violates section 51.095 because Coby has not shown that he was harmed by the admission of his recorded custodial statement.

Conclusion: Statutory errors that result in erroneous admission of a statement are subject to a non-constitutional harm analysis. Nonn v. State, 117 S.W.3d 874, 880–81 (Tex. Crim. App. 2003) (addressing analysis of an article 38.22 violation as non-constitutional harm because such a violation did not render the statement unconstitutional). When performing a rule 44.2(b) harm analysis, we uphold the verdict unless the erroneous admission had a substantial and injurious effect on the jury's verdict. Id.; see TEX. R. APP. P. 44.2(b). The record reflects that Coby admitted to his role in the murder during phone conversations with his family. Coby had no right to privacy in the contents of these conversations, and no police action caused him to make the inculpatory statements. See Cortez v. State, 240 S.W.3d 372, 382 (Tex. App.—Austin 2007, pet. ref'd) ("[Juvenile] appellant's claim of privacy in a police station interview room is not consistent with historical notions of privacy."). Officer Burrow offered Coby his cell phone, and Coby appeared to call several family members and friends. The statements Coby made during the phone calls were not a result of a custodial interrogation as they were not in response to questions initiated by law enforcement. See Delacerda, 425 S.W.3d at 386. During the conversations, Coby admitted that he was "fixing to go down for capital murder." He admitted that he had made bad decisions and been caught. He also stated: "We were out all night. We went to go there, we tried to get this man, and he fought back, and I popped him in the chest and like five minutes later he died." Physical evidence also tied Coby to the murder. Police tracked Ward's cell phone to the house that Coby left immediately before he was arrested. The victim's stolen car was found nearby with the phone inside. When police approached, Coby ran under a house. He only surrendered after police threatened K-9 intervention.

We overrule Coby's second issue and uphold the trial court's denial of his motion to suppress. We affirm the judgment of the trial court.

CRIMINAL PROCEEDINGS, EVIDENCE

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A VIDEO IN THE PUNISHMENT PHASE OF A CRIMINAL PROCEEDING, WHICH HAD PREVIOUSLY BEEN A PART OF A JUVENILE RECORD, WITHOUT HAVING TO COMPLY WITH STATUTORY JUVENILE RECORDS RESTRICTIONS, BECAUSE THE VIDEO WAS MADE AVAILABLE FROM A SOURCE OTHER THAN THE JUVENILE COURT.

Harris v. State, MEMORANDUM, No. 05-18-01506-CR, 2020 WL 4218035, Tex. Juv. Rep. Vol 34 No. 3 ¶ 20-3-4 (Tex.App.—Dallas, 7/23/2020).

Facts: Royneco Harris appeals his aggravated robbery conviction. A jury convicted appellant and sentenced him to forty-five years' confinement and a $10,000 fine. In five issues, appellant argues the evidence was legally insufficient to support his conviction, and the trial court erred in overruling his objection to the prosecutor's questioning during voir dire, allowing the State to present evidence of an extraneous offense, overruling his objection to evidence of an extraneous robbery, and overruling his objection to the proffer of a video from his conviction in juvenile court.

In his fifth issue, appellant argues the trial court erred and abused its discretion in overruling appellant's objection to the proffer of a video from appellant's conviction in juvenile court.

Held: Affirmed

Memorandum Opinion: We review a trial court's decision to admit or exclude evidence of extraneous offenses under an abuse of discretion standard. Id. During the hearing outside the presence of the jury, defense counsel objected to the admission of a video from appellant's conviction in juvenile court for an aggravated robbery. Counsel argued that, under section 58.007 of the Family Code, the State was required to have the juvenile justice system's approval to use any evidence from appellant's juvenile conviction other than a certified conviction. In making this argument, counsel stated the "purpose of that is to protect the juveniles." Counsel stated she understood the State obtained the video at issue from DART but argued the State was "linking that certified conviction to that video," and the video "is not a public document when used in that way."

In response, the prosecutor argued section 58.007 pertained only to "the sealed records from the juvenile case," and the video at issue was separate and apart from those records because it was obtained from the DART police department and was sponsored by a DART employee. The prosecutor later clarified that the video came from the Dallas Area Rapid Transit Authority and was "not from the police department; it's from DART." The prosecutor argued the fact that the video was also part of the juvenile record did not prevent her from obtaining the video from another source and offering it into evidence. Further, the prosecutor argued "the identity of [appellant] being associated with this juvenile case is no longer being protected, assuming this juvenile conviction is going to be part of this record." The trial court overruled defense counsel's objection.

In appellant's brief, he quotes the above exchange and "submits pursuant to defense counsel's argument to the trial court that the State may not use that which was part of a juvenile record, i.e. the video offered into evidence." Appellant also quotes section 58.007(g) of the family code as follows:
(g) For the purpose of offering a record as evidence in the punishment phase of a criminal proceeding, a prosecuting attorney may obtain the record of a defendant's adjudication that is admissible under Section 3(a), Article 37.07, Code of Criminal Procedure, by submitting a request for the record to the juvenile court that made the adjudication. If a court receives a request from a prosecuting attorney under this subsection, the court shall, if the court possesses the requested record of adjudication, certify and provide the prosecuting attorney with a copy of the record. If a record has been sealed under this chapter, the juvenile court may not provide a copy of the record to a prosecuting attorney under this subsection. TEX. FAM. CODE ANN. § 58.007(g).

Appellant cites no authority to support his argument that, because the video at issue was made part of the juvenile record, the State was required to obtain the video from the juvenile court even though it was available from another source.

Conclusion: We conclude the trial court did not abuse its discretion in determining section 58.007 only applied to disclosure of juvenile court records, not to records or evidence from a third party such as DART, and overruling appellant's objections to the video. See Devoe, 354 S.W.3d at 469. We overrule appellant's fifth issue. We affirm the trial court's judgment.

SUFFICIENCY OF THE EVIDENCE

IN SUFFICIENCTY OF THE EVIDENCE ARGUMENTS, APPELLATE COURTS WILL PRESUME THE FACTFINDER RESOLVED CONFLICTING INFERENCES IN THE EVIDENCE IN FAVOR OF THE VERDICT AND NOT ATTEMPT TO SUBSTITUTE THEIR JUDGEMENT FOR THAT OF THE FACTFINDER.

In the Matter of A.G., MEMORANDUM, No. 01-18-01092-CV, 2020 WL 4006449, Tex. Juv. Rep. Vol 34 No. 3 ¶ 20-3-2 [Tex.App.—Houston (1st Dist.), 7/16/2020].

Facts: On February 6, 2016, Edison Williams set up a drug sale where Erron Shamlin was to supply half a pound of marijuana to A.G. and L.Y. for $800. For his role as middleman, Williams expected to receive $20 worth of marijuana and a ride. A.G. and L.Y. picked up Williams in a red Tahoe and drove to Shamlin's neighborhood. When Shamlin walked up to the car, an argument ensued over whether Shamlin was providing the full amount of marijuana. Shamlin got in the Tahoe to go with the other three to his house where he could weigh the marijuana for them. While on the way, A.G. pulled out a gun and yelled at Shamlin to give him the marijuana. L.Y. and Williams got out of the car and ran away. They heard gun shots as they were running. Shamlin's friends and a good Samaritan found him lying in the street. He had a gunshot wound, and he died soon thereafter. Shamlin was 24 years old at the time of his death.

Williams was initially charged with murder, due in part to information provided to law enforcement by A.G. As the investigation continued, the charge against Williams was dismissed, and the State filed a petition alleging that A.G. committed the capital murder of Shamlin.

After a bench trial, the court found that A.G. had engaged in delinquent conduct, namely capital murder, and sentenced him to a 20-year determinate sentence. He appeals.

Held: Affirmed

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Memorandum Opinion: On appeal, A.G. contends that the evidence is insufficient to support a finding that he engaged in the delinquent conduct. He also asserts that the trial court erred by not finding that a witness was an accomplice whose testimony must be disregarded.

We review the sufficiency of the evidence to support a finding that a juvenile engaged in delinquent conduct using the standard applicable to criminal cases. R.R., 373 S.W.3d at 734. Accordingly, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. Id. at 734–35 (citing Jackson v. Virginia, 443 U.S. 307, 318–19 (1979)). This standard of review applies to cases involving both direct and circumstantial evidence. R.R., 373 S.W.3d at 735. Although we consider everything presented at trial, we do not substitute our judgment regarding the weight and credibility of the evidence for that of the factfinder. Id. (citing Williams v. State, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)). We presume the factfinder resolved conflicting inferences in favor of the verdict, and we defer to that determination. Id. (citing Clayton v. State, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). We also determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. Id.

We find the evidence legally sufficient to prove A.G. committed the offense of capital murder. A person commits capital murder if a person intentionally or knowingly causes the death of an individual in the course of committing or attempting to commit burglary. TEX. PENAL CODE § 19.03(a)(2). The trial court heard evidence that (1) A.G. admitted to Gaffney that he killed Shamlin; (2) A.G.'s phone had contact with Williams's phone on the date of the murder; (3) A.G.'s phone was near the crime scene around the time of the murder; (4) Williams arranged the sale between Shamlin and A.G. and did not want to ruin his relationship with Shamlin as a reliable drug source; (5) Williams expected an $800 transaction but A.G. and L.Y. only showed him $400 in cash on the way to the park; (6) Williams heard A.G. cock a gun in the truck on the way to the park; (7) A.G. demanded that Shamlin give him the marijuana when they were in the backseat; (8) Williams believed that A.G. was trying to rob Shamlin when he demanded the marijuana while holding a gun; (9) A.G. and Shamlin fought after Shamlin refused to hand over the drugs; (10) Williams and L.Y. ran out of the truck; (11) the Tahoe drove away from the area of the murder on the tollway later that night; (12) A.G. lied to Deputy Brown about knowing Williams; and (13) A.G. did not use his phone after the night of the murder for several days.

A.G. argues that Williams's and Gaffney's testimony is not credible. He argues that while he cooperated with police, gave a DNA sample, and consented to the search of his phone and vehicle, Williams failed to cooperate until months after the murder when he was arrested. To the extent A.G. argues there was conflicting testimony and inferences at trial, we defer to the factfinder's resolution of conflicting witness testimony. Clayton, 235 S.W.3d at 778. We may not reevaluate the weight and credibility of the record evidence and thereby substitute our judgment for that of the factfinder. R.R., 373 S.W.3d at 735 (citing Williams, 235 S.W.3d at 750). We presume the factfinder resolved conflicting inferences in favor of the verdict and defer to that determination. Clayton, 235 S.W.3d at 778.

Viewing all the evidence in the light most favorable to the verdict, we conclude that the trial court could have found beyond a reasonable doubt that A.G. murdered Shamlin while in the course of robbing or attempting to rob him. We hold that the evidence is legally sufficient to support an adjudication of A.G. as delinquent. We overrule A.G.'s first issue.

In his second issue, A.G. contends that the trial court erred by failing to find that Williams was an accomplice whose testimony must be disregarded. The trial court did not make a finding about whether Williams was an accomplice. The State argues that Williams was not an accomplice, and if he were, his testimony could be considered because it was corroborated by other evidence.

"Texas law requires that, before a conviction may rest upon an accomplice witness's testimony, that testimony must be corroborated by independent evidence tending to connect the accused with the crime." Druery, 225 S.W.3d at 498 (citing TEX. CODE CRIM. PROC. art. 38.14). In reviewing the sufficiency of the corroborating evidence, we consider only the non-accomplice evidence to determine whether any of that evidence connects the defendant with the commission of the crime. Solomon v. State, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001). "If the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, the requirement of Article 38.14 has been fulfilled." Cathey v. State, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). We review the non-accomplice evidence in the light most favorable to the verdict. See Smith, 332 S.W.3d at 442. The accomplice witness rule is satisfied if there is some non-accomplice evidence tending to connect the accused to the commission of the alleged offense. M.H., 553 S.W.3d at 118–19. When there are conflicting views of the evidence, one that tends to connect the accused to the offense and one that does not, the appellate court defers to the factfinder's resolution of the evidence. Smith, 332 S.W.3d at 442.

There was sufficient non-accomplice evidence to connect A.G. to the murder and corroborate Williams's testimony. A.G. told Gaffney that he killed the complainant and described how the murder happened. See Matthews v. State, 999 S.W.2d 563, 566 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (assuming that a witness was an accomplice, her testimony was

corroborated by evidence including the defendant's admission of guilt to another person). A.G.'s vehicle was consistent with descriptions and video of the suspect vehicle. The Tahoe incurred toll violations on the night of the murder, suggesting that it was traveling away from the scene. See Smith, 332 S.W.3d at 442–43 (proof that the accused was near the scene of the crime about the time of its commission, when coupled with other suspicious circumstances, may furnish sufficient corroboration to support a conviction). The evidence reflects that A.G. was in the area at the time of the murder and was in contact with Williams's phone on the day of the murder, discussing a drug deal. Id. After the murder, the phone was not used again for several days. When first asked for his phone number by law enforcement, A.G. provided a number that had been activated after the murder. He and his family never provided a correct number for his previous phone. See Guevara v. State, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (attempts to conceal incriminating evidence are probative of wrongful conduct and circumstances of guilt). He also lied to Deputy Brown when first discussing the incident with him. See id. (inconsistent statements and implausible explanations to police are probative of wrongful conduct and consciousness of guilt).

Conclusion: There is sufficient evidence tending to connect A.G. to the offense. If the trial court implicitly found that Williams was an accomplice, his testimony could still be considered by the court because it was sufficiently corroborated by other evidence. We overrule A.G.'s second point of error.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

AFTER A DISCRETIONARY TRANSFER TO ADULT COURT, JURISDICTION REMAINS WITH THE ADULT COURT, UNLESS A PREVIOUS TRASFER ORDER WAS REVERSED BY AN APPELLATE COURT OR SET ASIDE BY A DISTRICT COURT.

In the Matter of D.T., No. 14-20-00079-CV, 14-20-00081-CV, --- S.W.3d ----, 2020 WL 3422320, Tex. Juv. Rep. Vol 34 No. 3 ¶ 20-3-6 [Tex.App.—Houston (14th Dist.), 6/23/2020].

Facts: Appellant was named as a suspect in two separate offenses. The first was a capital murder alleged to have been committed in December 2012, and the second was a regular murder alleged to have been committed in March 2013. At the time of both offenses, appellant was sixteen years old.

In May 2013, the State filed two petitions in juvenile court, alleging that appellant had engaged in delinquent conduct by committing the capital murder and the regular murder. Appellant was seventeen years old at the time of these petitions.

In July 2013, the State moved for the juvenile court to waive its exclusive, original jurisdiction and to certify appellant to be tried as an adult. In September 2013, after various evaluations and a hearing, the juvenile court granted the State's motion and issued two separate orders, transferring each case to criminal district court. Appellant was still seventeen years old at the time of the transfers. He turned eighteen in April 2014.

The State proceeded by first trying the capital murder case in July 2016, when appellant was twenty years old. A jury convicted him of that offense and the trial court imposed a sentence of life imprisonment.

Following the conviction, the State moved for the district court to dismiss the regular murder case, apparently in the interest of judicial economy. The reason given on the motion to dismiss was that appellant was already serving a life sentence because of the capital murder conviction. The district court granted that motion.

Meanwhile, appellant brought an appeal of his capital murder conviction to our court, contending among other issues that the juvenile court's transfer order did not sufficiently state the reasons for its waiver of jurisdiction. This issue invoked the holding in Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014), which was decided after the juvenile court had already rendered its transfer order. Because we agreed that the transfer order was deficient under Moon, we sustained appellant's issue. We then vacated appellant's conviction for capital murder and remanded that case back to the juvenile court. See Taylor v. State, 553 S.W.3d 94, 100 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd).

Our mandate did not encompass the regular murder case, which belonged to a separate trial court cause number. Nevertheless, the State determined for itself that the transfer order in the regular murder case was also deficient because that transfer order similarly lacked case-specific reasons for the juvenile court's waiver of jurisdiction. Believing that the deficient transfer order had deprived the district court of jurisdiction to render a dismissal, the State simply refiled the delinquency petition for the regular murder case in juvenile court. The State also refiled the delinquency petition for the capital murder case, and then moved for the juvenile court to transfer both cases back to the district court in a manner consistent with Moon.

The State's motion set up a dispute between the parties as to which transfer standard should apply. Because appellant had since turned twenty-three, the State argued that the juvenile court should follow the standard set forth in subsection (j) of Section 54.02 of the Texas Family Code, which applies to alleged juvenile offenders who have since become adults. Appellant countered that the juvenile court should follow the standard set forth in subsection (a), which applies to alleged juvenile offenders who are still children.

Subsection (a) is more demanding than subsection (j) because it requires the juvenile court to perform an individualized assessment of the alleged juvenile offender. Even though appellant was no longer a child, he pointed out that the juvenile court had previously applied subsection (a) in 2013 during his original transfer hearing, and he reasoned that if the juvenile court did not reapply subsection (a), then he would be penalized for having successfully exercised his right of appeal. He relatedly argued that the State's proposed application of subsection (j) was unconstitutional because a transfer without an individualized assessment violates the Eighth Amendment's protection against cruel and unusual punishment and the Fourteenth Amendment's guarantee of the due process of law.

The juvenile court disagreed with appellant's legal arguments and issued two new transfer orders under subsection (j). Appellant then brought these separate appeals from those orders, availing himself of an interlocutory procedure that was not available at the time of his previous transfer hearing.

Held: Transfer Order in Capital Murder, Affirmed. Transfer Order in Regular Murder, Reversed and Dismissed.

Opinion: In his appeal of the other transfer order, appellant argues that the State failed to satisfy its burden under subsection (j)(4)(A), which is what the juvenile court cited as the basis for its waiver of jurisdiction. Appellant also brings the same constitutional challenges that we just addressed (and rejected) in his appeal in the capital murder case. Before we can dispose of these arguments on the merits, we must first determine a threshold question of jurisdiction.

The juvenile court raised the question of its own jurisdiction during the second transfer hearing. In response to that question, both sides agreed that the juvenile court had the jurisdiction to act on the State's motion to transfer, even though the previous transfer order had never been reversed by an appellate court or set aside by a district court. The parties reasoned that the original transfer order was void on its face because it violated Moon by not containing any case-specific reasons for the juvenile court's waiver of jurisdiction. Continuing with that premise, the parties argued that the juvenile court's previous waiver of jurisdiction was ineffective, which meant that the juvenile court still retained its exclusive, original jurisdiction.

By rendering the second transfer order, the juvenile court apparently accepted this reasoning.

We believe that this reasoning conflicts with the final footnote in Moon, where the Court of Criminal Appeals made the following comment regarding the juvenile court's authority to cure a deficient transfer order: "Unless and until the transfer order is declared invalid, the criminal courts retain jurisdiction, and the juvenile court lacks jurisdiction to retroactively supply critical findings of fact to establish whether or not it has validly waived its jurisdiction." See Moon, 451 S.W.3d at 52 n.90. That comment is consistent with State v. Rhinehart, 333 S.W.3d 154 (Tex. Crim. App. 2011), where the Court of Criminal Appeals signaled that a transfer order would still vest the district court with jurisdiction, even if the transfer order were somehow erroneous. Id. at 159 ("It is not apparent to us that a juvenile court's erroneous ruling on a due-diligence issue deprives the criminal district court of jurisdiction over the matter.").

The original transfer order in the regular murder case has not been declared invalid yet. It has not been reversed in an appeal; though there was an appeal following appellant's capital murder conviction, that appeal only affected the transfer order in the capital murder case, not the transfer order in the regular murder case. It has not been reversed by a district court either. See Tex. Fam. Code § 54.02(j)(4)(B)(iii) (contemplating a procedure in which the district court may set aside a transfer order).

Conclusion: Unless and until the original transfer order is declared invalid, we conclude that the district court retains jurisdiction in the regular murder case, which means that the juvenile court lacked jurisdiction and that its second transfer order is void. See Moon, 451 S.W.3d at 52 n.90. In light of this conclusion, we do not address the merits of appellant's arguments.

The transfer order in the capital murder case is affirmed. The transfer order in the regular murder case is reversed and dismissed for want of jurisdiction.

IN A DISCRETIONARY TRANSFER TO ADULT COURT, THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION WHERE COURT'S FINDINGS WERE SUPPORTED BY LEGAL AND FACTUAL SUFFICIENT EVIDENCE AND THE JUVENILE COURT CORRECTLY APPLIED THE STATUTORY CRITERIA GOVERNING THE WAIVER OF ITS JURISDICTION TO ITS FACT FINDINGS.

In the Matter of K.M., MEMORANDUM, No. 01-20-00121-CV, 2020 WL 4210493, Tex. Juv. Rep. Vol 34 No. 3 ¶ 20-3-3 [Tex.App.—Houston (1st Dist.), 7/23/2020]

Facts: The State petitioned to adjudicate K.M., a juvenile who was 16 years of age at the time of the alleged offense, delinquent. The State alleged that K.M. intentionally and knowingly caused the death of another, Delindsey Mack, by shooting him with a firearm. The State later moved the juvenile court to waive its jurisdiction over K.M. and transfer her to the criminal district court.

At the certification hearing, the State called several witnesses: T. Miller, a homicide detective with the Houston Police Department; A. Bock, a detective assigned to a multi-agency gang task force; P. Bonds

and T. Hall, two juvenile detention officers at the facility in which K.M. is housed; Dahlia Mack, the mother of the victim; and Dr. Matthew Shelton, the deputy director of residential services for the county's juvenile probation department. The defense called several witnesses, including K.M.'s father, mother, aunt, and grandmother; Florencia Iturri, K.M.'s therapist at the juvenile detention facility; Autumn Lord, the associate manager of the intake unit at the facility for delinquent girls; and Dr. Uche Chibueze, chief psychologist for the county's juvenile forensic department.

Detective Miller investigated the murder of Mack, who attended Lamar High School and associated with a street gang called "Free Money." In November 2018, Mack was gunned down near the school shortly after noon. Mack and Robin Hale, a female classmate, were walking down a nearby street when two masked gunmen exited a vehicle and opened fire. Hale was wounded and fled. Mack was shot several times and died at the scene.

Police later found the gunmen's abandoned vehicle. From the vehicle, the police recovered the fingerprints of Brent Williams and Kendrick Johnson. Johnson was later arrested and charged with Mack's murder, remaining in custody at the time of K.M.'s certification hearing. Both Williams (who remains a suspect in Mack's murder) and Johnson are members of the street gang "103," shorthand for "100 Percent Third Ward," a rival of "Free Money."

Early in the investigation, Miller interviewed Hale and K.M. Hale told Miller that K.M. had directed them to the location of the shooting. Hale also told Miller that K.M. was not upset after the shooting. K.M. told Miller that she, Hale, and Mack had left school at lunch to get something to eat. But halfway through the parking lot, K.M. turned around and returned to school because she was concerned about tardiness. She began running away when the shooting started.

A couple of days after K.M.'s initial interview, she sat for a second interview. K.M. related the same basic facts as before—that she initially accompanied Mack and Hale to get lunch together, changed her mind and returned to school halfway through the parking lot, and ran away when the shooting began.

The juvenile court entered an order waiving its jurisdiction and transferring K.M. to the criminal district court. In its order, the juvenile court found probable cause to believe that K.M. committed murder existed. It also found that several considerations weighed in favor of transfer.

In particular, it found that:
• the murder was an egregious crime against a person;
• K.M. showed a high level of sophistication and maturity;
• her previous history supported transfer; and
• the need to protect the public and the unlikelihood that K.M. would be rehabilitated in the juvenile system supported transfer.

The juvenile court recited extensive facts in support of these four findings. K.M. appeals.

Held: Affirmed

Memorandum Opinion: K.M. contends that the juvenile court's section 54.02(f) findings are not supported by legally and factually sufficient evidence. She argues that the record strongly shows that she is amenable to rehabilitation and poses no danger to the public.

Not all four criteria enumerated in section 54.02(f) need weigh in favor of transfer to justify a juvenile court's waiver of its jurisdiction. Moon v. State, 451 S.W.3d 28, 47 (Tex. Crim. App. 2014). In general, any combination of these criteria may justify the waiver of juvenile jurisdiction. Id. at 47 n.78. In reviewing the sufficiency of the evidence underlying the juvenile court's decision, we may consider only the express findings it made as to these criteria. Id. at 49–50. But we must bear in mind that the juvenile court is not required to exhaustively catalogue all the evidence that supports its findings. See In re S.G.R., 496 S.W.3d at 241.

Egregious Offense Against the Person

The juvenile court determined that Mack's murder, an offense against the person, was particularly egregious because K.M. deliberately lured Mack into an ambush with knowledge of the purpose to harm him. The juvenile court recited extensive facts in support of this determination, including that:
• K.M. assisted Johnson in planning to ambush Mack;
• K.M. befriended Mack about two weeks beforehand;
• K.M. informed Johnson as to Mack's location;
• K.M. abruptly left Mack's company before the ambush;
• K.M. tried to conceal her role in the ambush;
• after K.M.'s role was uncovered, she indicated that Mack was an evil person who got what he deserved; and
• K.M. knew that gang members, like Johnson, commonly settle their disputes with rival gang members, like Mack, with guns.
*11 The record amply supports the juvenile court's recitation of facts.

K.M. posits that because she thought Johnson was going to assault Mack rather than murder him, her role in the crime is less egregious and thus does not weigh in favor of transfer to the criminal district court. Even if we were to accept K.M.'s premise, an assault is a crime against the person, not property. Moreover, a planned assault that results in death may support a conviction for the charged offense of murder under circumstances like those in this case. See PENAL § 19.02(b)(2); Forest v. State, 989 S.W.2d 365, 368 (Tex. Crim. App. 1999).

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We therefore reject K.M.'s argument that the crime was not an egregious one.

In essence, the juvenile court found that Mack's murder was egregious because it was planned in advance and carried out via subterfuge. K.M. also lied about her role afterward and was callous about Mack's death when her role was exposed. More than a scintilla of evidence supports the juvenile court's finding that the murder was egregious. The great weight and preponderance of the evidence is not to the contrary. The evidence is thus legally and factually sufficient to support the juvenile court's finding that section 54.02(f)(1) favors waiver of its jurisdiction.

K.M.'s Sophistication and Maturity

The juvenile court determined that K.M. showed a high degree of sophistication and maturity and that these qualities weighed in favor of transfer. The juvenile court recited extensive facts in support of this determination, including that:

- K.M. was 17 years old at the time of the certification hearing;
- K.M. has above-average intelligence;
- K.M. is more mature than the average person her age;
- K.M. was manipulative in feigning friendship with Mack;
- K.M. helped plan and coordinate the ambush; and
- K.M. tried to conceal her participation in the crime.

The record amply supports the juvenile court's recitation of facts.

Some witnesses testified that K.M. lacks common sense or street smarts. Most of the evidence, however, shows that K.M. is intelligent and mature for her age. For example, K.M.'s mother testified that her daughter is intelligent and mature. K.M.'s certification evaluation confirms this assessment. Dr. Chibueze testified that K.M. is above average in intelligence and intellectual sophistication. Chibueze also stated that K.M. is more mature than her peers within the juvenile justice system.

While Chibueze opined that K.M.'s criminal sophistication was below average, this was only true absent consideration of Mack's murder. When accounting for Mack's murder, K.M. "has an elevated level of criminal sophistication." In its recitation of facts, the juvenile court relied on the criminal sophistication that K.M. displayed in Mack's murder in significant part, noting that K.M.'s involvement in the crime included planning, trickery, and concealment. Notably, this remains true regardless whether K.M. intended murder or, as she insists, some lesser assault.

K.M. complains that the juvenile court additionally relied on her "knowledge of the law and legal consequences" in assessing her sophistication and maturity. K.M. argues that her ability to understand and heed her attorney's advice "should not be a basis for findings weighing in favor of transfer" because if "she was incapable of processing this information" then she would be adjudicated incompetent. We disagree. Whether a juvenile can assist her attorney in her defense is a relevant consideration when assessing the juvenile's maturity and sophistication. In re K.J., 493 S.W.3d 140, 151 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

In essence, the juvenile court found that K.M. is sophisticated and mature in general and that she used her sophistication and maturity in the commission of the charged offense. More than a scintilla of evidence supports the juvenile court's finding, and the great weight and preponderance of the evidence is not to the contrary. The evidence is thus legally and factually sufficient to support the juvenile court's finding that section 54.02(f)(2) favors waiver of its jurisdiction.

K.M.'s Record and Previous History

The juvenile court determined that K.M. does not have a record of delinquent conduct but that her previous history nonetheless weighs in favor of transfer. Among many other circumstances, the juvenile court relied on K.M.'s association with a criminal street gang. In support, the juvenile court noted that K.M. had extensive communications with members of the "103" street gang and that she continued to associate with Johnson, a member of the gang, even after Mack's murder.

K.M. argues no evidence of negative previous history exists to support the juvenile court's finding that her history favors waiver. On the contrary, she argues, the evidence shows that before Mack's murder she was a good student, typical teenager, and loving member of her family. K.M. further argues that the juvenile court improperly considered K.M.'s conduct after Mack's murder in assessing her history.

A juvenile court may give significant weight to gang affiliation when assessing previous history. In re S.G.R., 496 S.W.3d at 242. While the evidence on this subject was disputed, the juvenile court heard substantial evidence that K.M. knowingly associated with members of the "103" street gang before planning to ambush Mack with some of them. The record indicates that she had a romantic or physical relationship with more than one member before Mack's murder. Her affinity for the "103" street gang was so well known that Mack, who associated with a rival gang, referred to K.M. as an "op" on a video introduced at the hearing. Moreover, while K.M. did not have a record, a guard at the juvenile detention facility testified that she overheard K.M. state that Mack's murder was not the first time she had "done things." The juvenile court could have reasonably considered this admission as evidence of prior uncharged delinquent conduct in evaluating K.M.'s prior history. See id. at 241–42 (considering delinquent conduct admitted by juvenile despite lack of record).

As to K.M.'s contention that the juvenile court should have confined its evaluation of her previous history to conduct predating Mack's murder, we

disagree. K.M. has not cited any authority in support of her position, and decisions to the contrary exist. See, e.g., In re K.J., 493 S.W.3d at 153 (considering rule infractions while in juvenile detention facility as part of juvenile's record and previous history). Evidence of a juvenile's conduct postdating the charged offense is at the very least relevant to the extent it sheds light on the juvenile's history predating the charged offense. Detective Bock testified that K.M. was "very closely aligned with other 103 gang members." The defense hotly contested Bock's opinion. The juvenile court did not err in relying on K.M.'s continued contact with Johnson after his charge for Mack's murder—contact that K.M. tried to conceal—as evidence that she previously had formed a high degree of loyalty or commitment to the "103" street gang.

In conclusion, more than a scintilla of evidence supports the juvenile court's finding that K.M.'s previous history weighs in favor of transfer despite her lack of a record of delinquency. While some evidence in the record shows that K.M. was in some other respects an ordinary teenager, the great weight and preponderance of the evidence is not so contrary to the juvenile court's finding as to make it clearly wrong and unjust. The evidence is thus legally and factually sufficient to support the juvenile court's finding that section 54.02(f)(3) favors waiver of its jurisdiction.

Protection of the Public and K.M.'s Rehabilitation

The juvenile court found that the need for adequate protection of the public and the unlikelihood of rehabilitation in the juvenile justice system weigh in favor of transfer. The juvenile court recited several supporting facts, including that:

- K.M. participated in gang-related organized criminal activity that involved "conduct fundamentally dangerous to the community through gunfire in an open area in the middle of the day"; and
- K.M. cannot be rehabilitated in the juvenile justice system because she is 17 years old, which does not leave the system sufficient time to rehabilitate her given the egregiousness of her crime.

In its written order, the juvenile court also referenced provisions of the Family Code that place age restrictions on its juvenile jurisdiction. In addition, the juvenile court heard evidence—Lord's testimony—that K.M. could remain at the facility for female juvenile delinquents only for about 18 months due to her age.

K.M. urges that the ability to adequately protect the public and rehabilitate her within the juvenile justice system heavily weighs against transfer to the criminal district court—so heavily, she asserts, that it also outweighs the other three section 54.02(f) criteria. In support, K.M. primarily relies on Dr. Chibueze's testimony. Chibueze opined that K.M. has "a high treatment amenability" and that K.M.'s odds of reoffending are low.

However, Chibueze's conclusions were not binding on the juvenile court. See In re S.G.R., 496 S.W.3d at 241. It instead concluded that the danger K.M. currently poses to the public—as demonstrated by her role in a gang-related murder—makes rehabilitation in the juvenile justice system unlikely given the limited time K.M. would be subject to it. Evidence in the record supports the juvenile court's assessment of K.M.'s current dangerousness. Chibueze assessed K.M.'s dangerousness as being in the middle range when accounting for Mack's murder. In doing so, Chibueze relied on some of the same circumstances recited by the juvenile court in its transfer order, like the premeditated and manipulative nature of the crime.

K.M. argues that the juvenile court's reliance on her age and the limited jurisdiction of the juvenile justice system is improper because these facts would support waiver of juvenile jurisdiction in any instance involving an older juvenile. But K.M.'s argument misapprehends the juvenile court's ruling, which is not premised solely on her age. Rather, the juvenile court found that the limited time K.M. could remain in the juvenile justice system made the system inadequate to protect the public or rehabilitate her given the particularly serious nature of her offense. This is not an improper application of section 54.02(f)(4). See Faisst v. State, 105 S.W.3d 8, 12–15 (Tex. App.—Tyler 2003, no pet.) (upholding finding that juvenile justice system was inadequate to protect public and rehabilitate juvenile based on evidence that system could not address serious offense—intoxication manslaughter—given that juvenile was already 17 at certification hearing).

The record does not contain any direct evidence that the limited amount of time K.M. could be subject to the juvenile justice system would be inadequate to protect the public and rehabilitate her. No witness testified that this limited amount of time would be inadequate. (No witness testified it would be adequate either.) But the juvenile court heard evidence from which it reasonably could infer such inadequacy. Evidence of K.M.'s persistent loyalty to the "103" street gang, for example, suggests that rehabilitating her so that she will not pose a danger to public upon her release may be difficult. See In re S.R.G., 496 S.W.3d at 242–43 (affirming similar finding based in part on evidence of juvenile's close association with gang). In addition, Chibueze agreed that a lack of regret or remorse makes rehabilitation more difficult. While conflicting evidence existed as to K.M.'s remorse, it is undisputed that she asserted Mack was evil and suggested he got what was coming to him after detectives told her they knew of her involvement in his murder

On this record, more than a scintilla of evidence supports the juvenile court's finding that the prospect of protecting the public and the likelihood of rehabilitating K.M. in the juvenile justice system weigh in favor of waiver. As K.M. contends, contrary evidence, like Chibueze's testimony, indicates that she could be rehabilitated within the juvenile justice system. But when all the evidence is taken into account, the great

weight and preponderance of the evidence is not so contrary to the juvenile court's finding as to make it clearly wrong and unjust. The evidence therefore is legally and factually sufficient to support the juvenile court's finding that section 54.02(f)(4) favors waiver of its jurisdiction. We overrule K.M.'s second issue.

Conclusion: The juvenile court's findings are supported by legally and factually sufficient evidence. In addition, the juvenile court correctly applied the statutory criteria governing the waiver of its jurisdiction to its fact findings. We therefore hold that the juvenile court did not abuse its discretion by waiving its jurisdiction and transferring K.M. to the criminal district court to stand trial for murder. We affirm.

IN DISCRETIONARY TRANSFER TO ADULT COURT, STATE'S APPEAL RULED MOOT WHERE TRIAL COURT RECONSIDERED AND CHANGES ITS RULING ON "DEFENDANT'S MOTION IN BAR OF PROSECUTION FOR LACK OF JURISDICTION AND FOR VIOLATION OF CONSTITUTIONAL PROVISIONS," WITHDRAWING PREVIOUS ORDER AND DENYING DEFENDANT'S ORIGINAL MOTION.

State v. Dean, NO. 14-19-00306-CR, NO. 14-19-00308-CR, NO. 14-19-00309-CR, NO. 14-19-00310-CR, NO. 14-19-00311-CR, NO. 14-19-00312-CR, NO. 14-19-00313-CR, --- S.W.3d ----, 2020 WL 2832161, Tex. Juv. Rep. Vol 34 No. 3 ¶ 20-3-1 [Tex.App.—Houston (14th Dist.), 5/28/2020].

Facts: The State of Texas appeals the district court's orders granting "Defendant's Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions." The State argues the district court's orders were (1) void ab initio because, by statute, the court lacked authority to enter the order; and (2) erroneous because it held Texas Family Code section 54.02 (the discretionary transfer statute) unconstitutional.

Appellee, Kahlil Dean, was charged with aggravated robbery in cause numbers 18-DCR-083833, 18-DCR-083834, and 18-DCR-083835. He was also charged with assault of a public servant in cause numbers 18-DCR-083836 and 18-DCR-083837.

On July 6, 2018, the State filed a first amended petition for discretionary transfer to a criminal district court or a district court for criminal proceedings in the County Court at Law No. 4 sitting as a juvenile court in Fort Bend County. The State alleged there is probable cause that Appellee committed three aggravated robberies and two assaults of a public servant in September 2017 (while he was a juvenile). The State moved for the juvenile court to waive its jurisdiction and transfer Appellee in accordance with Texas Family Code section 54.02 to the appropriate district court for criminal proceedings for prosecution of the alleged five offenses as an adult. After a hearing on July 19, 2018, the juvenile court waived its exclusive jurisdiction and transferred Appellee to district court to stand trial as an adult. The same day, Appellee waived his right to appeal the juvenile court's "waiver of jurisdiction and discretionary transfer to Criminal Court." Appellee's case was transferred to the 268th District Court in Fort Bend County. Appellee was indicted by a grand jury for three aggravated robberies and two assaults of a public servant in the above listed five cause numbers.

On March 11, 2019, **Appellee filed a "Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions"** in each cause number, and argued:

- "[T]he juvenile court's stated 'reasons for waiver' were supported by insufficient evidence and the juvenile court therefore abused its discretion by waiving jurisdiction over" Appellee.
- "[T]he State failed to prove that it was not practicable to prosecute [Appellee] as a juvenile despite its use of due diligence to do so."
- The juvenile court abused its discretion by "certifying [Appellee] as an adult because of the tenuousness of the evidence underlying the decision, in particular the State failed to provide the juvenile court with all of the [Appellee]'s juvenile school records including ... all special education records; and further the expert's conclusions were unfounded and did not support the decision, particularly with respect to the [Appellee]'s lack of maturity, given the failure to consider all education and special education records."
- "[T]he State has used the transfer and certification process as an artifice [to] circumvent the protections afforded juveniles under [t]he Texas Family Code Sec[tion] 51.09 and Sec[tion] 51.095."
- Appellee's constitutional right to trial by jury was violated when the trial court, instead of a jury, decided to transfer him from juvenile court to stand trial as an adult in district court contrary to the Supreme Court's pronouncements in Apprendi v. New Jersey, 530 U.S. 466 (2000). "The exposure to adult punishment greatly exceeds the maximum punishment that he would be exposed to as a juvenile. However, the decisions that are made to expose him to that increased punishment are not made by a jury and found beyond a reasonable doubt, but by a judge and by a preponderance of the evidence."

The district court held a hearing on Appellee's motions on three different days. On March 29, 2019, the district court signed an order granting "Defendant's Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions" in cause numbers 18-DCR-083497, 18-DCR-083704, 18-DCR-083833, 18-DCR-083835, 18-DCR-083836, and 18-DCR-083837 **by placing a check mark next to the line stating "ORDERED that said Motion is in all things GRANTED**."

The district court also signed an order in cause number 18-DCR-083834 on March 29, 2019, but it **failed to place a check mark next to the line stating**

"ORDERED that said Motion is in all things GRANTED." Several weeks later, the State asked the district court to sign the "State's Proposed Amended Order on Defendant's Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions" because the district court "inadvertently did not check off the box indicating whether the order was granted or denied." On May 28, 2019, the district court signed the proposed order in cause number 18-DCR-083834, which corrected the district court's omission and stated "the COURT hereby ORDERS that the Defendant's Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions is hereby GRANTED on this 28th day of May, 2019."

In the meantime, the State filed in each cause number a "Motion for Reconsideration and Alternative Motion for Clarification of its Order Granting Defendant's Motion in Bar" on April 3, 2019. **The State also filed notices of appeal in each cause number on April 16, 2019, stating the district court granted "Defendant's Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions", and asserting it is appealing "the trial court's order dismissing the State's indictment[s]."** In its notices of appeal and appellate brief, the State contends it is authorized to pursue an appeal pursuant to article 44.01(a)(1) of the Texas Code of Criminal Procedure because the district court "dismissed the State's indictments." See Tex. Code Crim. Proc. Ann. art. 44.01(a)(1). More specifically, the State contends in its appellate brief: Appellee filed a "Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions" arguing that the adult indictments should be dismissed and the case returned to juvenile court because the juvenile court's waiver of jurisdiction was improper on various grounds. (1CR91). **The district court held a hearing on this motion over several days. (2RR-4RR). The district court ultimately granted these motions and dismissed the State's indictments in these cases. (1CR104). The State appealed those rulings in accordance with Texas Code of Criminal Procedure article 44.01(a)(1) (allowing the State to appeal an order of a criminal court if the order dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint).**

Held: Motion Denied as Moot

Opinion: On April 16, 2020, supplemental clerk's records were filed in this court. They contained the district court's April 12, 2019 "Order on State's Motion for Reconsideration and in the Alternative Motion for Clarification", **which stated that the district court "GRANTS the State's Motion for Reconsideration, withdraws the Order Granting Defendant's Motion in Bar of Prosecution, and DENIES Defendant's Motion in Bar of Prosecution" in cause numbers 18-DCR-083833, 18-DCR-083834, 18-DCR-083835, 18-DCR-083836, and 18-DCR-083837. The supplemental clerk's records also contained the "State's Proposed Order in Response to the 14th Court of Appeals' Order to the 268th District Court to Clarify the 268th District Court's Order on Defendant's 'Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions' " signed by the district court in the above five cause numbers on April 13, 2020.** Each order provides in pertinent part:

The Court held a hearing on "Defendant's Motion in Bar of Prosecution for Lack of Jurisdiction and for Violation of Constitutional Provisions," wherein it orally granted said motion on March 29, 2019. The Court then signed an order reflecting its grant of relief on this motion on the same day, March 29, 2019. The 14th Court of Appeals has ordered this Court to clarify its order granting relief as to whether this Court intended to dismiss the State's indictments against the Defendant.

Conclusion: The Court hereby clarifies its order to reflect that the Court ... DID NOT intend to dismiss the State's indictments.

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