STATE BAR SECTION REPORT JUVENILE LAW

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CHAIR'S MESSAGE
by Brian Fischer

The Annual Nuts & Bolts of Juvenile Law Conference held in Austin on July 30-31, 2007 was a great success with the largest number of attendees yet (220). The evaluation forms indicated that the attendees enjoyed the conference and are interested in the conference expanding to 2 full days if not longer to cover the topics in more depth. The Council will address these recommendations at its next meeting.

The 21st Robert O. Dawson Juvenile Law Institute will be held on February 18-20, 2008 at the Omni Bayfront Hotel in Corpus Christi, Texas. Registration information and hotel registration information should be available on the section website at www.juvenilelaw.org. Additionally, Kristi Almagar, the conference coordinator is preparing for registration confirmation e-mails with passwords so that registrants who register and pay their registration fees at least two weeks in advance of the conference will be able to download any of the conference speaker's papers in advance of the conference. The conference materials will be provided at the conference on CD in Word, Wordperfect and PDF so that the CD will be searchable.

Council met on July 29, 2007 for a planning committee meeting for the February conference and is working diligently to prepare an innovative and comprehensive program for the conference All of the speakers and topics should be confirmed by the time that you receive this Section Report.

The Annual Meeting of the Section will again be at the 2008 conference to elect Council Members. All section members are requested to submit recommendations for Council Members for the three council seats that are up in 2008. Recommendations can be sent to the Immediate Past Chair, Sharon Pruitt, who chairs the election committee.

As always, this is your section and your participation in the section is encouraged. Anyone interested in participating in the section and any of the section committees may contact any of the officers to make your wishes known.

EDITOR'S FOREWORD
by Pat Garza

Well, it looks like another summer is coming to an end. All the rain we had this summer almost affected my golf game. Contrary to popular belief, rubber goulashes can go over golf spikes. Oh, I didn't mind the rain too much, but I had to draw the line when my golf course implemented the cart path only rule. I've played cart path only before, but when they told me it was to protect the rice paddies in the fairways, I knew things were too wet. I will never say a golf course has too much water on it, but when you finished a round with one birdie, four pars, four bogeys, a perch, and two bass, you probably shouldn't be playing. I still haven't figured out how to work that score into my handicap. Oh well.

The summer was also interesting at the home front. It was the first summer we didn't put our youngest daughter, Krystal, into some kind of a summer daycare. My wife took some time off and spent most of the summer with her. Not wanting her to just stay home all summer, I put her in some summer camps. She went to two golf camps (gee, I wonder who's idea that was) and one drama camp. I know, does a ten year old really need to go to a camp for drama? It wasn't too bad though. They finished the two week camp performing their own version of the end of Harry Potter. I would like to tell you all about it, but words wouldn't do it justice. Lets just say they went from the students at Hogwarts doing the "Time Warp" (Rocky Horror Picture Show) to finishing with a presidential debate between Harry and Voldemort. Like I said, you just have to have been there to have appreciated it.

Congratulations. The 2007 Annual Nuts and Bolts of Juvenile Law Conference was held July 30-31, 2007, the Marriott Airport South, in Austin. This was the largest turnout for a Nuts and Bolts Conference that we've ever had. Special thanks to Kristy Almager and all the volunteers from TJPC that worked so hard in putting it all together. Congratulations.

Elections. The council plans to have elections for council and officer positions in connection with our February conference. That means under State Bar rules the slate of nominees must be published in the December issue of this newsletter. If you have ideas for council members or officers, please contact Sharon Pruitt, nominations committee chair at (512) 936-6406 or Brian Fischer at (713) 520-7500.

21st Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's Juvenile Law Institute will be held on February 18-20, at the Omni Bayfront in Corpus Christi, Texas. Chair-elect Tim Menikos and his planning committee are already working on putting together an excellent and practical conference.

**"If all I'm remembered for is being a good lawyer or judge,
I've done a bad job with the rest of my life."**

Register Today and Mark Your Calendars…

21st Annual Juvenile Law Conference
Robert O. Dawson Juvenile Law Institute

February 18 – 20, 2008

Omni Bayfront Hotel ~ Corpus Christi, Texas

Approximately 12.75 hours of MCLE

For additional information or to register,
visit us online at www.juvenilelaw.org/CLE/

Questions? Contact Kristy Almager
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CONFESSIONS—
[FROM THE 9TH U.S. CIRCUIT] THE 9TH U.S. CIRCUIT HELD THAT TITLE *18 U.S.C. § 5033* OF THE JUVENILE DELINQUENCY ACT, PRESCRIBES THAT AN ARRESTING OFFICER MUST ADVISE THE PARENTS OF THEIR CHILD'S *MIRANDA* RIGHTS CONTEMPORANEOUSLY WITH ADVISING THEM OF THEIR CHILD'S CUSTODY, AND MAY NOT UNREASONABLY REFUSE A REQUEST BY EITHER THE JUVENILE OR THE PARENT TO COMMUNICATE WITH ONE ANOTHER BEFORE THE JUVENILE IS INTERROGATED.

¶ 07-3-1. **U.S. v. C.M.**, __F.3d__, No. 05-50585, 2007 U.S. App.Lexis 10858 (9th Cir., 5/8/07).

Facts: Around 4:25 a.m. on May 20, 2005, seventeen-year old C.M., a Mexican national, approached the border patrol checkpoint on the I-8 westbound near Pine Valley, CA. He stopped his vehicle and the officer on duty observed two persons seated in the back with their heads down. C.M. responded briefly to the officer's questions and then proceeded forward without having been visibly flagged on. The officer yelled for deployment of a "spike mat," which flattened the tires on the vehicle and brought it to a rest about a half-mile from the checkpoint. C.M. and the six other occupants of the vehicle were apprehended as they scattered into the nearby brush. The arresting agents, Saul Enriquez and Rebecca Brudnok, transported C.M. and the six other occupants of the vehicle to the checkpoint for processing. A keyless entry remote for the vehicle was found on C.M.

At the checkpoint, arresting agents Enriquez and Brudnok locked C.M. in a holding cell and began processing the detainees, including asking each of them basic biographical questions. From the birth date that C.M. gave the arresting agents, they realized he was a minor. Neither arresting agent, nor any other agent at the checkpoint, informed C.M. of his rights or attempted to contact his parents.

After two hours had elapsed, Agent Enriquez informed C.M. that he had the right to speak with the Mexican consulate. C.M. asked to exercise this right. Agent Enriquez called the consulate, but upon receiving no answer, hung up the phone without leaving a message. Agent Enriquez did not make any further attempts to contact the consulate. Instead, he called a supervisor, who told Agent Enriquez that they would try to contact the consulate "later." Agent Enriquez testified that, "at the time," he did not have an all-hour emergency number for the consulate and did not know "for sure" that such a number existed. Agent Brudnok, however, testified that an all-hour number for the Mexican consulate was kept at the border checkpoint. Agent Brudnok also testified that she never attempted to contact the consulate with that all-hour number.

Four hours later, at 10:15 a.m., Supervisory Border Patrol Agent David Holt contacted consular official Ivan Castillo and advised Castillo that C.M. was a juvenile being held for alien smuggling. C.M. was not concurrently given the opportunity to speak with the consulate.

At 10:20 a.m., Border Patrol Agent Luis Gutierrez arrived at the checkpoint from San Diego to assist with processing C.M. Forty minutes later, around 11 a.m., Agent Gutierrez first notified C. M. of his *Miranda* rights in Spanish. C.M. waived his right to remain silent and Agent Gutierrez proceeded to question him. Sometime after beginning the interrogation, Agent Gutierrez asked C.M. whether he had contact information for his parents. C.M. responded that he did not.

Around 12:40 p.m., Agent Gutierrez re-advised C.M. of his *Miranda* rights. The record does not indicate whether C.M. waived his rights this time. Nonetheless, Agent Gutierrez continued questioning C.M., who again asked to speak with the Mexican consulate. Agent Gutierrez ignored C.M.'s request, telling C.M. that he would get a chance to speak with the consulate and an attorney later. During the second period of questioning, C.M. indicated that he was living with his uncles in Los Angeles. Presentence Report ("PSR") 2. Agent Gutierrez did not attempt to contact C.M.'s uncles, but instead continued to question C.M., who ultimately gave a sworn statement incriminating himself.

The government used C.M.'s incriminating statements to support a juvenile information that it filed against C.M. that afternoon, alleging six counts of delinquency. After obtaining C.M.'s incriminating statement, the government transported the juvenile to San Diego, where he was arraigned around 4 p.m. on the information. The information charged C.M. with three counts of transporting an illegal alien in violation of *8 U.S.C. § 1324(a)(1)(A)(ii)*, and three counts of bringing in illegal aliens for "commercial advantage or private financial gain," in violation of *8 U.S.C. § 1324(a)(2)(B)(ii)*. At the arraignment, the magistrate judge appointed C. M. counsel and noted that no family members or representatives of the Mexican consulate were present. C. M., through counsel, denied the allegations in the information. Dist. Ct. Rec. 4.

B. Motions and Trial

On June 1, 2005, C.M. filed motions to suppress statements, to suppress evidence, and to dismiss the information due to multiple violations of *18 U.S.C. § 5033*. The government filed its response on June 13, 2005, also filing motions in limine to exclude expert testimony, admit evidence of transport, admit evidence of prior misconduct, admit demeanor evidence, and admit statements concerning financial arrangements.

The motion hearing and trial were conducted together on June 15, 2005. The District Court granted the government's motions in limine, except the motion to admit *Rule 404(b)* evidence of prior misconduct. The District Court concluded there were violations of the JDA, but that these violations did not deny C.M. due process. As such, the Court denied C.M.'s motion to dismiss the information. The District Court also discussed prejudice, but declined to make a specific finding as to whether the violations of the JDA prejudiced C.M., indicating that the remedy for such prejudice would be "suppression of the statement," which, in the District Court's view, had already occurred because the government stipulated it would not use C.M.'s post-arrest statements in its case-in-chief.

During trial, the government called three occupants of the vehicle as material witnesses. The witnesses testified to substantially similar stories of how they crossed the border into the United States and waited for transport along the side of a highway. The witnesses also testified to their understanding that they would have to pay for their transport -- either to a friend, or a friend of a friend. The witnesses generally did not know how much they would owe, when payment was due, or how they were expected to pay. None saw the driver of the vehicle or knew C.M.

At the close of the government's case, C.M. made a *Fed. R. Crim. P. 29* motion on all counts, which the District Court denied. The District Court found C.M. delinquent on the six counts and sentenced him to twenty-one months in custody and three years of supervised release. C.M. timely appeals to this Court, contending that his juvenile information should be dismissed due to multiple, egregious violations of the JDA, which prejudiced his statutory rights and amounted to a denial of due process. C.M. also claims there was insufficient evidence presented at trial to find him delinquent.

Held: REVERSE, and **DISMISS** the juvenile information, and **REMAND** for further proceedings not inconsistent with this opinion.

Opinion: This Court has repeatedly held that a juvenile is entitled to relief under *§ 5033* when the government violates the requirements of the statute and causes the juvenile constitutional or statutory harm. Where the government's violations deprive the juvenile of his or her constitutional rights, reversal is required. *See RRA-A, 229 F.3d at 744*. If the violations result in statutory prejudice, and irrespective of whether they amount to a constitutional deprivation, this Court has the "discretion to reverse the conviction so as to ensure that the prophylactic safeguard for juveniles not be eroded or neglected." *Id.* (internal quotation marks and citation omitted). Accordingly, we first determine whether the JDA has been violated. If it has, we then consider the harm, if any, caused by the violations.

A. The Government Violated the JDA

> The JDA provides in relevant part:
>
> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.
>
> The juvenile shall be taken before a magistrate judge forthwith. In no event shall the juvenile be detained for longer than a reasonable period of

time before being brought before a magistrate judge.*18 U.S.C. § 5033*.

The burden is on the government to show compliance with *§ 5033*. *Jose D.L., 453 F.3d at 1120*. Here, C.M.'s arresting officers violated every requirement mandated by Congress in *§ 5033*: they failed timely to notify C.M. of his rights; failed to engage in reasonable efforts to contact C. M.'s parents or guardian; failed to provide adequate consular notification in the event C.M.'s parents could not be reached; failed to honor C.M.'s request to speak with a consular representative; and failed to arraign C.M. forthwith.

1. *Advising C. M. of his rights*

C.M. was placed in custody shortly before 5 a.m. on May 20, 2005, when he was apprehended in the field and locked in a holding cell at the I-8 checkpoint. *See Doe IV, 219 F.3d at 1014* (a juvenile is taken into custody when he would have reasonably believed "he was not free to leave") (quoting *United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980))*. C. M. was therefore in custody for six hours before being advised of his rights at 10:55 a.m., which violates *§ 5033*'s requirement that juveniles in federal custody be immediately advised of their rights. *See Doe IV, 219 F.3d at 1014* (finding three and a half hours to be a statutory violation because "[a]lthough there is a dearth of case law interpreting 'immediately' in the context of *18 U.S.C. § 5033*, a three and a half hour delay simply does not comport with the plain meaning of the word"); *RRA-A, 229 F.3d at 744* (holding that a four hour delay in advising a juvenile of her rights does not qualify as "immediately" under *§ 5033*).

2. Parental notification

The District Court did not determine whether the government violated *§ 5033*'s parental notification provisions. We have held that these provisions require that "[r]easonable efforts . . . be made to notify the parents," *United States v. Doe, 701 F.2d 819, 822 (9th Cir. 1983) (Doe I)*, that the notification "have substantive content," n1 *United States v. Doe, 862 F.2d 776, 779 (9th Cir. 1988) (Doe II)*, and that the phrase "immediately notify" mean the same thing as it does in the context of "immediately" advising the juvenile of his or her rights, *see Doe IV, 219 F.3d at 1014-15*. In the event the juvenile's parents live outside the United States and cannot be reached, the arresting officer should provide notification to the juvenile's consulate. *See RRA-A, 229 F.3d at 744-45*.

n1 This Circuit—guided by the text and evident purpose of *§ 5033* "to provide meaningful protection to juveniles by facilitating parental involvement," *see United States v. Wendy G., 255 F.3d 761, 766-67 (9th Cir. 2001)*—has required the following substantive content to parental notification: the arresting officer must advise the parents of their child's *Miranda* rights contemporaneously with advising them of their child's custody, *United States v. Doe, 170 F.3d 1162, 1167 (9th Cir. 1999)* (*Doe III*), and the officer must also advise the parents that they are permitted to speak with their child before the child is interrogated, *Wendy G., 255 F.3d at 767*. Moreover, an arresting officer may not unreasonably refuse a request by either the juvenile or the parent to communicate with one another before the juvenile is interrogated. *Doe IV, 219 F.3d at 1017*.

Here, the arresting officers did not even attempt to reach C.M.'s parents until Agent Gutierrez, sometime after 11 a.m., asked C. M. for his parents' contact information, *after he had already begun questioning C.M.* Agent Enriquez, who had arrested C.M. over six hours earlier, testified that although he was aware of the JDA's parental notification requirements, he made no attempt to contact C.M.'s parents or to ask C.M. how to reach his parents. Waiting until C.M. had been in custody for more than six hours before attempting to notify his parents does not constitute reasonable efforts to notify the juvenile's parents "immediately," and therefore violates the JDA. *See Doe IV, 219 F.3d at 1014-15* (noting that the start of custody, not the start of interrogation, is the trigger for parental notification; thus, the officers violated *§ 5033*'s immediacy requirement by waiting until the juvenile had been in custody for three and a half hours before attempting to contact his parents). Nor were C.M.'s arresting officers permitted to focus solely on consular notification, and bypass contacting his parents, as a way of satisfying *§ 5033*. *See Doe II, 862 F.2d at 779* (even when the parents live outside the United States, the officers cannot simply notify the consulate, but must also make reasonable efforts to contact the parents).

Additionally, by its own terms, *§ 5033*'s parental notification provision applies with equal force to guardians and custodians of the juvenile. *See 18 U.S.C. § 5033* (requiring immediate notification to "the juvenile's parents, guardian, or custodian" of the juvenile's custody, rights, and alleged offense). Thus, if parental notification is not possible, the government is not relieved of its substantive obligation to make the advice and counsel of a responsible adult available to the juvenile prior to interrogation. Instead, if a guardian or custodian is available, the JDA clearly requires that the arresting officer provide notification to the guardian or custodian just as he or she would provide notification to the parents.

Here, while C.M. did not have his parents' contact information, he told his interrogators that he was living with his uncles in Los Angeles. PSR 2. As soon as Agent Gutierrez discovered this fact, he had a duty to halt the interrogation and make reasonable efforts to provide immediate notification to C.M.'s uncles, as parental surrogates. This would include asking C.M. for his uncles' contact information, which the record demonstrates C.M. could have provided, had he been notified of his right to speak with a responsible adult prior to interrogation. Agent Gutierrez's failure to make timely contact with

C.M.'s uncles in this case violates the JDA's clear requirement that the arresting officer provide immediate notification to an adult responsible for the juvenile—usually to the juvenile's parents, but possibly to a guardian or custodian instead.

3. Consular notification

In the event parental notification is not possible and the juvenile's parents live abroad, adequate consular notification consists of "reasonable efforts to notify the consulate of the juvenile's custody and rights prior to interrogation." *RRA-A, 229 F.3d at 745*. As we explained in *RRA-A*, the primary functions of consular notification are to "facilitate contact with the parents . . . by providing an in-country mechanism for locating [them]," *id. at 745-46*, and "to permit diplomatic officials to become involved as surrogates for parents who are not in the country," *id. at 746*. Consular notification "must thus occur as soon as reasonably possible after the arresting officer has difficulty contacting the parents so that the minor has access to meaningful support and counsel," as contemplated by *§ 5033*. *Id.*

The supervisor of C.M.'s arresting officers, Agent Holt, notified the Mexican consulate of C.M.'s custody and alleged offense around 10:15 a.m., over five hours after C.M.'s arrest and almost four hours after C.M. had explicitly asked to speak with a representative of his consulate. This notification was patently inadequate. First, the notification was not timely. C.M.'s arresting officers failed to use reasonable efforts to notify the consulate as soon as possible, *see id.*, by using the 24-hour hotline that Agent Brudnok testified was kept at the border checkpoint; *see* Dist. Ct. Rec. 16. Second, the notification was substantively inadequate. When Agent Holt finally contacted the consulate, he did not notify the consulate of any of C.M.'s legal rights, as we have held is required under the JDA. *See id. at 745*.

4. *Right to speak with the consulate*

The District Court found, and we agree, that the arresting officers did not comply with C.M.'s request to speak with the Mexican consulate prior to being Mirandized. This finding is not clearly erroneous; rather, it fairly reflects the record. The only evidence the government provides that C.M. spoke with the consulate is C.M.'s statement to Agent Gutierrez during questioning to the effect that "he had spoken with the consulate before." But C.M. said this immediately after asking Agent Gutierrez when in fact he would be able to speak with the Mexican consulate that day. Read in context, it is abundantly clear that C.M. meant by his statement *not* that he had already had the opportunity to speak with the consulate *on May 20*, but that he had on a previous occasion been able to speak with the consulate. Moreover, the government fails to show when C.M. would have had the opportunity to speak with the consulate while in custody on May 20. Instead, Agents Brudnok, Enriquez, and Gutierrez all testified that they did not put C.M. in touch with the consulate. Indeed, the record shows that the only person to speak with the consulate on May 20 was the supervisor of the arresting agents, who did not concurrently afford C. M. his right to speak with a country representative. n2

n2 Indeed, it is unclear whether Agent Holt was even present at the checkpoint where C. M. was being held when he made contact with consular official Castillo.

The record reflects that the agents repeatedly ignored C.M.'s request to speak with the Mexican consulate. Such disregard constitutes a violation of *§ 5033*. In *Doe IV*, we held that an arresting officer may not unreasonably refuse a request by either the juvenile or his or her parent to communicate with one another before the juvenile is questioned. *219 F.3d at 1017*. We have repeatedly held that consular notification operates as a proxy for parental notification, *see, e.g., RRA-A, 229 F.3d at 745-46*, and must therefore be substantive. n3 For example, consular notification must include notice of the juvenile's rights in addition to the fact that the juvenile is in custody. *Id. at 745*. Like parental notification, the purpose of consular notification is not to "impart[] general information in the abstract," *Doe IV, 219 F.3d at 1017*, but to satisfy *§ 5033*'s substantive requirement of meaningful protection for the juvenile by enabling diplomatic officials "to become involved as surrogates for parents who are not in the country," *RRA-A, 229 F.3d at 746*. In *Doe IV*, we reiterated that Congress intended for parents to be informed of their child's rights so that they could assist their child in a meaningful way; the notification to the parents is reduced to an empty recitation of facts if a child's request to speak with his or her parent is simply ignored. *See 219 F.3d at 1017*. So too is consular notification rendered an empty formality, and the evident purpose of *§ 5033* thwarted, if the juvenile's request to speak with the consulate in his or her parents' stead is simply ignored. We therefore hold that a juvenile's request to speak with his or her consulate cannot be unreasonably denied and we protect a juvenile's right to confer with a parental surrogate while in custody, in the event his or her parents cannot be reached. C.M.'s arresting officers violated *§ 5033* in ignoring C.M.'s repeated requests to confer with a country representative.

n3 See *supra* note 1 for the substantive requirements for parental notification.

5. Prompt arraignment

Section 5033 provides that a juvenile in federal custody "shall be taken before a magistrate judge forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate judge." *18 U.S.C. § 5033*. "'Forthwith' means 'with dispatch' or 'immediately.'" *United States v. L.M.K., 149 F.3d 1033, 1035 (9th Cir. 1998), as amended 166 F.3d 1051*. The plain meaning of *§ 5033* is

thus that juveniles must be arraigned with dispatch or immediately, unless factors are present to excuse a reasonable delay. We have found only a limited set of factors that rise to the level of exigency necessary to justify a delay: for example, that no magistrate judge is immediately available, *Doe I, 701 F.2d at 824*; that the officers are extremely busy and must prioritize more urgent cases, *id*. (describing such cases to be "a woman in late pregnancy and women with infants and small children"); and that the officers are trying to reach the parents or consulate, *see RRA-A, 229 F.3d at 746*.

Here, there was a delay of eleven hours in bringing C.M. before a magistrate. The government does not cite any extenuating circumstances to justify this delay, but rather points to the routine tasks of processing, interrogating, and transporting the juvenile. Red Br. at 22. In comparing the amount of time it took to perform these routine tasks with the total amount of time that elapsed before C.M. was arraigned, we find that the government has not met its burden of showing that it acted with the expediency required by *§ 5033* in bringing C.M. before a magistrate.

The record indicates that C.M. was processed between 5 and 6:30 a.m., interrogated between 11 a.m. and about 1 p.m., and then transported a distance of forty-five miles, which requires about an hour's travel. The four to five hours that it took to conduct these tasks do not explain why eleven hours elapsed before C.M. was arraigned. Given the dispatch with which juveniles must be arraigned under *§ 5033*, it was not reasonable to delay five to six hours to interrogate C.M., or to process any of the other adult occupants of the vehicle ahead of him. *See Doe I, 701 F.2d at 824* (requiring the government to prioritize the arraignment of juveniles); *Doe IV, 219 F.3d at 1015* (calling for the expedited handling of juveniles as compared to adults). There is even less reason for the government's delay here given that it cannot be excused on the basis that the officers were trying to put C.M. in touch with his parents or the consulate. Indeed, we are troubled by the government's contrary claim that the reason for the delay in arraigning C.M. was the officers' need to comply with *§ 5033*'s parental notification provisions, when, as detailed in the preceding sections, the officers did not make reasonable efforts to notify the parents or consulate to begin with. n4 We conclude that the government has failed to meet its burden of showing that it complied with the JDA's prompt arraignment requirement.

n4 Specifically, the government asserted during oral argument that the arresting agents had to delay six hours to notify C. M. of his rights because "they couldn't get in contact with the consulate and they didn't know any contact information for the parents." This claim ignores the fact that the first time any officer asked C. M. for his parents' contact information was sometime *after* the juvenile was Mirandized around 11 a.m. and the interrogation had already begun.

B. The Violations of the JDA Were Not Harmless

Having determined that the government violated *§ 5033* in every respect, we turn to the question of remedies. Reversal of C.M.'s conviction is mandatory if the government's misconduct deprived C.M. of any constitutional right. *See RRA-A, 229 F.3d at 744*. Furthermore, irrespective of whether the government's misconduct rose to the level of a constitutional violation, if it gave rise to prejudice under the JDA, we may "reverse or order more limited remedies so as to ensure that [C.M.'s statutory] rights are safeguarded and the will of Congress is not thwarted." *Id. at 747*. For example, where violations of the JDA contribute to a juvenile's confession and that confession results in the juvenile's prosecution, the juvenile is prejudiced by the government's misconduct and the charges against him or her must be dismissed. *Doe II, 862 F.2d at 781*. In assessing harmlessness, we must be convinced beyond a reasonable doubt that the government's misconduct did not give rise to any prejudice. *See Wendy G., 255 F.3d at 767*.

Our first inquiry is whether the violations of the JDA were a cause of C. M.'s confession. In other words, did C. M.'s confession result in part from "[his] isolation from family, friends, [or] representatives of [his] country or an attorney"? *RRA-A, 229 F.3d at 747*. Here, prior to being interrogated, C.M. was locked in a holding cell for six hours without any notification of his rights. During this time, his request to speak with a country representative went unheeded. Seven hours later, after his interrogation had begun, C.M. repeated his request to contact his consulate, which Agent Gutierrez flatly refused. Only after Agent Gutierrez unlawfully denied C.M.'s request to speak with his consulate did C.M. finally confess. Moreover, when C.M. was finally afforded contact with a responsible adult during his arraignment, he promptly denied the statements contained in the information, including the incriminating statements he had made only a few hours before. We have little difficulty under these circumstances in concluding that the government's multiple violations of the JDA were, "at the very least, *a* cause of [C.M.'s] confession." *Id.* The many hours C.M. spent locked in the holding cell without being advised of his rights; the repeated and unlawful denial of C.M.'s right to speak with a parental surrogate before being interrogated; and the undue delay in arraigning C.M. all improperly "interfere[d] with [C.M.'s] right to remain silent." *Doe IV, 219 F.3d at 1018*. There is therefore a statutory basis to suppress the confession.

The only remaining question is the prejudice caused by C.M.'s confession. Here, the government relied on C.M.'s statements, obtained in deprivation of his statutory rights, to procure the juvenile information and initiate proceedings against C.M. The record is clear that the delay in arraigning and charging C.M. was incurred in order to permit a senior officer, Agent Gutierrez, to travel to the checkpoint and interrogate C.M. When the information was filed, C.M.'s incriminating statements

were the only evidence the government presented of C.M.'s awareness that the occupants of the vehicle were illegal immigrants, and C.M.'s intent to facilitate transport for financial gain—both essential elements of the crimes with which C.M. was charged. *See 8 U.S.C. §§ 1324(a)(1)(A)(ii)* and *(a)(2)(B)(ii).* We conclude that the government's reliance on the fruits of its misconduct to initiate proceedings against C.M. was not harmless beyond a reasonable doubt. The appropriate remedy in this case is to dismiss the charges. *See Doe II, 862 F.2d at 781*; *Jose D.L., 453 F.3d at 1126* ("If a violation of the JDA was prejudicial because it led the Government to initiate prosecution of the juvenile, the remedy is for the charges against the juvenile to be dismissed.").

Our conclusion that dismissal is warranted derives not only from this Court's holdings in *Doe II* and *Jose D.L.,* but also from our obligations under the JDA. In remedying violations of *§ 5033*, this Court is charged with ensuring "that the prophylactic safeguard for juveniles not be eroded or neglected." *RRA-A, 229 F.3d at 744* (internal quotation marks and citation omitted). Here, the government violated every requirement of *§ 5033*. Further, the agents involved uniformly testified to their familiarity with their obligations under the JDA. Yet, despite their familiarity with the statute, the agents failed to engage in the basic steps necessary to comply with the JDA. Agents Enriquez and Brudnok both testified that they knew they had to notify C.M. immediately of his rights, yet, inexplicably, neither ever did so. Both agents also testified to their understanding that they had to notify the juvenile's parents as soon as possible -- but again, neither did so. Both agents, as well as Agent Gutierrez, testified that they knew C.M. had a right to speak with the consulate, yet, during the eleven hours that elapsed before C. M. was arraigned, no one put C.M. in touch with the consulate—not even when Agent Holt had the consulate on the phone at 10:15 a.m.

The harm that flows from such conduct extends beyond the prejudicial impact on the individual of any improperly elicited statements. The harm also erodes the comprehensive system of juvenile justice that Congress has established through the federal juvenile laws. n5 As we noted in *United States v. Frasquillo-Zomosa*, the JDA "creates a special procedural and substantive enclave for juveniles accused of criminal acts," which stands apart from "the ordinary criminal justice system" and accords juveniles "preferential and protective handling not available to adults accused of committing crimes."

n5 In enacting the JDA, Congress intended "to improve the quality of juvenile justice and to *provide a comprehensive, coordinated approach to the problems of juvenile delinquency*." S. Rep. No. 93-1011, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5283, 5283 (emphasis added). The Senate Report on the JDA further notes that the "United States has a long tradition of dealing differently with juveniles than with adults," but "many of the methods of dealing with juveniles in this country have come to be viewed either as counterproductive or as violations of the rights of children"—"[t]hus there is a pressing need for national standards to improve the quality of juvenile contacts with the justice system." S. Rep. No. 93-1011, at 25-26 (citation omitted).*626 F.2d 99, 101 (9th Cir. 1980).*

It is this system of juvenile justice, as well as C.M.'s individual rights, that we are charged with protecting. Here, the government's conduct effectively nullified the unequivocal provisions of the statute defining the process that Congress has mandated juveniles in federal custody are due. We caution against further erosion of the critical protections due to juveniles under the JDA. *See Jose D.L., 453 F.3d at 1125* (finding that the government "flagrantly violated" the JDA); *Wendy G., 255 F.3d at 768* (reversing due to multiple, prejudicial violations of the JDA); *RRA-A, 229 F.3d at 747* (same); *Doe IV, 219 F.3d at 1014-15* (same); *Doe III, 170 F.3d 1162* (finding the government violated the JDA); *L.M.K., 149 F.3d at 1035* (same); *Doe II, 862 F.2d at 780-81* (remanding due to multiple violations of the JDA); *Doe I, 701 F.2d at 821* (finding multiple violations of the JDA). As we recently observed,

> [O]ver thirty years after the JDA was enacted, government law enforcement agents trample even the most basic requirements of the JDA. . . . We do not believe that it furthers Congress's intent to allow the government, in case after case, to ignore with impunity the protective requirements of the JDA. Courts should not close their eyes to these continuing violations by mindlessly reciting the rubric of harmless error as an overarching excuse for ignoring what Congress has clearly ordained. . . .

Jose D.L., 453 F.3d at 1125 (citations omitted).

Conclusion: C.M. was deprived of his rights under *§ 5033* to immediate notification and prompt arraignment, and to the advice and counsel of a responsible adult prior to interrogation. His resulting confession was highly prejudicial and should not have been used against him to initiate his proceedings. Accordingly, we **REVERSE** the District Court's adjudication of delinquency, **DISMISS** the juvenile information, and **REMAND** for further proceedings not inconsistent with this opinion. n6

n6 Having reversed based on our finding of statutory prejudice, we need not reach the alternative grounds for relief advanced by Appellant.

DISSENT: CALLAHAN, Circuit Judge, dissenting:

I question whether the government agents violated *18 U.S.C. § 5033* of the Juvenile Delinquency Act ("JDA") in their processing of C.M. in as many ways as the majority states, but I agree with the majority's implicit determination that the alleged violations did not rise to the level of a constitutional violation. *See United*

States v. D.L., 453 F.3d 1115, 1125 (9th Cir. 2006). I disagree, however, with the majority's determination that the alleged violations, were prejudicial and with its directions that the juvenile information must be dismissed. I read our precedent as requiring not only a determination of whether the violations contributed to the juvenile's statements, but also whether the improperly procured statements were harmless. Here, the improperly procured statements were harmless, but even if this conclusion were in doubt, our precedents direct that the proper remedy is a remand. *D.L., 453 F.3d at 1126-27*; *United States v. RRA-A, 229 F.3d 737, 747 (9th Cir. 2000)*; *United States v. Doe (Doe III), 862 F.2d 776, 781 (9th Cir. 1988).*

I

Accepting that the record supports a determination that the Government's violations of the JDA were a cause of C.M.'s statements, the remaining issue is whether the procurement of the confession, which was not admitted or referred to at C.M.'s trial, was harmless or prejudicial. The majority concludes that it was prejudicial because C.M.'s statements that he was aware that the occupants of the vehicle were illegal immigrants and that he was driving the vehicle in order to reduce the fee he would have to pay for being smuggled into the United States were set forth in the declaration of the agent supporting the juvenile information. The majority, however, fails to give any weight to the other evidence that supported the initiation of proceedings.

This evidence included that C.M. drove up to a border patrol check point at 4:25 a.m. Although C.M. initially stopped at the check point, he then rapidly accelerated away from the check point, without authority to leave. The agent activated a controlled tire deflation device, and the vehicle, with two flattened tires, came to a stop one-half mile from the check point. The driver of the vehicle was identified as wearing something orange and when C.M. was discovered hiding in some nearby brush after abandoning the vehicle, he was wearing a shirt with orange sleeves. C.M. had on his person the keyless remote entry for the abandoned vehicle. In addition, three passengers that the border agent had spotted crouched in the back of the vehicle were also discovered hiding nearby and they testified that they were attempting to enter the United States illegally. When C.M.'s fingerprints were taken, he was identified as having failed to yield at a border check point four months earlier. Thus, the Government had sufficient evidence on which to initiate juvenile proceedings without the mention of C.M.'s confession.

The majority cites *Doe II* as supporting its conclusion that "the government's reliance on the fruits of its misconduct to initiate proceedings against C.M. was not harmless beyond a reasonable doubt," but the facts in *Doe II* were very different. There, although the Government did not use Doe's statements in its case-in-chief, the statements were introduced through defense cross-examination of a Government agent. *862 F.2d at 778*. This use of the statements is the predicate on which the court determined that the statutory violations "must be said to have prejudiced Doe." n1 *Id. at 781*. Indeed, the fact that the statements were used at trial was critical to the disposition of the case as the panel split three ways on the appropriate remedy. Judge Tang thought the violations were so egregious that the panel should direct the dismissal of the charges. *Id. at 782*. Judge Farris, the author of the opinion, remanded the matter to the district court to determine whether the violations of the JDA "prejudiced Doe's defense." *Id. at 781*. Judge Wallace was of the opinion that the record demonstrated that Doe suffered no prejudice. n2 *Id. at 782*. As the use of the juvenile's statement at trial in *Doe II* did not mandate the dismissal of the juvenile information, it follows that in this case the use of the statement in a preliminary statement by an agent, but not at trial, should not mandate the dismissal of the juvenile information. n3

n1 The opinion states: "[i]f the prosecution resulted from the confession and the confession came in part as a result of Doe's isolation from family, friends, representatives of his country or an attorney, then the statutory violations must be said to have prejudiced Doe." *862 F.2d at 781*. Although not clear of ambiguity, I do not read this sentence as holding that the procurement of a statement from a juvenile in violation of the JDA necessarily means that a subsequent conviction must be vacated where, as here, the statement is not admitted or referred to at the trial.

n2 Judge Wallace's reasoning is particularly relevant to this case. He explained that the court was faced with the effect of a nonconstitutional statutory violation on the decision to charge and prosecute. We must therefore consider whether Doe's post-arrest statements substantially influenced the decision to charge and prosecute Doe, or whether we have grave doubts that this decision was free from the substantial influence of Doe's statements. Neither of these tests is met in this case. The government expressly stipulated that it would not use these statements at trial. It would not have pursued Doe's prosecution without believing that there was a good chance of obtaining a conviction without that evidence. Doe's post-arrest statements, therefore, could not have substantially influenced the decision to charge and prosecute. For the same reasons, I have no grave doubts that the decision to charge and prosecute Doe was free from the substantial influence of the government's statutory violations. *862 F.2d at 783*.

n3 The other cases relied upon by the majority similarly concern the use at trial of statements procured in violation of the JDA. In *United States v. Doe (Doe IV), 219 F.3d 1009, 1013 (9th Cir. 2000)*, the juvenile's statements were used at trial. In *RRA-A*, the court determined that "RRA's confession was the primary basis of evidence on which she was convicted." *229 F.3d at 747*.

The majority attempts to bolster its determination of prejudice by arguing that the Government's failure to

follow the JDA erodes "the comprehensive system of juvenile justice that Congress has established through the federal juvenile laws." This concern, however, must be balanced with the Supreme Court's decision in *United States v. Morrison, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)*. Judge Alarcon explained in his concurring and dissenting opinion in *D.L.*:

> In *Morrison,* the Court held that when the Government has improperly obtained incriminating information from an accused "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted." *Id.* Here, the District Court dutifully complied with *Morrison* by excluding Jose's statements. The Supreme Court instructed in *Morrison* that where evidence has been obtained in violation of the *Fourth*, *Fifth*, or *Sixth Amendments*, "[t]he remedy in the criminal proceeding is limited to denying the fruits of the transgression." *Id. at 366* . . . The Court also stated:
>
> Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book. *Id. at 366 n. 3* . . . (quoting *United States v. Blue, 384 U.S. 251, 255, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966)). 453 F.3d at 1133*.

The majority's focus on the alleged egregiousness of the agents' failures to comply with the provisions of the JDA, majority opinion at page 5331, does not justify its failure to adhere to the Supreme Court's admonition in *Morrison*.

My review of the record indicates that the district court correctly determined that on balance, the violations did not require the dismissal of the juvenile information when it stated:

> Obviously, the prejudice would stem principally from the use of any such confession, but that is absent here since there is no evidence being received of his confession. And there is not any other prejudice or constitutional violation arising simply from the other conduct attributed to the border patrol agents; that is the consulate issue and the delay in mirandizing Mr. M.

This ruling does not reward the Government for failing to abide by the JDA. Rather, as the Government recognized, the misconduct deprived it of the use of C.M.'s statements at trial. Where, however, the Government proves its case at trial beyond a reasonable doubt without the use of, or reference to, the juvenile's statement, justice does not require that the guilty defendant be absolved just because he is a juvenile.

II

Even if there was some question as to whether the violations of the JDA were prejudicial, the appropriate remedy is a remand, not an order vacating the adjudication of delinquency and dismissing the juvenile information. In *D.L.* we stated that "where the record does not satisfy us, beyond a reasonable doubt, that a violation of the JDA was harmless, a remand to the district court is appropriate." *453 F.3d at 1126* (emphasis omitted). In *RRA-A*, even though we found that RRA's confession "was the primary basis of evidence on which she was convicted, " and should have been suppressed, we reversed and remanded, but did not direct the dismissal of the juvenile information. *229 F.3d at 747*. Similarly, in *Doe IV* we determined that the improperly obtained statements used against Doe "were highly prejudicial and should have been suppressed," but we did not direct the dismissal of the juvenile information, but reversed and remanded "for further proceedings not inconsistent with this opinion." *219 F.3d at 1018*. Also in *Doe II*, when the statements were introduced through cross-examination, we nonetheless remanded "for the district court to make all findings relevant to a determination of whether the government's violations of the notice and speedy arraignment provisions of the Federal Juvenile Delinquency Act prejudiced Doe's defense." *862 F.2d at 781*. n4

> n4 I recognize that there is language in *Doe II* that is repeated in *RRA-A* that "we have the discretion to reverse or to order more limited remedies." *Doe II, 862 F.2d at 780*; *RRA-A, 229 F.3d at 747*. I do not question this statement of the breadth of our options, but read the specific remedies ordered in those cases as guiding what we should do in this case.

Based on these precedents—where the use of statements procured in violation of the JDA were clearly more adverse to the defendants than the statement in this case was to C.M.—the proper remedy is a remand, not the vacation of the juvenile information. Moreover, the district court on the remand should focus, as we held in *Doe II*, on whether the violations prejudiced C.M.'s *defense*.

For the foregoing reasons I dissent. I would affirm C.M.'s conviction because the violations of the JDA did not prejudice C.M.'s defense to the juvenile information. Moreover, even if I had some question as to whether the violations were harmless, our precedent instructs that the appropriate remedy is a remand for the district court to consider the appropriate remedy, not a direction to vacate the adjudication of delinquency and dismiss the juvenile information.

CERTIFICATION AND DISCRETIONARY TRANSFER—
A CHALLENGE TO A CERTIFICATION AND TRANSFER ORDER CAN ONLY BE RAISED IN AN APPEAL FROM THE CONVICTION IN CRIMINAL COURT.

¶ 07-3-2. **Silva v. State**, ___S.W.3d.___, No. 01-06-00031-CR, 2007 Tex.App.Lexis 3698 (Tex.App.—Houston [1st Dist.], 5/10/07).

Facts: After a hearing on the State's motion to transfer jurisdiction, the juvenile court waived juvenile jurisdiction and certified appellant, Jonathan Silva, to stand trial in the adult criminal court. Subsequent to the transfer hearing, appellant gave notice of appeal in the juvenile court.

Held: Dismissed

Opinion: The State has filed a motion to dismiss the appeal of the juvenile court's order transferring jurisdiction to the adult criminal court for lack of jurisdiction because appellant's notice of appeal was given prior to disposition of his case in the adult criminal court. The circumstances under which an appeal in a juvenile case may be taken are controlled by provisions of the Texas Family Code. *See Tex. Fam. Code Ann. § 56.01©)* (Vernon 2002).

Appellant Silva was transferred to the district court to stand trial as an adult under *Section 54.02 of the Texas Family Code*, which provides that a juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court. *TEX. FAM. CODE ANN. § 54.02* (Vernon 2002). However, the Family Code does not permit a juvenile defendant to appeal from certification proceedings prior to being finally convicted as an adult. *TEX. FAM. CODE ANN. § 56.01 ©)* (Vernon 2002); *Small v. State, 23 S.W.3d 549, 550 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)* (holding that *section 56.01©)* does not authorize appeals from juvenile court's transferring a child to district court for criminal proceedings under *section 54.02 of the family code*); *Miller v. State, 981 S.W.2d 447, 449 (Tex. App.—Texarkana 1998, pet. ref'd)* (holding the 1995 amendment to *section 56.01©)* removed all rights to appeal from a *section 54.02* ruling) (citing Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 48, *sec. 56.01*, 1995 Tex. Gen. Laws 2546). Any challenge to a transfer order must be raised in an appeal from the conviction in criminal court. *Carlson v. State, 151 S.W.3d 643, 644 n.1 (Tex. App.—Eastland 2004, no pet.).*

Conclusion: Under the preceding authorities, we do not have jurisdiction to consider an appeal from a *section 54.02* transfer order. We grant the State's motion and dismiss the appeal for lack of jurisdiction.

PER CURIAM

CONFESSIONS—
[OUT OF DELAWARE] IN DETERMINING WHETHER A CONFESSION IS VOLUNTARY, THE DELAWARE SUPREME COURT HELD THAT THE LACK OF GUIDANCE FROM AN INTERESTED ADULT WAS A MAJOR FACTOR, ESPECIALLY IF THE JUVENILE SUFFERS FROM DIMINISHED MENTAL CAPACITY.

¶ 07-3-3. **Smith v. Delaware**, 918 A.2d 1144, No. 43,2006, 2007 Del.Lexis 68 (Del.S.C., 2/16/07).

Facts: The incidents that gave rise to this delinquency proceeding took place on September 20, 2003. Rita Smith[n2][2] took her children, James and Cheryl, to visit her sister, Mary Hawn, and Mary's daughter, Georgia Gallo. At that time James was 14 years old and Georgia was three. According to Georgia, at some time during that day, she was in the bathroom with James and he told her to "lick his wee-wee." Later that day, while they were playing frisbee, they went behind a shed and he again demanded that she perform fellatio. Georgia reported what happened to her mother, who immediately sought assistance from her family physician and the authorities. Georgia was examined at the A.I. duPont Hospital. Although the examining physician found no physical evidence of sexual contact, he opined that Georgia had been abused based on her spontaneous statements in the waiting room and in the examining room. In October, 2003 Terri Kaiser, a forensic interviewer from The Children's House interviewed Georgia about the events in question. Georgia repeated her earlier statements and also said that James touched her "wee-wee" and her behind.

> n2 Pursuant to Supreme Court Rule 7(d) all family members have been given pseudonyms.

Detective Jason Atallian, of the New Castle County Police Department, went to the motel where James and his family were living on December 19, 2003. Rita answered the door and told Atallian that her son was asleep, having stayed home from school for the past two days because of a cold. Atallian told Rita that he wanted to talk to James and that she should call to schedule the interview. As Atallian was returning to his car, however, Rita called out and told him that James was awake and that they would come to the station right then. Rita and James followed Atallian to the station in their own car.

There is some dispute as to exactly what was said before Atallian took James into the interrogation room. Atallian testified that he told Rita that James was a suspect in a criminal investigation involving sexual misconduct; that Rita could be present while he questioned James; and that she could have a lawyer present during the questioning. Rita testified that Atallian refused to tell her what the investigation was about; told her she could not be with her son; and never mentioned a lawyer prior

to the questioning. The trial court accepted Atallian's version of the facts.

Atallian questioned James for approximately 45 minutes. At the outset, Atallian asked James whether he could read and write. James said he had trouble with reading. Atallian said that he would read the rights to James and that James could stop him and ask questions. Atallian then stated:

> Okay number one you have the right to remain silent. And what that means is you can be quiet if you want to. You don't have to answer anything if you don't want to. Anything you say can and will be used against you in a Court of law. It just means whatever we're talking about today you know is legal, you know whether it happens from here on out whatever we talk about you know is pertinent to what's going to happen okay. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you can't afford to hire a lawyer one will be appointed to represent you. If you wish one we've already talked to your mom about that and that's fine. At any time during this interview if you wish to discontinue your statement you have the right to do so. All that means is at any time we're talking if you want to talk to me or you don't. You understand these things I explained to you?

James answered, "Uh Uh" and then wrote his name in the appropriate space on the form (he could not sign his name because he did not know how to write in cursive). During the questioning, Atallian repeatedly told James that he knew what had happened, but that he had to hear it from James so Atallian would be able to help James. Frequently, after Atallian's questions, James gave no response. He simply sat silently, bent over, looking at the floor. After many attempts to get James to open up, and another period of silence, Atallian said, "I'm not going anywhere. The only way we're walking out of here is if you're straight up and honest with me and we deal with this and then I can help you." During the course of the interrogation, James confessed to several of the sexual encounters Georgia described. At the end of the interrogation, Atallian explained to James, and then his mother, that James was going to be arrested for sexual crimes.

Prior to trial, James moved to suppress the statement, arguing that his waiver of *Miranda* rights was not knowing and voluntary. After a hearing, the trial court acknowledged that James was a special education student with reading problems. Nonetheless, the court denied the motion, finding that the rights were read to him in "simple language" and that there was no indication that James did not understand them. Several months later, James filed a motion to determine his competency to stand trial.

At the competency hearing, Dr. Abraham Mensch, a psychologist supervisor with the Delaware Division of Child Mental Health Services, was the only witness. Mensch testified that James was identified as a special needs child at the age of three. James has a full scale IQ of 67, which is in the mild mental retardation range, and his word recognition and arithmetic skills are equivalent to second grade, which is extremely low. In his 12 page report, Mensch concluded:

> In summary, at the time of this evaluation, as a result of mental defects involving impaired neurocognitive functions, [James] presents with significant impediments to his ability to proceed to trial, including: (1) to consult with defense counsel rationally, (2) to assist in preparing his defense, and (3) to have both a rational and factual understanding of the proceedings against him.
>
> [James], in spite of specific significant deficits, possesses some of the skills/abilities related to competency to proceed to trial. He understands that he faces "criminal" charges, and can relate the date and basic elements of his offenses. He is likely able to establish rapport with his attorney, but his intellectual deficits set limits on the functionality of this rapport.

Although there are also difficulties with the accurate understanding of the roles of some of the participants in the courtroom, these can be taught to [James], and this does not constitute a significant impediment to adjudicative competency. The most serious impediments to the capacity to proceed to trial involve significant deficits in the cognitive abilities necessary to consult with his attorney, follow testimony reasonably well, and testify in his behalf, if necessary.

The trial court decided that, despite his limitations, James was competent to understand the proceedings, assist his attorney, and give evidence in his own defense. In recognition of Mensch's findings, however, the trial court agreed to schedule additional time for the trial to allow James and his counsel to review the proceedings slowly.

> n3 Psychological Evaluation for Competency, dated 12/8/04, at 10-11.

At trial, the State relied primarily on Georgia's testimony and James's videotaped statement. James did not testify. His only witness was his sister, who testified that she was at Mary's house most of the day and that Georgia and James were not together, alone. The trial court found James delinquent on two counts of second degree rape and one count of second degree unlawful sexual contact. In reaching that decision, the trial court relied primarily on the admissions in James's videotaped statement and Georgia's testimony.

Held: Reversed and remanded

Opinion: James first argues that the trial court erred in finding him competent to stand trial. The applicable legal standards are settled:

> Juveniles in delinquency proceedings are entitled to the same essential and fundamental due process rights as adult criminal defendants. The prosecution bears the burden of proving a defendant's legal competency by a preponderance of the evidence. The test for competency is set forth in *11 Del. C. § 404(a)*, which provides in relevant part:
>
> Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own defense or to instruct counsel on the accused's own behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trail.

Put another way, "the test of legal competency... is... [w]hether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. The United States Supreme Court has also added the requirement that a defendant be able to "assist in preparing his defense."

When the Family Court decides a juvenile's competency to stand trial, that determination is entitled to deference by this Court. [4]

n4 *Randolph v. State, 2005 Del. LEXIS 243, 2005 WL 1653635 at * 1-2 (Del. Supr.)* (Citations omitted.)

James points out that he is mildly mentally retarded and that, according to Mensch, he has "significant cognitive and language deficits that might interfere with his ability to testify relevantly, and to recognize self-injurious statements."[n5] Moreover, Mensch testified that James cannot be relied upon to respond accurately to the question, "Do you understand?" because he cannot always recognize what it is that he does not understand. Based on the evidence of these and other related limitations in his ability to process information and communicate, James contends that the trial court abused its discretion in finding him competent to stand trial.

n5 *State v. JS*, Incident No. 0312013339, Psychological Evaluation for Competency at 8, Defense Exhibit # 2, March 8, 2005 Competency Hearing.

The trial court, relying on Mensch's testimony and report, concluded that James could understand the proceedings, give evidence in his own defense, and assist and consult with his attorney "with a reasonable degree of rational understanding."[n6] That conclusion is supported by Mensch's testimony that: (1) James understood that he was charged with a crime and knew when the events took place and who was involved; (2) James knew that his attorney was there to help him and that there was someone on the "other side" who was not; and (3) James has a "rudimentary" ability to tell his attorney facts about the offenses. In addition, the trial court made accommodations for James's limitations by agreeing to proceed slowly and to allow multiple recesses. Because the trial court's decision was supported by the record and not unreasonable, we find no abuse of discretion and affirm the competency determination.

n6 *State v. JS*, 2005 Del. Fam. Ct. LEXIS 75, 2005 WL 3507990 at *7 (Del. Fam. Ct.).

We reach a different conclusion, however, with respect to the trial court's denial of James's suppression motion. The State has the burden of proving, by a preponderance of the evidence, that James knowingly and voluntarily waived his *Miranda*[n7] rights:

n7 *Miranda v. Arizona, 384 U.S. 436, 466, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).*

The general requirements for a suspect's waiver of his *Miranda* rights under the *Fifth Amendment* prior to in-custody interrogation are well established. "[A] suspect may waive his Fifth Amendment privilege, provided the waiver is made voluntarily, knowingly and intelligently.'"....The question of whether an accused has waived his rights "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." This determination must ... be made under a "totality of the circumstances" inquiry. A judicial inquiry into a valid waiver ... has "two distinct dimensions":

First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.[n8]

n8 *Marine v. State, 607 A.2d 1185, 1195 (Del. 1992)* (Citations omitted.).

Juvenile confessions "require special scrutiny."[n9] Thus, in deciding whether a juvenile's waiver is valid, the "totality of the circumstances" standard requires "evaluation of the juvenile's age, experience, education, background, and intelligence, and ... whether he has the capacity to understand the warnings given to him, the nature of his ... rights, and the consequences of waiving those rights."[n10]

n9 *Haug v. State, 406 A.2d 38, 43 (Del. 1979).*

n10 *Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).*

This Court has expressly rejected the so-called "interested adult" rule B the contention that a juvenile cannot waive his rights without first being given the opportunity to consult with a parent or other interested adult.[n11] But, the lack of guidance from an interested adult certainly is a factor in the "totality of circumstances." And, it is an important factor if, in addition, the juvenile suffers from diminished mental capacity.

n11 *Haug v. State, 406 A.2d at 43.*

In ruling on James's motion to suppress, the trial court made several findings. Based on credibility, the trial court found that: (1) Atallian told James's mother that James was a suspect in a criminal investigation involving sexual behavior; and (2) Atallian also told James's mother generally about James's *Miranda* rights. From watching the videotape, the trial court found that:

> [James] was presented with the Miranda warnings in a way that he could know it. It's clear he had some problem reading. I'm not sure how much of that is real or how much that was, what the credibility of that is today. But even if I were to believe he could not read those statements today and maybe he might not have understood that language as they are written when I heard Officer Atallian on each one I thought translated in very plain language.... I don't know how [James] could not understand that.... [T]here's no indication to me that [James] couldn't hear and understand the simple language that Officer Atallian ... went through each of those rights.[n12]

When the trial court ruled on the motion to suppress, the court did not have the benefit of Mensch's competency evaluation. In fact, after Mensch testified, the trial court noted that, "probably if I re-heard that (the suppression motion) today would have required much more detailed explanation of the Miranda rights than I saw today. But that's water over the dam."[n13]

n12 Appellant's Appendix, A-122-23.

n13 Appellant's Appendix, A-216.

This Court has viewed the videotape with the added perspective that the trial court lacked. As a result, we know that there was no credibility issue about James's inability to read or understand the "standard" *Miranda* warnings. His word recognition skills were those of a second grader. In addition, Atallian's simplification of the *Miranda* warnings was not as clear and understandable as the trial court suggested. For example, in explaining that James's statements will be used against him, Atallian said, "It just means whatever we're talking about today you know is legal, you know *whether it happens from here on out whatever we talk about you know is pertinent to what's going to happen today.*" The italicized portion of that "explanation" is almost unintelligible. The same is true for Atallian's explanation of James's right to "discontinue [his] statement." Atallian explained, "All that means is at any time we're talking *if you want to talk to me or you don't*."

Atallian's explanation of James's right to an attorney was particularly troublesome. He told James, "If you wish one (an attorney) we've already talked to your mom about that and that's fine." The simplest meaning of that message is, "Your mother took care of that for you." The trial court discounted Atallian's comment because James testified during the suppression hearing and did not say that he thought his mother had waived his right to an attorney. The trial court noted, "I heard him say it didn't mean anything to him. He didn't feel pressured by the fact that his mother said that."[n14] Again, with the perspective of Mensch's report, the trial court's first statement undoubtedly is correct B the right to an attorney, and the right to have one appointed for you, "didn't mean anything" to James.

n14 Appellant's Appendix, A-124.

The remainder of the videotape adds to our concern about James's understanding of his rights. He was told at the outset that he could "be quiet" if he wanted to and that he did not have to answer anything. When Atallian asked James to come clean and tell him what really happened, James repeatedly responded by being quiet B not answering. To the extent that James understood the first, and arguably simplest, of the *Miranda* warnings, the videotape strongly suggests that he was trying to do what he was told he could do, by remaining silent. We do not hold that James's silence in response to numerous questions constituted an invocation of his right to terminate the interrogation. Rather, we find his repeated silences to be evidence of his limited and inadequate understanding of his rights.

This is a boy who, according to Mensch, could not be counted on to understand the limits of his own understanding. He was 14 years old, but was functioning at a second grade level. He could not read the *Miranda* warnings himself, so was given a quick and confusing explanation of what they supposedly meant. He could not sign his name because he did not know how. His mother was not with him during the interview. He had never been involved with the police before that interrogation. The totality of these circumstances compels the conclusion that James's waiver of his *Miranda* rights was not knowing. Accordingly, we must reverse the trial court's denial of his motion to suppress and remand for a new trial.

Conclusion: Based on the foregoing, the Family Court's judgment of delinquency is **REVERSED** and this matter is remanded for a new trial. Jurisdiction is not retained.

MODIFICATION OF DISPOSITION—
EXCEPT FOR DISCOVERY AND EVIDENTIARY MATTERS, THE TRIAL OF A JUVENILE CASE IS GOVERNED BY THE TEXAS RULES OF CIVIL PROCEDURE, AND NEITHER THE RULES OF CIVIL PROCEDURE NOR THE FAMILY CODE REQUIRE A PLEA TO BE ENTERED IN A JUVENILE MODIFICATION HEARING.

¶ 07-3-4. **In the Matter of T.J.H.T.**, MEMORANDUM, No. 04-06-00805-CV, 2007 Tex.App.Lexis 3727 (Tex.App— San Antonio, 5/16/07).

Facts: T.J.H.-T. was placed on juvenile probation on June 20, 2006 resulting from the misdemeanor offense of possession of a prohibited weapon. T.J.H.-T. plead true to this charge and was placed on probation in the custody of his mother until his eighteenth birthday. Among the conditions of his probation was that he was to have no contact with Mary Rumage.

On September 19, 2006, the State filed a motion to modify disposition alleging that T.J.H.-T. violated three conditions of his probation: (1) he violated the laws of Texas by committing the offense of terroristic threat against Mary Rumage; (2) he failed to avoid the use of illegal drugs; and (3) he violated the condition ordering him to have no contact with Mary Rumage.

At the hearing on the motion to modify, T.J.H.-T. was not asked to enter a plea to the charges, and therefore he did not enter a plea. The case proceeded as if a "not true" plea had been entered. Mary Rumage, the State's first witness, testified that she was outside her home between 10:30 and 11:00 p.m. on August 27, 2006, and T.J.H.-T., who resided across the street from her home, called her a "bitch" and said "I'll get you, bitch." Rumage stated that she was afraid of T.J.H.-T. and that the confrontation occurred on the day before a hearing on T.J.H.-T.'s brother's case regarding an incident in which Rumage's grandson was stabbed.

Juvenile Probation Officer Scott Pool also testified for the State and the court admitted business records from T.J.H.-T.'s file into evidence. The records indicated that T.J.H.-T.'s probation officer discussed his probation conditions with him, but that T.J.H.-T. nonetheless failed a random drug test and admitted to his probation officer that he smoked marihuana.

T.J.H.-T.'s mother, Charlotte Rangel, testified on his behalf and said that she was home with T.J.H.-T. on the evening of August 27, 2006. Rangel stated that T.J.H.-T. was not in the front yard of their house that evening unsupervised and that the outfit she recalled T.J.H.-T. wearing that evening was different from the clothing described by Ramage. Rangel did admit, however, that she was not home that evening between 6:00 and 10:25 p.m. T.J.H.-T. testified on his own behalf and denied threatening Rumage or going to her home, but he admitted to using marihuana after being placed on probation.

T.J.H.-T.'s cousin and aunt both testified that they were willing to take custody of T.J.H.-T. and supervise him. Both T.J.H.-T. and his mother testified that they would agree to this arrangement. He stated that he had stopped using marihuana and had been focusing on his school work and testified that he would not return to his mother's home if he remained on probation.

Following the testimony, the trial judge expressed her concern regarding T.J.H.-T.'s potential threat of harm to the community. The court concluded that based on his probation violations and past assault charges, T.J.H.-T. should be committed to TYC based on his need for rehabilitation and for the public's protection.

On appeal, T.J.H.-T. argues that the trial court committed fundamental error when it failed to require him to enter a plea to the allegations in the motion to modify disposition. T.J.H.-T. also contends the trial court abused its discretion when it committed him to TYC because the record indicates that the continuation of probation would have been a more appropriate disposition.

Held: Affirmed

Memorandum Opinion: In his first issue, T.J.H.-T. contends that the trial court committed fundamental error when it failed to require him to enter a plea to the allegations in the motion to modify disposition. In order to properly preserve a complaint for appeal, a party must make the complaint to the trial court by a timely request, objection, or motion. *See TEX. R. APP. P. 33.1(a).* Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties. *In the Interest of B.L.D., 113 S.W.3d 340, 350-52 (Tex. 2003).* Fundamental error occurs when error directly and adversely affects the interest of the public generally or when the record conclusively shows that the court rendering the judgment was without jurisdiction. *Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 577 (Tex. 2006).*

T.J.H.-T. admits that his defense counsel did not object to the trial judge's failure to ask him to enter a plea to the charges in the motion to modify and T.J.H.-T. does not argue that the court was without jurisdiction. Instead, T.J.H.-T. argues that the failure to require him to enter his plea to the charges against him adversely affects the public interest as defined by the laws of Texas and argues that this court should look to the Code of Criminal Procedure when deciding this issue.

T.J.H.-T. is correct in stating that the Code of Criminal Procedure requires a plea to be entered in every criminal case and if one is not entered, the trial is a nullity. *See TEX. CODE CRIM. PROC. ANN. art. 26.12, 26.13* (Vernon Supp. 2006); *Lumsden v. State, 384 S.W.2d 143, 144 (Tex. Crim. App. 1964).* However, except for discovery and evidentiary matters, the trial of a juvenile case is governed by the Texas Rules of Civil Procedure. *See TEX. FAM. CODE ANN. § 51.17* (Vernon Supp. 2006); *In re D.I.B., 988 S.W.2d 753, 756 (Tex.*

1999). Neither the Rules of Civil Procedure nor the Family Code require a plea to be entered. We therefore conclude that T.J.H.-T.'s argument that his failure to enter a plea at the modification hearing rendered the proceedings a nullity lacks merit and we thus overrule T.J.H.-T.'s first issue. *See In the Matter of C.C., No. 05-01-01882-CV, 2002 Tex. App. LEXIS 4384, 2002 WL 1340319 (Tex. App.—Dallas June 20, 2002, no pet.)* (concluding that neither the Family Code nor the Rules of Civil Procedure require a plea to be entered and therefore appellant's argument that his failure to enter a plea at the adjudication and modification hearings rendered the proceedings a nullity lacks merit.)

T.J.H.-T. argues in his second issue that the trial court abused its discretion when it committed him to TYC because the record indicates that a continuation of probation would have been a more appropriate disposition. A trial court may modify a juvenile's disposition if the court, after a hearing to modify disposition, finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court. *TEX. FAM. CODE ANN. § 54.05(f)* (Vernon Supp. 2006); *In re H.G. 993 S.W.2d 211, 213 (Tex. App.—San Antonio 1999, no pet.)*. The trial judge has broad discretion to determine a suitable disposition of a child found to have engaged in delinquent conduct; this is especially true in hearings to modify a disposition. *In re D.R.A., 47 S.W.3d 813, 815 (Tex. App.—Fort Worth 2001, no pet.)*. In reviewing a trial court's modification of a juvenile's disposition on appeal, the controlling issue is whether the evidence is sufficient to support the trial court's finding, by a preponderance of the evidence, that the juvenile violated a condition of probation. *Id.*

In the instant case, the court had before it an admission by T.J.H.-T. that he violated Condition 2 of his probation by using illegal drugs. Likewise, there was sufficient testimony to conclude that T.J.H.-T. also violated Conditions 1 and 13 of his probation by threatening Rumage. Because the record supports the trial court's findings that T.J.H.-T. violated several conditions of his probation, the trial court acted well within its discretion in committing T.J.H.-T. to TYC. *See id.* We therefore overrule T.J.H.-T.'s second issue.

Conclusion: Based on the foregoing, the judgment of the trial court is affirmed.

TRIAL PROCEDURE—
WHERE THE RECORD DOES NOT SHOW THAT THE JUVENILE HIMSELF WAIVED HIS RIGHT TO JURY ON DISPOSITION, AND UNDERSTOOD HIS RIGHT, WAIVER BY THE CHILD'S ATTORNEY ALONE IS INSUFFICIENT.

¶ 07-3-5. **In the Matter of A.G.P.**, MEMORANDUM, No. 09-06-396CV, 2007 Tex.App.Lexis 4079 (Tex.App.—Beaumont, 5/24/07)

Facts: A.G.P., a juvenile, was charged with four counts of aggravated sexual assault of a child and two counts of indecency with a child. A jury returned a verdict of "true" on all six allegations, and the trial court adjudicated A.G.P. as having engaged in delinquent conduct. The trial court ordered A.G.P. "committed to the Texas Youth Commission for a fifteen (15) year determinate sentence with possible transfer to the Texas Department of Criminal Justice Institutional Division pursuant to *§53.045 of the Texas Family Code*."

Abandoning issues one and three, A.G.P. relies solely on issue two on appeal. He contends the record does not establish he waived his right to have a jury decide disposition of his sentence, and asks that the case be remanded for further proceedings. The State concedes error on issue two, and states the case should be remanded to the trial court "for disposition purposes only."

Held: Affirmed in Part, Reversed in Part, and Remanded for a New Disposition Hearing.

Memorandum Opinion: *Section 54.04(a) of the Family Code* provides that "[t]he disposition hearing" "shall be separate, distinct, and subsequent to the [juvenile's] adjudication hearing." *Tex. Fam. Code Ann. § 54.04(a)* (Vernon Supp. 2006). The statute further provides that "[t]here is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence." *Id*. Here, the juvenile was in jeopardy of a determinate sentence and was entitled to a jury at the disposition hearing. *See Tex. Fam. Code Ann. § 54.04(d)(3)* (Vernon Supp. 2006); *Tex. Fam. Code Ann. § 53.045(a)(5)* (Vernon 2002).

Section 51.09 of the Family Code governs waiver of rights under the Juvenile Justice Code and provides as follows:

> *§ 51.09*. Waiver of Rights
>
> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
>
> (1) the waiver is made by the child and the attorney for the child;
>
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
>
> (3) the waiver is voluntary; and
>
> (4) the waiver is made in writing or in court proceedings that are recorded.

Tex. Fam. Code Ann. § 51.09 (Vernon 2002).

At the beginning of the disposition hearing, the following occurred:

(Open court, juvenile-respondent present, no jury)

[THE COURT]: The Juvenile-Respondent's attorney has approached the Court and indicated that he wished to waive the jury in deciding disposition and the State has indicated that they have no objection to that election.

For the purposes of the record, is that correct, Mr. [Attorney for A.G.P.]?

[A.G.P's ATTORNEY]: It is, Judge.

[THE COURT]: And, [Prosecutor], does the State agree with that decision?

[PROSECUTOR]: State agrees.

[THE COURT]: All right. Thank you. Ask the jury in.

The Clerk's Record does not contain a written waiver by A.G.P. of jury disposition of the sentence, and although the colloquy before the trial court reveals the juvenile's attorney waived jury disposition, there is no record the juvenile himself did. The statute requires that both the child and the attorney for the child waive the right. *See id*. The State concedes the trial court erred by not complying with *section 51.09*. Where there is no record showing that the juvenile himself waived jury disposition, and understood his right, waiver by the child's attorney alone is insufficient under the statute. *See id.*

The Supreme Court has stated that juvenile proceedings are quasi-criminal in nature. *In re D.I.B., 988 S.W.2d 753, 756 (Tex. 1999)*. The lack of a waiver of a jury disposition of the juvenile's sentence has not been labeled structural error by the United States Supreme Court. *See Johnson v. State, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005)*. Unless the error is structural, generally an appellate court must conduct a harm analysis of the trial court's error. *See Cain v. State, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)*; *see also Mendez v. State, 138 S.W.3d 334, 339-40 (Tex. Crim. App. 2004)* (list of structural errors). In the juvenile context, the Texas Supreme Court in *In re D.I.B.* analyzed two Court of Criminal Appeals cases, *Cain v. State* and *Matchett v. State,* [n1] and stated that the decisions in those cases "thoughtfully explain why a harm analysis should be applied even in cases in which the trial court fails to give statutorily mandated explanations or admonishments.*" In re D.I.B., 988 S.W.2d at 758*; *see also In re C.O.S., 988 S.W.2d 760, 765-69 (Tex. 1999)* (harm analysis conducted). The Court in *D.I.B.* conducted a harm analysis. n2 *In re D.I.B., 988 S.W.2d at 759*.

n1 *See Cain, 947 S.W.2d at 264*; *Matchett v. State, 941 S.W.2d 922 (Tex. Crim. App. 1996)*.

n2 The court stated, "We are not called upon to decide, and do not decide, whether the failure to give one or more of the other explanations required by *section 54.03(b)* [at the adjudication hearing] . . . might be a 'structural defect . . ., which def[ies] analysis by 'harmless-error' standards.'" *In re D.I.B., 988 S.W.2d at 759* (quoting *Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991))*. However, as we noted, the United States Supreme Court has not labeled the error in this case as structural.

Conclusion: Here, the trial court was required to implement A.G.P.'s right to a jury disposition of his sentence unless he affirmatively waived that right. *See §§ 51.09*, *54.04(a)*. When error occurs, a harm analysis would normally be required. *See Tex. R. App. P.44.1*, *44.2*. Given the circumstances of this case, the nature of the error, the insufficiency of the record for harmless error analysis, the State's concession of error, and both the juvenile's and the State's requests for remand, we resolve any doubt concerning harm in the juvenile's favor. We reverse the disposition only and remand for a new disposition hearing. *See In re D.I.B., 988 S.W.2d 753*; *In re J.H., 150 S.W.3d 477, 485-86 (Tex. App.—Austin 2004, pet. denied)*. We sustain issue two.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW DISPOSITION HEARING.

TRIAL PROCEDURE—
ONCE A TRIAL COURT ACCEPTS A PLEA BARGAIN, IT HAS A MANDATORY DUTY TO MAKE A DISPOSITION IN ACCORDANCE WITH THE TERMS OF THE PLEAS BARGAIN.

¶ 07-3-6. **In re J.H.**, MEMORANDUM, No. 04-07-00208-CV 2007 Tex.App.Lexis 3927 (Tex.App.—San Antonio, 5/23/07).

Facts: J.H., a juvenile alleged to have engaged in delinquent conduct, negotiated a plea bargain agreement with the State. Pursuant to this agreement, J.H. pled "true" to committing the offense of aggravated sexual assault in two cases. [n2] The trial court accepted the plea bargain agreement and placed J.H. on probation. Days later, the trial court rescinded its approval of the plea bargain agreement in open court, allowed J.H. to withdraw his pleas, and reinstated the cases on the court's jury trial docket. J.H. then filed a pleading entitled "Respondent's Plea in Bar," arguing his retrial for the same delinquent conduct would violate his constitutional right to be free from double jeopardy. The trial court denied the plea in bar.

n2 The State filed two petitions arising from the same incident.

J.H. now seeks a writ of mandamus compelling the trial court to follow the plea bargain agreement. J.H. alleges the trial court lacked the authority to rescind its approval of the plea agreement and that it clearly abused its discretion by overruling his plea in bar. This court provided the State and the trial court an opportunity to respond to the mandamus petition; however, only the trial court has filed a brief in this original proceeding.

Held: Petition for Writ of Mandamus Conditionally Granted.

Memorandum Opinion: Although juvenile delinquency proceedings are civil proceedings, they are quasi-criminal in nature. *State v. C.J.F., 183 S.W.3d 841, 847 (Tex.App.—Houston [1st Dist.] 2005, pet. denied)*; *In re J.F.R., 907 S.W.2d 107, 109 (Tex.App.—Austin 1995, no writ)*. The Texas Rules of Civil Procedure govern juvenile proceedings, except when in conflict with Title 3 of the Texas Family Code. *See TEX. FAM. CODE ANN. § 51.17(a)* (Vernon Supp. 2006). Additionally, because a juvenile delinquency proceeding seeks to deprive a juvenile of his liberty, a juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding. *In the Matter of J.R.R., 696 S.W.2d 382, 383 (Tex. 1985)* ("A juvenile is entitled to due process and is thus given double jeopardy protection..."); *C.J.F., 183 S.W.3d at 848*.

The Texas Code of Criminal Procedure provides that before the trial court accepts a plea of guilty from a defendant it shall inquire as to the existence of any plea bargain agreement. *TEX. CRIM. PROC. CODE ANN. art. 26.13(a)(2)* (Vernon Supp. 2006). *Article 26.13(a)(2)* further mandates that "the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea." *Id.* After the trial court accepts a plea bargain agreement, however, a criminal defendant may insist on the benefit of his plea agreement with the State and is entitled to enforce the agreement by specific performance. *Wright v. State, 158 S.W.3d 590, 595 (Tex. App.—San Antonio 2005, pet. ref'd)* (citing *Perkins v. Court of Appeals for the Third Supreme Judicial Dist. of Tex., 738 S.W.2d 276, 283-284 (Tex. Crim. App. 1987)* (en banc)). Thus, in a criminal proceeding "[t]he trial court has a 'ministerial, mandatory, and non-discretionary duty' to follow the plea bargain agreement once it has been approved by the court." *Id.* (quoting *Perkins, 738 S.W.2d at 285*). When the trial court has a ministerial duty to enforce a plea agreement, but instead withdraws its approval of the agreement, mandamus may issue to correct the error. *See Perkins, 738 S.W.2d at 284-285* (when the trial court rescinded its approval of a plea agreement and the law did not authorize such action, the court of appeals properly granted mandamus relief); *In re Gooch, 153 S.W.3d 690, 694 (Tex.App.—Tyler 2005, orig. proceeding)* (granting mandamus relief when the trial court violated its mandatory duty to enforce a plea bargain agreement).

Like the Texas Code of Criminal Procedure, Title 3 of the Texas Family Code gives the trial court broad discretion in accepting or rejecting plea bargain agreements in juvenile proceedings. *See TEX. FAM. CODE ANN. § 54.03(j)* (Vernon Supp. 2006). However, after a trial court accepts a plea bargain agreement in a juvenile case, the law imposes a duty on the trial court to make a disposition in accordance with the terms of the agreement. *See id.* Specifically, *section 54.03(j)* provides:

> When the state and the child agree to the disposition of the case, in whole or in part, the prosecuting attorney shall inform the court of the agreement between the state and the child. The court shall inform the child that the court is not required to accept the agreement. The court may delay a decision on whether to accept the agreement until after reviewing a report filed under Section 54.04(b). If the court decides not to accept the agreement, the court shall inform the child of the court's decision and give the child an opportunity to withdraw the plea or stipulation of evidence. If the court rejects the agreement, no document, testimony, or other evidence placed before the court that relates to the rejected agreement may be considered by the court in a subsequent hearing in the case. A statement made by the child before the court's rejection of the agreement to a person writing a report to be filed under Section 54.04(b) may not be admitted into evidence in a subsequent hearing in the case. *If the court accepts the agreement, the court **shall** make a disposition in accordance with the terms of the agreement between the state and the child. Id.* (emphasis supplied).

Section 54.03(j) controls in this case. It is undisputed that the trial court accepted the plea bargain agreement and J.H. started serving his term of probation. By rescinding approval of the plea agreement and returning J.H.'s cases to the trial docket, the trial court violated its mandatory duty to make a disposition in accordance with the terms of the plea bargain agreement as required by *section 54.03(j) of the Texas Family Code*.

The trial court argues its action was authorized by *Texas Rule of Civil Procedure 329b(d)* [n3] and *section 54.05(d) of the Texas Family Code*. We disagree. First, the Texas Family Code is clear that to the extent there is a conflict, *Texas Rule of Civil Procedure 329b(d)* must yield to the express requirements of *section 54.03(j)*. *See TEX. FAM. CODE ANN. § 51.17(a)* (Vernon Supp. 2006). Second, *section 54.05(d) of the Texas Family Code*, which allows a trial court to modify a disposition in a juvenile matter, does not apply here. The challenged action simply did not occur in the context of a disposi-

tion modification proceeding, which requires the filing of a petition, reasonable notice to all parties, and a hearing. *See TEX. FAM. CODE ANN. § 54.05(d)* (Vernon Supp. 2006).

n3 *RULE 329B(D)* provides: "The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed." *TEX. R. CIV. P. 329b(d).*

Conclusion: When a trial court has a duty to follow a plea bargain agreement and fails to do so, mandamus is the appropriate remedy. *See Perkins, 738 S.W.2d at 284-85*; *In re Gooch, 153 S.W.3d at 694*. Accordingly, we conditionally grant the writ. The trial court is ordered to: (1) reinstate the December 4, 2006 order placing J.H. on probation; (2) remove the underlying cases from the trial docket; and (3) vacate the order denying J.H.'s plea in bar. The writ will issue only if we are notified that the trial court has not done so within ten days of the date of this opinion.

DETERMINATE SENTENCE ACT—ALTHOUGH BEHAVIORALLY COMPLIANT WHILE IN TYC, TESTIMONY ABOUT APPELLANT'S CONDUCT WHILE ON PAROLE AND ABOUT HIS HIGH RISK FOR RE-OFFENDING, SUPPORTED THE TRIAL COURT'S DECISION TO TRANSFER CHILD TO TDJC.

¶ 07-3-7. **In the Matter of D.T.,** 217 S.W. 3d 741, 2007 Tex.App.Lexis 2107 (Tex.App.—Dallas[5th Dist.], 3/20/07).

Facts: On January 23, 2001, the trial court adjudicated appellant a child engaged in delinquent conduct for committing aggravated sexual assault. The trial court committed appellant, who was fourteen-years-old, to TYC for a determinate sentence of thirty years, with possible transfer to TDCJ. Subsequently, TYC requested that appellant be transferred to TDCJ to complete his sentence. After a hearing, the trial court ordered appellant to be transferred.

In his first issue, appellant contends the trial court abused its discretion by ordering him transferred to TDCJ because he (1) achieved academic goals, (2) participated in vocational training, (3) successfully completed sex offender treatment program, the coping skills group and two victim impact panels, (4) participated in sports, (5) completed his community service, and (6) was selected student of the month. According to appellant, TYC sought his transfer to TDCJ only because of his infractions while on parole.

Held: Affirmed as Modified

Opinion: We review the trial court's decision under an abuse of discretion standard. *In re T.D.H., 971 S.W.2d 606, 610 (Tex. App.—Dallas 1998, no pet.)*. When deciding this issue, we review the entire record to determine if the trial court acted without reference to any guiding rules or principles. *Id.* If some evidence supports the trial court's decision, there is no abuse of discretion. *Id.* We do not substitute our discretion, and reverse only if the trial court acted in an unreasonable or arbitrary manner. Id.

In making its decision, the trial court may consider: (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense and the manner in which the offense was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim of the offense or any member of the victim's family; (5) the recommendations of TYC and the prosecuting attorney; and (6) the best interests of the juvenile and any other relevant factors. *See TEX. FAM. CODE ANN. § 54.11(k)* (Vernon Supp. 2006); *In re R.G., 994 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)*. Evidence of each factor is not required, and the trial court need not consider every factor. *In re R.G., 994 S.W.2d at 312*. Further, the trial court may assign different weights to the factors it considers, and it may consider unlisted but relevant factors. *Id*.

Here, the record shows that appellant was committed to TYC after he threatened a seven-year-old boy with a gun and penetrated his anus. During therapy at TYC, appellant explained that he chose the boy because the boy had been sexually assaulted previously and appellant believed the boy would not tell, or if he did tell, he would not be believed. Appellant also admitted that he had done the same type of sexual acts to another six-year-old boy.

Leonard Cucolo, the court liaison for TYC, testified appellant was paroled from TYC, but violated the terms of that parole by failing to attend school and by having a sexual relationship with A.R., a fifteen-year-old girl. Appellant was coming into A.R.'s bedroom through the window without her parents' knowledge. After her parents bolted A.R.'s window, appellant began coming into the house through A.R.'s brother's window. Later, A.R.'s mother discovered appellant in A.R.'s bedroom. Her mother got a telephone and called the police. A.R. knocked the telephone from her mother's hand and then ran away with appellant for several hours. When A.R. returned home, her parents allowed her to talk on the telephone with appellant in an attempt to keep her from running away. However, when she returned to school the following Monday, A.R. left with appellant for several days. Thereafter, appellant's parole was revoked for absconding.

When appellant returned to TYC, he continued to contact A.R. by "manipulating other kids into sending [her] mail." Appellant refused to recognize this behavior as part of his offense cycle, and, according to Cucolo,

this failure places him at a high risk to reoffend sexually. Further, in Cucolo's opinion, appellant's actions while on parole demonstrated that he is a risk to the community and that he is likely to reoffend.

Chris Wilson, a licensed professional counselor at TYC, testified she performed a psychological evaluation of appellant. According to Wilson, appellant was not helpful and lied to her about his relationship with A.R. In Wilson's opinion, appellant has not shown he is able to control his behavior while on parole because he "has a behavior script that applies . . . to his sexual relationships.. . . even [after] having gone through specific treatment." She considered him at a high risk to reoffend because (1) appellant had "numerous sexual assaults primarily with an age discrepancy of more than five years," (2) used a weapon in one of the offenses, (3) his initial victims were male, (4) he has been unsuccessful after treatment, and (5) he has an extensive criminal history for things for which "he was not caught," including gang affiliation, drug use and sales, robbery, and physically assaultive behavior.

Conclusion: Although the record shows appellant was behaviorally compliant while in TYC, has achieved academically, has completed sex offender therapy, and his case manager and two teachers disagreed with the recommendation to transfer appellant, we cannot conclude the trial court abused its discretion by ordering appellant transferred to TDCJ. Cucolo's and Wilson's testimony about appellant's conduct while on parole and about his high risk for reoffending, along with the TYC's recommendation for transfer, constitute evidence supportive of the trial court's decision. After considering the relevant factors, we cannot conclude the trial court abused its discretion by ordering appellant transferred to TDJC. We overrule appellant's first issue.

APPEALS—
RULINGS ON MOTION TO SUPPRESS NOT APPEALABLE BY THE STATE, OTHER THAN IN CASES OF HABITUAL OR VIOLENT JUVENILE OFFENDERS.

¶ 07-3-8. **In the Matter of F.G.**, MEMORANDUM, No. 13-06-216-CV, 2007 Tex.App.Lexis 4887 (Tex.App. — Corpus Christi, 6/21/07).

Facts: On October 24, 2005, the State filed a "PETITION ALLEGING DELINQUENT CONDUCT" against F.G. asserting that on or about August 26, 2005, F.G. "did then and there, intentionally or knowingly possess a useable quantity of marihuana, in an amount of two ounces or less and Respondent did then and there possess said marihuana in, on and within 1,000 feet of the premises of a school, namely, the Lockhart Junior High School. . . ." On December 1, 2005, F.G. filed a motion to suppress the marihuana obtained from the search contending that her detention and subsequent search violated *Amendments IV*, *V*, *VI*, and *XVI of the United States Constitution*, *Article 1, Sections 9*, *10*, and *19 of the Texas Constitution*, and *articles 1.04*, *1.05*, *38.22*, and *38.23* of the Texas Code of Criminal Procedure.

The trial court heard the motion to suppress, and at the conclusion of the hearing, the trial court took the matter under advisement. On February, 24, 2006, the trial court granted the motion to suppress. By four issues, the State challenges the trial court's decision to grant the motion to suppress.

Held: Dismiss for want of jurisdiction

Memorandum Opinion: F.G. complains in her appellate brief that we do not have jurisdiction over this appeal. *Article 44.01(a)(5) of the Texas Code of Criminal Procedure* gives the State the right to appeal certain orders in criminal cases, including a trial court's grant of a motion to suppress evidence. *See TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5)* (Vernon 2006). However, juvenile cases, although quasi-criminal in nature, are civil proceedings that are governed by the Texas Family Code and not the Texas Code of Criminal Procedure. *In re F.C., 108 S.W.3d 384, 385 (Tex. App.—Tyler 2003, no pet.)*. *Section 56.01 of the Texas Family Code* provides that the right to appeal in a juvenile case rests solely with the child, leaving the State without any statutory or common-law authority to appeal from an adverse ruling in such a case. *See TEX. FAM. CODE ANN. § 56.01* (Vernon 2002); *see also C.L.B. v. State, 567 S.W.2d 795, 796 (Tex. 1978)*; *In re S.N., 95 S.W.3d 535, 537 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)*.

In 2003, our Legislature expressly authorized the State to appeal an order of a court in a juvenile case that grants a motion to suppress evidence. *TEX. FAM. CODE ANN. § 56.03(b)(5)* (Vernon Supp. 2006). However, *section 56.03* only applies to State's appeals in cases involving violent or habitual juvenile offenders. *See TEX. FAM. CODE ANN. §§ 53.045*, *56.03(b)* (Vernon Supp. 2006). Because this case does not involve an habitual or a violent juvenile offender, *section 56.03* does not authorize the State to appeal from the trial court's order granting the motion to suppress. *See Id.*

Conclusion: We dismiss this attempted appeal for want of jurisdiction.

JUDGEMENTS —
FAILURE OF TRIAL COURT TO LIST FINDINGS FOR TYC COMMITMENT DOES NOT WARRANT REVERSAL, BUT ABATEMENT OF APPEAL AND REMAND FOR SUBMISSION OF PROPER DISPOSITION ORDER.

¶ 07-3-9. **In the Matter of S.J.F.**, No. 04-06-00619-CV, 2007 Tex.App.Lexis 4742 (Tex.App.—San Antonio, 6/20/07).

Facts: S.J.F. pled true to the offense of burglary of a building, the trial court found the charge to be true and committed S.J.F. to TYC. At the conclusion of the disposition hearing, the trial court made the statutory findings required by *subsection 54.04(I)* and then with respect to the findings required by *subsection 54.04(f)* stated the following on the record: "I will order the child committed to the Texas Youth Commission in light of his record regarding his education and complying with conditions of probation." The trial court's Order of Disposition also includes the statutory findings required by *subsection 54.04(I)*. However, the order does not list any findings required by *subsection 54.04(f)*. The order only states the following: "The Court finds that this is the appropriate disposition for the following reason(s):" No reasons, however, are listed.

In one issue on appeal, S.J.F. contends the trial court abused its discretion when it committed him to TYC because the trial court failed to clearly state its reasons for the commitment as required by *subsection 54.04(f) of the Texas Family Code*.

Held: Abated and Remanded

Opinion: *Subsection 54.04(f)* provides that "[t]he court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child." *TEX. FAM. CODE ANN. § 54.04(f)* (Vernon Supp. 2006). This subsection of the Family Code requires the court to articulate "clear, specific reasons for the disposition." *In re A.G.G., 860 S.W.2d 160, 162 (Tex. App.—Dallas 1993, no writ)*. The trial court is required to specifically state its reasons for the disposition to allow "an appellate court, on review, to determine whether the reasons given in the order are supported by the evidence or whether they are insufficient to justify the disposition made." *In re A.N.M., 542 S.W.2d 916, 919 (Tex. Civ. App.—Dallas 1976, no writ)*.

In this case, the trial court did not include any reasons in its order of disposition. Further, the trial court's statement at the conclusion of the hearing that S.J.F. would be committed to TYC "in light of his record regarding his education and complying with conditions of probation" is simply too unclear and ambiguous to allow meaningful review on appeal.

When a juvenile court does not comply with *subsection 54.04(f)*, we do not reverse for a new trial, but instead remand with instructions for the juvenile court to render a proper disposition order specifically stating the reasons for such disposition. *See TEX. R. APP. P. 44.4*; *In re S.S., No. 04-99-00806-CV, 2001 Tex. App. LEXIS 2315, 2001 WL 356963, at *3 (Tex. App.—San Antonio 2001, order)*; *In re K.K.H., 612 S.W.2d 657, 658 (Tex. Civ. App.—Dallas 1981, no writ)*.

Conclusion: We, therefore, abate this appeal and remand the cause to the trial court with instructions for the trial court to render a proper disposition order specifically stating the reasons for such disposition in compliance with *subsection 54.04(f)*.

DETERMINATE SENTENCE ACT—
IN MAKING A DETERMINATION REGARDING A TRANSFER TO TDCJ, A TRIAL COURT MAY ASSIGN DIFFERENT WEIGHTS TO THE FACTORS IT CONSIDERS, AND IT MAY CONSIDER OTHER UNLISTED BUT RELEVANT FACTORS.

¶ 07-3-10. **In the Matter of C.R.**, ___S.W.3d___, No. 04-06-00494-CV, 2007 Tex.App.Lexis 114 (Tex.App.—San Antonio, 1/10/07).rel. for pub. 7/7/07

Facts: In April of 2001, C.R. waived his right to a jury trial and pled true to aggravated sexual assault of a child. In accordance with the plea bargain agreement of the parties, the trial court entered its order of adjudication and sentenced C.R. to a ten-year determinate sentence at TYC with the possibility of transfer to TDCJ. After conducting a transfer hearing in May of 2006, the trial court ordered that C.R. be transferred to TDCJ for the remainder of his sentence. This appeal followed.

Held: C.R. contends that the trial court abused its discretion in ordering his transfer to TDCJ because the record does not support a transfer. In making a determination regarding transfer of a juvenile offender to TDCJ, a trial court may consider: (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense and the manner in which it was committed; (3) the abilities of the person to contribute to society; (4) the protection of the victim or the victim's family; (5) the recommendations of TYC and the prosecuting attorney; (6) the best interests of the person; and (7) any other factor relevant to the issue to be decided. *TEX. FAM. CODE ANN. § 54.11(k)* (Vernon Supp. 2006); *In re J.L.C., 160 S.W.3d 312, 313 (Tex. App.—Dallas 2005, no pet.)*. Evidence of each factor is not required, and the trial court need not consider every factor in making its decision. *J.L.C., 160 S.W.3d at 313-14*; *In re R.G., 994 S.W.2d 309, 312 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)*. The trial court may assign different weights to the factors it considers, and it may consider other unlisted but relevant factors. *J.L.C., 160 S.W.3d at 314*; *R.G., 994 S.W.2d at 312*.

At the transfer hearing, the trial court heard testimony from Leonard Cucolo, a TYC representative, and C.R.'s mother. The court also took judicial notice of a TYC summary report, TYC's complete file on C.R., and the evidence and judgment from C.R.'s underlying aggravated sexual assault case. The record shows that the victim of the underlying aggravated sexual assault was C.R.'s nine-year-old female cousin. During C.R.'s confinement in TYC for the offense, he had fifty-eight documented incidents of misconduct. However, he also successfully completed three specialized treatment programs and went nine months without any incidents of misconduct. As a result, he was placed on parole and released to a halfway house in June of 2004. Once on parole, he secured a job and completed sex offender and chemical dependency treatment. He was transferred to his mother's home in March of 2005.

In November of 2005, C.R. was arrested for possession of marihuana. He also tested positive for the use of marihuana that same month. C.R.'s mother testified that C.R. was driving her car when he was arrested for possession of marihuana and that the marihuana inside the car belonged to her nephew, not C.R. Nevertheless, as a result of his arrest and marihuana use, C.R. was required to complete further chemical dependency counseling. He did not complete the counseling, and he did not report to his parole officer at the next three reporting dates. C.R.'s mother testified that C.R. failed to report to his parole officer because he was at work. She stated that she called C.R.'s parole officer to tell him C.R. was working, and the parole officer said it was okay. In January of 2006, C.R. was arrested for possession of marihuana, cocaine, and heroine with the intent to deliver. C.R.'s mother testified that the drugs were discovered at C.R.'s friend's house and that C.R. went to the house only to pick up his girlfriend. Late in January of 2006, C.R.'s parole was revoked for failure to report to his parole officer.

Cucolo testified that he and TYC recommended that C.R. be transferred to TDCJ based on C.R.'s behavior in the community and the revocation of his parole. Cucolo stated that C.R.'s continued poor judgment made him a risk to the community. Considering TYC's recommendation, C.R.'s previous offense, his failure to comply with parole requirements, and his continued drug use and association with people engaged in criminal activity, we conclude that the trial court did not abuse its discretion in transferring C.R. to TDCJ for the remainder of his determinate ten-year sentence.

Conclusion: We affirm the trial court's order.

**ORDERS AND JUDGEMENTS—
RECITATIONS IN JUDGEMENTS REGARDING NOTICE MAY BE PRESUMED REGULAR WHERE THE RECORD IS ABSENT ANY CONTROVERTING MATERIAL.**

¶ 07-3-11. **In the Matter of E.V.**, ___S.W.3d.___, No. 08-04-00364, 2006 Tex.App.Lexis 945 (Tex.App.—El Paso, 2/2/06), reh den'd 3/1/06, pet. for rev. den'd 5/19/06.

Facts: Appellant E.V. is a citizen of Mexico. He was first detained while in the United States in connection with the unlawful carrying of a club in violation of Texas law. The State dismissed this indictment in December of 1998. On the same day as the dismissal, the State filed an amended petition alleging that Appellant had intentionally fled from law enforcement officials who were attempting to detain him in connection with another matter. The State subsequently filed a motion to dismiss and the trial court granted the motion.

In October of 2000, the State filed a petition against E.V. for murder. A hearing was set for early November of 2000. Prior to the scheduled hearing, the State filed a second amended petition alleging attempted murder, breaking into a vehicle, and destroying and/or damaging property. The State sought a determinate sentence and the grand jury approved on four counts: (1) murder; (2) attempted murder; (3) burglary of a vehicle; and (4) criminal mischief. A pretrial hearing was set and all parties were ordered to appear. On motion by counsel, Appellant underwent a psychological evaluation. After a hearing, the trial court found that E.V. was fit to proceed to trial. In February of 2001, pursuant to a plea agreement, Appellant was adjudicated delinquent and received a thirty-year determinate sentence to be served at the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.

In September of 2004, the Texas Youth Commission sent a letter to the trial court requesting that a hearing be conducted to determine whether or not Appellant should be transferred to the Institutional Division of the Texas Department of Criminal Justice. The trial court set a date for the transfer hearing and ordered all parties, both Appellant and parents, to attend.

In Issue One, Appellant argues that the *Texas Family Code section 54.11* is both unconstitutional on its face and as applied to him. Appellant argues that the court's decision to transfer him to the Institutional Division of the Texas Department of Criminal Justice is actually a sentence enhancement. He relies on *Apprendi v. New Jersey, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 2365 n.19, 147 L. Ed. 2d 435 (2000)* for the proposition that as a sentence enhancement, the factors enumerated under the Texas Family Code must be found by a jury beyond a reasonable doubt to withstand constitutional scrutiny.

Held: Affirmed.

Opinion: Appellant argues that the transfer proceeding was unlawful because Appellant's mother was not notified in accordance with *TEX.FAM.CODE ANN. § 54.11. Section 54.11(b)(2)* requires that notice of the transfer hearing be given to, among others, the parents of the individual to be transferred. *See TEX.FAM.CODE ANN. § 54.11(b)(2)*. During the hearing, the following exchange took place between the trial court, Appellant and trial counsel:

> The Court: Are you in contact with your parents?
>
> Appellant: Yes, sir.
>
> The Court: Where are they?
>
> Appellant: My mother is in Mexico and my grandmother is here in El Paso.
>
> The Court: How about your father?
>
> Appellant: I don't got no father, sir.
>
> The Court: They had intentions of being here, do you know?
>
> Trial Counsel: His uncle is here, Your Honor. That is him walking in the door.

We note that during the proceedings, counsel failed to object to a defect in notice during the hearing or to otherwise direct the trial court's attention to a defect in notice as to Appellant's mother.

Assuming, *arguendo*, this issue was properly preserved, the order transferring Appellant to the Institutional Division of the Texas Department of Criminal Justice recited that "after due notice had been issued on all parties as requested by *Section 54.11(b)* and *(d)* Texas Family Code . . . ." We may presume the regularity of recitations like this in judgments. *See Breazeale v. State, 683 S.W.2d 446, 450-51 (Tex.Crim.App. 1985)*(Op. on reh'g); *In re B.D., 16 S.W.3d 77, 80 (Tex.App.—Houston [1st Dist.] 2000, pet. denied)*. However, we will only presume this regularity where the record is absent any controverting material. *Casillas v. State Office of Risk Management, 146 S.W.3d 735, 738 (Tex.App.—El Paso 2004, no pet.), citing Gen. Elec. Capital Assurance Co. v. Jackson, 135 S.W.3d 849, 853 (Tex.App.—Houston [1st Dist.] 2004, pet. denied)*. If the record supports a court's finding, as set forth in a judgment or order, that all parties were notified, notice will be deemed adequate. *See In re R.G., 994 S.W.2d 309, 311-12 (Tex.App.—Houston [1st Dist.] 1999, pet. denied)*. Although the issue in *R.G.* concerned notice to the appellant, we think the reasoning is applicable to situations in which an appellant alleges that notice to other parties, as required by the same statute, was insufficient.

Here, the Texas Youth Commission sent a letter to the trial court requesting a transfer hearing and counsel was appointed to represent Appellant. Prior to that hearing, private counsel was retained for Appellant. Counsel informed the trial court that he knew Appellant's mother, aunt, and uncle. Appellant's uncle actually attended the hearing. The only controverting evidence in this case was the absence of Appellant's parents at the hearing. However, Appellant's uncle did attend the hearing, presumably because his parents could not. Based on the foregoing, we think the record sufficiently supports the recitation in the court's order that notice was served on the parties as required by statute. Therefore, Issue Two is overruled.

Conclusion: Having addressed each of Appellant's issues, we affirm the judgment of the trial court.

APPEALS—
ONCE A PROBATION IS TERMINATED, AN APPEAL OF THAT DISPOSITION BECOMES MOOT.

¶ 07-3-12. **In the Matter of G.E.,** 225 S.W.3d 647, 2006 Tex.App.Lexis 7553 (Tex.App.—El Paso, 8/24/06) rel. for pub. 6/14/07.

Facts: Appellant, G.E., a juvenile, appeals from a disposition order placing him on probation until his eighteenth birthday with out-of-home placement in the Challenge Boot Camp Program as a condition of his probation.

In its second amended petition, the State alleged that Appellant committed the offenses of evading arrest, criminal mischief over $ 1,500 but less than $ 20,000, possession of marijuana under two ounces, and assault of a family member. On January 10, 2005, an adjudication hearing was held and Appellant pled true to evading arrest, possession of marijuana, and assault of a family member. [n1] The trial court found that Appellant engaged in delinquent conduct and scheduled a disposition hearing.

> n1 The State dropped the criminal mischief charge pursuant to a restitution agreement.

At the disposition hearing, Probation Officer Patricia Soto recommended that Appellant receive probation with out-of-home placement in the Challenge Boot Camp Program until his eighteenth birthday. The trial court agreed with Probation Officer Soto's recommendation and placed Appellant on probation until his eighteenth birthday. Appellant was also required to participate in the Challenge Boot Camp Program as a condition of his probation.

In his sole issue, Appellant argues the trial court abused its discretion by placing him in a boot camp program as a condition of his probation when alternative,

less restrictive programs were available. The State contends that since Appellant is no longer on probation, his issue on appeal is now moot.

Held: Appeal Dismissed

Opinion: In this case, a review hearing was held subsequent to the disposition hearing and Appellant's probation was terminated. We note Appellant did not appeal the trial court's adjudication. Rather, Appellant only challenged the condition of probation which required him to participate in a boot camp program. Because Appellant's probation was terminated, no decision of this Court regarding the condition of probation would have any effect. *See* In re of J.P.D., 2003 Tex. App. LEXIS 3466, No. 03-02-00425-CV, 2003 WL 1922466, *at *1 (Tex.App.—Austin, April 24, 2003, no pet.).*

When the judgment of this Court can have no effect on an existing controversy, a case becomes moot. *Restrepo v. First National Bank of Dona Ana County, New Mexico, 888 S.W.2d 606, 607 (Tex.App.—El Paso 1994, no writ).* Thus, Appellant's issue has become moot. *See In re of J.P.D., 2003 Tex. App. LEXIS 3466, 2003 WL at 1922466, at *1*. Generally, an appellate court must dismiss the cause and not simply the appeal when a case becomes moot. *Hanna v. Godwin, 876 S.W.2d 454, 457 (Tex.App.—El Paso 1994, no writ).* However, in this case, the entire cause is not moot, only Appellant's issue. *See In re of J.P.D., 2003 Tex. App. LEXIS 3466, 2003 WL 1922466, at *2*. Therefore, only the appeal should be dismissed as moot.

Conclusion: Accordingly, we dismiss this appeal as moot.

SUFFICIENCY OF THE EVIDENCE—
IN AN ASSAULT ON A PUBLIC SERVANT, EVIDENCE THAT COMPLAINANT WAS A TEACHER'S AID WAS SUFFICIENT TO ESTABLISH THE ELEMENT OF PUBLIC SERVANT, EVEN WHERE PETITION ALLEGED COMPLAINANT WAS "A TEACHER."

¶ 07-3-13. **In the Matter of S.C.,** No. 06-06-00053, 2007 Tex.App.Lexis 5194 (Tex.App.—Texarkana, 7/5/07).

Facts: Who started the pushing that morning at Paris High School was disputed. All agreed that S.C. and Cleda Brownfield were at cross purposes before normal school hours began. S.C., then a fourteen-year-old high school freshman, wanted into the school building. Brownfield, a "special services aide, teacher's assistant," was tasked to keep out all students except those having business which specifically authorized early entry.[n1] S.C. thought her business justified her early entry; Brownfield ruled to the contrary. The ensuing altercation resulted in S.C. being charged with, tried for, and found guilty by a six-person jury as having engaged in, delinquent conduct by assaulting a public servant.[n2] *See TEX. FAM. CODE ANN. § 54.03* (Vernon Supp. 2006).

n1 One of Brownfield's duties at the time of the altercation was to keep unauthorized students out of the school building before the bell rang for general classes at 8:30 a.m. The first bell rang at 8:00 a.m. At that time, authorized students could come in for tutorials and other specified purposes until 8:05 a.m., when the second bell rang. At that point, the doors were again closed until 8:30 a.m., when general admission began. Brownfield and other school personnel testified that S.C. initiated physical contact before 8:30 by pushing Brownfield. S.C. and two classmates testified that Brownfield initiated the contact. S.C. also stated that Mr. Fleming, a science teacher, pushed S.C. while stepping on her shoe string and that, as a result, she fell and stuck herself in the hand with a pencil she was carrying.

n2 After the trial court heard further evidence, it committed S.C. to the Texas Youth Commission (TYC) for an indeterminate sentence. *See TEX. FAM. CODE ANN. § 54.04* (Vernon Supp. 2006).

On appeal, [n3] S.C. contends that the evidence is insufficient because the State did not prove that S.C. was under seventeen years of age; that Brownfield was a school teacher as alleged in the State's petition; or that Paris High School is a governmental entity, a requirement to establish that Brownfield was a public servant. S.C. also argues that she had ineffective assistance of counsel at trial.[n4]

n3 We note that, though numerous reports in the public media discuss S.C.'s case as being one involving issues of racial discrimination, no racial issues have been raised in this appeal.

n4 At oral argument, acknowledging that S.C. has now been released from TYC, counsel waived his arguments that the trial court abused its discretion at the disposition phase by committing her for an indeterminate sentence.

Held: Affirmed

Opinion: S.C.'s next contention is that the evidence is insufficient because the State did not prove that Brownfield was a "school teacher," but instead proved only that she was a "teacher's aide." Thus, she argues, the petition's allegations were not met, and we should find the evidence insufficient.

The jury was charged to determine whether S.C. had committed delinquent conduct by committing assault on a public servant. *See TEX. PENAL CODE ANN. § 22.01* (Vernon Supp. 2006). Among other things, as presented to the jury, that includes "an officer, employee, or agent of government."

The petition alleges that S.C. caused bodily injury to Cleda Brownfield, a school teacher, and a person said defendant knew was a public servant, while Cleda Brownfield was lawfully discharging an official duty, or in retaliation or on account of exercise of official power or performance of an official duty as a public servant, by pushing Cleda Brownfield.

On appeal, S.C. focuses on a single portion of the petition, the language describing Brownfield as a school teacher. S.C. argues that the evidence does not support a finding that Brownfield was a school teacher, and cites a series of criminal cases involving fatal variances between the allegation and the proof. [n6]

n6 *See generally Weaver v. State, 551 S.W.2d 419 (Tex. Crim. App. 1977)* (Ruger, or Luger, pistol).

This is an allegation of criminal action, the truth of which is determined by the fact-finder. Thus, we apply the analysis used in criminal cases to review alleged charge error, or claims that the evidence is insufficient to support a jury's determination.

In reviewing the legal sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Johnson v. State, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000)*.

In a factual sufficiency review, we also view all the evidence, but do so in a neutral light and determine whether the evidence supporting the verdict is so weak that the jury's verdict is clearly wrong or manifestly unjust or against the great weight and preponderance of the evidence. *Roberts v. State, 220 S.W.3d 521 (Tex. Crim. App. 2007)*; *Marshall v. State, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006)*.

The Texas Court of Criminal Appeals has mandated that sufficiency of the evidence is to be analyzed under the hypothetically correct jury charge. *Gharbi v. State, 131 S.W.3d 481, 483 (Tex. Crim. App. 2003)* (allegation which is not statutory element or "an integral part of an essential element of the offense" need not be included in hypothetically correct jury charge); *see Fuller v. State, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002)* (allegation which is not statutory element need not be included in hypothetically correct jury charge); *see also Gollihar v. State, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001)*.

A variance occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial. *Hart v. State, 173 S.W.3d 131, 144 (Tex. App.—Texarkana 2005, no pet.)* (quoting *Gollihar, 46 S.W.3d at 246*). "The widely-accepted rule, regardless of whether viewing variance as a sufficiency of the evidence problem or as a notice-related problem, is that a variance that is not prejudicial to a defendant's 'substantial rights' is immaterial." *Id.* (quoting *Gollihar, 46 S.W.3d at 247-48*; and referencing *Rojas v. State, 986 S.W.2d 241, 246 (Tex. Crim. App. 1998)*).

To determine whether a defendant's "substantial rights" have been prejudiced, we consider two questions: whether the indictment, as written, informed the defendant of the charge against him or her sufficiently to allow such defendant to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime. *See Dickey v. State, 189 S.W.3d 339, 345 (Tex. App.—Texarkana 2006, no pet.)* (citing *Gollihar, 46 S.W.3d at 248*).

In this instance, the statute criminalizes assault on a public servant. It is not limited to assault on a school teacher. *TEX. PENAL CODE ANN. § 22.01(b)(1)*. It is undisputed that Brownfield was a teacher's aide employed by the Paris Independent School District at the time of the altercation. A "public servant" is "a person elected, selected, appointed, employed, or otherwise designated as . . . an officer, employee, or agent of government." *TEX. PEN. CODE ANN. § 1.07(a)(41)(A)* (Vernon Supp. 2006). Thus, the evidence shows that Brownfield was a public servant. *See Moore v. State, 143 S.W.3d 305, 311 (Tex. App.—Waco 2004, pet. ref'd)*.

The petition clearly provides sufficient information for the defendant to prepare an adequate defense at trial. The State was not required to prove the more specific allegation, but only what was required by the hypothetically correct jury charge: that Brownfield was a public servant.

A number of courts have expressly answered the question by concluding that public school teachers fall within the broad definition of "public servant" provided by the current version of *Section 1.07(a)(41)(A) of the Texas Penal Code*. *See In re J.P., 136 S.W.3d 629, 630 (Tex. 2004)* (juvenile assaulted public servant per *Section 22.01(b)(1)* by hitting and kicking public school teacher); *Moore, 143 S.W.3d at 311* (school superintendent was "public servant" under *Section 1.07(a)(41)(A)*); *In re F.C., No. 03-02-00463-CV, 2003 Tex. App. LEXIS 4709, at *10-11 (Tex. App.—Austin June 5, 2005, no pet.)* (mem. op., not designated for publication) (teacher at Dobie Middle School was "public servant" for purposes of *Section 22.01(b)(1)*); *In re J.L.O., No. 03-01-00632-CV, 2002 Tex. App. LEXIS 5730, at *8-9 & n.1 (Tex. App.—Austin Aug. 8, 2002, no pet.)* (mem. op., not designated for publication) (education assistant at public school satisfied Texas Penal Code definition, which Legislature intentionally made broad "to extend the law's protection to all school employees"); *In re B.M., 1 S.W.3d 204, 207 (Tex. App.—Tyler 1999, no pet.)* (public servants include employees of independent school districts).

Other Issues Omitted.

Conclusion: Accordingly, we conclude that Brownfield's undisputed testimony that she was a "teacher's aide" employed by the Paris Independent School District at Paris High School provided legally and factually sufficient evidence to establish this element of the offense. *See In re L.M., 993 S.W.2d 276, 284 (Tex. App.—Austin 1999, pet. denied)*; *In re P.N., No. 03-04-00751-CV, 2006 Tex. App. LEXIS 6878 (Tex. App.—Austin Aug. 4, 2006, no pet.)* (mem. op., not designated for publication).

SUFFICIENCY OF THE EVIDENCE—
IN ATTEMPTED BURGLARY, EVIDENCE WAS SUFFICIENT TO ESTABLISH INTENT TO COMMIT FELONY, THEFT, OR ASSAULT, WHERE CHILD WAS SEEN ATTEMPTING TO ENTER THE HABITATION, WITHOUT PERMISSION, BY WIGGLING A KNIFE AGAINST THE DEADBOLT LOCK, AND NOT LEAVING THE PREMISES ON HIS OWN.

¶ 07-3-14A. **In the Matter of J.O.T.**, MEMORANDUM, 13-06-226-CV, 2007 Tex.App.Lexis 5637 (Tex. App.— Corpus Christi - Edinburg, 7/19/07).

Facts: On July 26, 2005, C.T. was at home with his two younger sisters, Lu.T. and La.T. At approximately 10:00 a.m. in Travis County, Texas, J.O.T. knocked on the front door of the residents' home. C.T. saw J.O.T. through the peephole and knew him from school, but chose not to answer the front door. After knocking on the front door and receiving no answer, J.O.T. approached the front window and then went around to the rear door of the residence. Once at the rear door, J.O.T. knocked and again received no answer. He then inserted a knife blade into the doorjamb at the location of the dead bolt lock and wiggled the knife up and down. After J.O.T. had been at the back door of the residence for some time, C.T. asked Lu.T. to open the back door and ask what J.O.T. wanted. When she opened the back door, J.O.T. asked if C.T. was home, and Lu.T. replied that he was not. J.O.T. ran from the area and left on a bicycle.

On October 18, 2005, J.O.T. was charged with attempted burglary of a habitation and criminal trespass. The juvenile court referee found J.O.T. guilty on both counts. J.O.T. moved for a new trial on March 8, 2006, but the district court denied the request. J.O.T. now appeals.[n1]

n1 The case was transferred to the Thirteenth Court of Appeals pursuant to a docket equalization order issued by the Supreme Court of Texas. *TEX. GOV'T CODE ANN. § 73.001* (Vernon 1998).

II. STANDARD OF REVIEW

The Texas Family Code places juvenile delinquency proceedings in civil courts but requires that their adjudication be based on the standard of proof used in criminal cases. *TEX. FAM. CODE ANN. §§ 51.17, 54.03(f)* (Vernon Supp. 2006). In addition, the Texas Supreme Court has held that juvenile delinquency proceedings are "quasi-criminal" in nature, and therefore criminal rules of procedure must be looked to for guidance. *In re B.L.D, 113 S.W.3d 340, 351 (Tex. 2003).* Thus, for each of J.O.T.'s claims, we apply the same standards of review for sufficiency of the evidence that are applicable in criminal cases. *In re M.C.L., 110 S.W.3d 591, 594* (Tex. App.—Austin 2003, no pet.).

In evaluating a legal sufficiency challenge, the appellate court views the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *Drichas v. State, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005)*; *Sanders v. State, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003).* In determining whether evidence is sufficient to convict, the appellate court must examine the totality of the circumstances. *Vodochodsky v. State, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005).* This standard is applicable in both direct and circumstantial evidence cases. *Chambers v. State, 711 S.W.2d 240, 244-45 (Tex. Crim. App. 1986).* The appellate court is not a fact finder; its role is to act as a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).*

When evaluating a challenge to the factual sufficiency of the evidence, the appellate court views all the evidence in a neutral light, favoring neither party. *Watson v. State, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006)*; *Drichas, 175 S.W.3d at 799.* The appellate court should set the verdict aside only if: (1) the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the fact-finder's determination is clearly wrong and manifestly unjust; or (2) the verdict is against the great weight and preponderance of the evidence. *Watson, 204 S.W.3d at 414-15, 417*; *Johnson v. State, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).* The appellate court cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because it would have voted to acquit. *Watson, 204 S.W.3d at 417.* In other words, we may not simply substitute our judgment for the fact-finder's judgment. *Johnson, 23 S.W.3d at 12*; *Cain v. State, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).* To reverse for factual insufficiency, the appellate court must determine, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the verdict. *Watson, 204 S.W.3d at 417.* In examining a factual sufficiency challenge, the appellate court should defer to the fact-finder's determinations regarding credibility of the evidence. *Swearingen v. State, 101 S.W.3d 89, 97 (Tex. Crim. App. 2003).*

III. ATTEMPTED BURGLARY DEFINED

The Texas Penal Code defines a criminal attempt as follows: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *TEX. PENAL CODE ANN. § 15.01(a)* (Vernon 2003). Burglary is defined in the penal code, in pertinent part, as follows:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault. *Id*. at § 30.02.

Accordingly, a charge of attempted burglary is proven by establishing that the appellant committed an act amounting to more than mere preparation to enter a habitation not then open to the public, without the effective consent of the owner, with intent to commit a felony, theft, or an assault, and that the act tended but failed to effect the commission of a burglary. *Flournoy v. State, 668 S.W.2d 380, 382 (Tex. Crim. App. 1984).*

Held: Affirmed.

Memorandum Opinion: In his first issue, J.O.T. alleges that the evidence presented at trial was not legally or factually sufficient to prove that an actual entry occurred. This issue is irrelevant, though, because entry is not an element of attempted burglary. One need only commit an act amounting to more than mere preparation to enter the habitation to satisfy the entry element of attempted burglary. Issue one, therefore, is overruled.

In his second issue, J.O.T. argues that the evidence presented at trial was not legally or factually sufficient to prove his intent to commit a felony, theft, or assault. To support this assertion, J.O.T. alleges that the trial court deliberately omitted any mention of the intent to commit a felony, theft, or assault from its findings of fact. We disagree on both counts.

Juvenile criminal cases in Texas are governed by the Texas Rules of Civil Procedure, unless otherwise provided by statute. *TEX. FAM. CODE § 51.17(a)*. J.O.T. claims that according to *Rule 299 of the rules of civil procedure*, a deliberate omission from the findings of fact cannot be logically supplied by implication. While this is true, J.O.T. neglects to mention what exactly constitutes a deliberate omission under *Rule 299*. The rule states, in pertinent part:

> The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted *unrequested* elements, when supported by evidence, will be supplied by presumption in support of the judgment. *TEX. R. CIV. P. 299* (emphasis added).

In the instant case, the element of intent to commit a felony, theft, or assault is an omitted *unrequested* element. J.O.T. did not request a finding on the element of specific intent, nor did he mention specific intent in his Proposed Findings of Fact and Conclusions of Law. Furthermore, J.O.T. never asked for clarification on the element of specific intent, which was an option available to him under *Texas Rule of Civil Procedure 298*. J.O.T. must have specifically requested a finding or a clarification of the element in question for the presumption that a court inadvertently omitted the finding of fact on that element to be rebutted. *Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 253* (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (citing *Stretcher v. Gregg, 542 S.W.2d 954, 958 (Tex. Civ. App.—Texarkana 1976, no writ)*). Because J.O.T. did none of these things, the presumption applies.

Rule 299 also states that to presume that a court has ruled on a particular element of an offense, even though it has been omitted from the findings of fact, the omitted element must be supported by the evidence. J.O.T. contends that the element of specific intent is not supported by the evidence, and for this reason, the presumption that the court inadvertently omitted a finding of fact on this element should not apply. We disagree, and infer specific intent according to our discussion below.

A defendant's conduct and the surrounding circumstances may be found to imply intent to commit burglary. *Linder v. State, 828 S.W.2d 290, 294 (Tex.App.—Houston [1st Dist.] 1992, pet. ref'd)*; *Roane v. State, 959 S.W.2d 387, 388* (Tex.App.—Houston [14th Dist.] 1998, pet. ref'd) (implying intent where defendant was found to be wearing gloves and chipping away at the caulking around the window of a stranger's house, screen on the window had been removed); *Richardson v. State, 973 S.W.2d 384, 385 (Tex.App.—Dallas 1998, no pet.)* (finding implied intent where a man observed two strangers who had pulled up to his neighbor's house in an unfamiliar car making trips between the car and the front door of that house, police found a flat head screwdriver in the defendant's pocket, the size of which matched fresh pry marks that were found on the door of the house); *Flournoy, 668 S.W.2d at 381-382* (implying intent where defendant had already "reached his hand through a screen door of [the] habitation" when he was scared away by the shotgun-wielding owner).

In the instant case, the evidence showing that J.O.T. was attempting to burglarize the residents' home is as strong, if not stronger, than any of the evidence in the three cases presented above. As opposed to the defendant in *Roane*, who was merely chipping away at the caulking of a window, the appellant inserted a knife blade in the doorjamb at the location of the dead bolt lock and wig-

gled the knife up and down. *Roane, 959 S.W.2d at 388*. Like the defendant in *Richardson*, J.O.T. was seen by an eyewitness at the door of the residence in question. *Richardson, 973 S.W.2d at 385*. Unlike the defendant in *Richardson*, though, J.O.T. was seen actually manipulating a knife against the doorjamb by both Lu.T. and C.T., whereas the neighbor who called the police in *Richardson* could not see what the suspect was doing at the front door of his neighbor's house. *Id*. Comparing the facts of *Flournoy*, the defendant had simply reached his hand through the screen door to the main door of the habitation. *Flournoy, 668 S.W.2d at 382*. J.O.T. went considerably further than this, actually sticking a knife into the doorjamb of the residents' back door.

J.O.T. compares his case to two other cases where a conviction for attempted burglary was overturned. In *Solis v. State*, the defendant removed a screen from the window of a house, then put the screen down against the side of another house and walked away, without having been disturbed in the process. *Solis, 589 S.W.2d 444, 445-46 (Tex. Crim. App. 1979)*. The Court of Criminal Appeals ruled that even though removing the screen was enough of an act to infer intent to enter the house, the defendant's actions after he removed the screen cast a reasonable doubt on his specific intent to commit theft. *Id. at 446-47*. Here, J.O.T. was interrupted while in the act of putting a knife into the residents' door jamb, making it impossible to know if he would have left the premises of his own accord. Furthermore, there was no evidence that Solis made an attempt to open the window, whereas J.O.T. was actually wiggling a knife between the doorjamb and the back door of the residents' home. *Id*. Therefore, the evidence of guilt is more apparent than in *Solis*. *Id*.

J.O.T. also compares his situation to the facts of *Perez v. State, 695 S.W.2d 51, 52 (Tex. App.—Corpus Christi 1985, no pet.)*. The ruling in *Perez*, though, was based on the "exclusion of reasonable outstanding hypothesis" theory,[n2] which was rejected by the Texas Court of Criminal Appeals as a method of evaluating the sufficiency of evidence. *Geesa v. State, 820 S.W.2d 154, 161* (Tex. Crim. App. 1991, *overruled on other grounds*, *Paulson v. State, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)*). Thus, this precedent cannot be followed when deciding on the legal or factual sufficiency of evidence, since the theory of law that the holding was based on has been overturned.

n2 The "reasonable outstanding hypothesis" theory held that when an appellate court reviewed the sufficiency of evidence supporting a conviction, the court had to consider all other reasonable hypotheses besides the theory of guilt advanced by the state. *Perez, 695 S.W.2d at 54*. If the court found that the credible evidence could support another reasonable hypothesis, then the court would hold that the state had not proved its case beyond a reasonable doubt, and the verdict would be overturned. *Id*.

According to the foregoing analysis, the evidence presented at trial is both legally and factually sufficient to support the court's implied finding of specific intent to commit a felony, theft, or assault. With regard to legal sufficiency, a reasonable trier of fact could have found that J.O.T. had the specific intent to commit a felony, theft, or assault, since he was seen by two witnesses attempting to enter the habitation without permission from the owner. The evidence is also factually sufficient to support a finding of specific intent. J.O.T. was seen attempting to enter the habitation, without permission, by wiggling a knife against the deadbolt lock of the residents' back door. Furthermore, J.O.T. did not leave the premises on his own - it was only when Lu.T. opened the door that he left. The finding is not manifestly unjust, and the great weight and preponderance of the evidence does not undermine the verdict reached by the trial court.

Conclusion: We find that the evidence presented at trial was both legally and factually sufficient to support the adjudication of delinquency for attempted burglary of a habitation. The judgment of the district court is AFFIRMED.

ORDERS AND JUDGEMENTS—
A MISSING ELEMENT IN A COURT'S FINDINGS OF FACT WILL BE PRESUMED INADVERTENT, WHERE THERE IS NO REQUEST OF A FINDING OR A CLARIFICATION ON THE ELEMENT.

¶ 07-3-14B. **In the Matter of J.O.T.**, MEMORANDUM, 13-06-226-CV, 2007 Tex.App.Lexis 5637 (Tex. App.— Corpus Christi - Edinburg, 7/19/07).

Facts: On July 26, 2005, C.T. was at home with his two younger sisters, Lu.T. and La.T. At approximately 10:00 a.m. in Travis County, Texas, J.O.T. knocked on the front door of the residents' home. C.T. saw J.O.T. through the peephole and knew him from school, but chose not to answer the front door. After knocking on the front door and receiving no answer, J.O.T. approached the front window and then went around to the rear door of the residence. Once at the rear door, J.O.T. knocked and again received no answer. He then inserted a knife blade into the doorjamb at the location of the dead bolt lock and wiggled the knife up and down. After J.O.T. had been at the back door of the residence for some time, C.T. asked Lu.T. to open the back door and ask what J.O.T. wanted. When she opened the back door, J.O.T. asked if C.T. was home, and Lu.T. replied that he was not. J.O.T. ran from the area and left on a bicycle.

On October 18, 2005, J.O.T. was charged with attempted burglary of a habitation and criminal trespass. The juvenile court referee found J.O.T. guilty on both counts. J.O.T. moved for a new trial on March 8, 2006,

but the district court denied the request. J.O.T. now appeals.[n1]

n1 The case was transferred to the Thirteenth Court of Appeals pursuant to a docket equalization order issued by the Supreme Court of Texas. *TEX. GOV'T CODE ANN. § 73.001* (Vernon 1998).

II. STANDARD OF REVIEW

The Texas Family Code places juvenile delinquency proceedings in civil courts but requires that their adjudication be based on the standard of proof used in criminal cases. *TEX. FAM. CODE ANN. §§ 51.17, 54.03(f)* (Vernon Supp. 2006). In addition, the Texas Supreme Court has held that juvenile delinquency proceedings are "quasi-criminal" in nature, and therefore criminal rules of procedure must be looked to for guidance. *In re B.L.D, 113 S.W.3d 340, 351 (Tex. 2003).* Thus, for each of J.O.T.'s claims, we apply the same standards of review for sufficiency of the evidence that are applicable in criminal cases. *In re M.C.L., 110 S.W.3d 591, 594* (Tex. App.—Austin 2003, no pet.).

In evaluating a legal sufficiency challenge, the appellate court views the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *Drichas v. State, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005)*; *Sanders v. State, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003).* In determining whether evidence is sufficient to convict, the appellate court must examine the totality of the circumstances. *Vodochodsky v. State, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005).* This standard is applicable in both direct and circumstantial evidence cases. *Chambers v. State, 711 S.W.2d 240, 244-45 (Tex. Crim. App. 1986).* The appellate court is not a fact finder; its role is to act as a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Moreno v. State, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).*

When evaluating a challenge to the factual sufficiency of the evidence, the appellate court views all the evidence in a neutral light, favoring neither party. *Watson v. State, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006)*; *Drichas, 175 S.W.3d at 799.* The appellate court should set the verdict aside only if: (1) the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the fact-finder's determination is clearly wrong and manifestly unjust; or (2) the verdict is against the great weight and preponderance of the evidence. *Watson, 204 S.W.3d at 414-15, 417*; *Johnson v. State, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).* The appellate court cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because it would have voted to acquit. *Watson, 204 S.W.3d at 417.* In other words, we may not simply substitute our judgment for the fact-finder's judgment. *Johnson, 23 S.W.3d at 12*; *Cain v. State, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).* To reverse for factual insufficiency, the appellate court must determine, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the verdict. *Watson, 204 S.W.3d at 417.* In examining a factual sufficiency challenge, the appellate court should defer to the fact-finder's determinations regarding credibility of the evidence. *Swearingen v. State, 101 S.W.3d 89, 97 (Tex. Crim. App. 2003).*

III. ATTEMPTED BURGLARY DEFINED

The Texas Penal Code defines a criminal attempt as follows: "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *TEX. PENAL CODE ANN. § 15.01(a)* (Vernon 2003). Burglary is defined in the penal code, in pertinent part, as follows:

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>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault. *Id.* at § 30.02.

Accordingly, a charge of attempted burglary is proven by establishing that the appellant committed an act amounting to more than mere preparation to enter a habitation not then open to the public, without the effective consent of the owner, with intent to commit a felony, theft, or an assault, and that the act tended but failed to effect the commission of a burglary. *Flournoy v. State, 668 S.W.2d 380, 382 (Tex. Crim. App. 1984).*

Held: Affirmed.

Memorandum Opinion: In his first issue, J.O.T. alleges that the evidence presented at trial was not legally or factually sufficient to prove that an actual entry occurred. This issue is irrelevant, though, because entry is not an element of attempted burglary. One need only commit an act amounting to more than mere preparation to enter the habitation to satisfy the entry element of attempted burglary. Issue one, therefore, is overruled.

In his second issue, J.O.T. argues that the evidence presented at trial was not legally or factually sufficient to prove his intent to commit a felony, theft, or assault. To support this assertion, J.O.T. alleges that the trial court deliberately omitted any mention of the intent to commit a felony, theft, or assault from its findings of fact. We disagree on both counts.

Juvenile criminal cases in Texas are governed by the Texas Rules of Civil Procedure, unless otherwise provided by statute. *TEX. FAM. CODE § 51.17(a).* J.O.T. claims that according to *Rule 299 of the rules of*

civil procedure, a deliberate omission from the findings of fact cannot be logically supplied by implication. While this is true, J.O.T. neglects to mention what exactly constitutes a deliberate omission under *Rule 299*. The rule states, in pertinent part:

> The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted *unrequested* elements, when supported by evidence, will be supplied by presumption in support of the judgment. *TEX. R. CIV. P. 299* (emphasis added).

In the instant case, the element of intent to commit a felony, theft, or assault is an omitted *unrequested* element. J.O.T. did not request a finding on the element of specific intent, nor did he mention specific intent in his Proposed Findings of Fact and Conclusions of Law. Furthermore, J.O.T. never asked for clarification on the element of specific intent, which was an option available to him under *Texas Rule of Civil Procedure 298*. J.O.T. must have specifically requested a finding or a clarification of the element in question for the presumption that a court inadvertently omitted the finding of fact on that element to be rebutted. *Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 253* (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (citing *Stretcher v. Gregg, 542 S.W.2d 954, 958 (Tex. Civ. App.—Texarkana 1976, no writ)*). Because J.O.T. did none of these things, the presumption applies.

Rule 299 also states that to presume that a court has ruled on a particular element of an offense, even though it has been omitted from the findings of fact, the omitted element must be supported by the evidence. J.O.T. contends that the element of specific intent is not supported by the evidence, and for this reason, the presumption that the court inadvertently omitted a finding of fact on this element should not apply. We disagree, and infer specific intent according to our discussion below.

A defendant's conduct and the surrounding circumstances may be found to imply intent to commit burglary. *Linder v. State, 828 S.W.2d 290, 294 (Tex.App.—Houston [1st Dist.] 1992, pet. ref'd)*; *Roane v. State, 959 S.W.2d 387, 388* (Tex.App.—Houston [14th Dist.] 1998, pet. ref'd) (implying intent where defendant was found to be wearing gloves and chipping away at the caulking around the window of a stranger's house, screen on the window had been removed); *Richardson v. State, 973 S.W.2d 384, 385 (Tex.App.—Dallas 1998, no pet.)* (finding implied intent where a man observed two strangers who had pulled up to his neighbor's house in an unfamiliar car making trips between the car and the front door of that house, police found a flat head screwdriver in the defendant's pocket, the size of which matched fresh pry marks that were found on the door of the house); *Flournoy, 668 S.W.2d at 381-382* (implying intent where defendant had already "reached his hand through a screen door of [the] habitation" when he was scared away by the shotgun-wielding owner).

In the instant case, the evidence showing that J.O.T. was attempting to burglarize the residents' home is as strong, if not stronger, than any of the evidence in the three cases presented above. As opposed to the defendant in *Roane*, who was merely chipping away at the caulking of a window, the appellant inserted a knife blade in the doorjamb at the location of the dead bolt lock and wiggled the knife up and down. *Roane, 959 S.W.2d at 388*. Like the defendant in *Richardson*, J.O.T. was seen by an eyewitness at the door of the residence in question. *Richardson, 973 S.W.2d at 385*. Unlike the defendant in *Richardson*, though, J.O.T. was seen actually manipulating a knife against the doorjamb by both Lu.T. and C.T., whereas the neighbor who called the police in *Richardson* could not see what the suspect was doing at the front door of his neighbor's house. *Id*. Comparing the facts of *Flournoy*, the defendant had simply reached his hand through the screen door to the main door of the habitation. *Flournoy, 668 S.W.2d at 382*. J.O.T. went considerably further than this, actually sticking a knife into the doorjamb of the residents' back door.

J.O.T. compares his case to two other cases where a conviction for attempted burglary was overturned. In *Solis v. State*, the defendant removed a screen from the window of a house, then put the screen down against the side of another house and walked away, without having been disturbed in the process. *Solis, 589 S.W.2d 444, 445-46 (Tex. Crim. App. 1979)*. The Court of Criminal Appeals ruled that even though removing the screen was enough of an act to infer intent to enter the house, the defendant's actions after he removed the screen cast a reasonable doubt on his specific intent to commit theft. *Id. at 446-47*. Here, J.O.T. was interrupted while in the act of putting a knife into the residents' door jamb, making it impossible to know if he would have left the premises of his own accord. Furthermore, there was no evidence that Solis made an attempt to open the window, whereas J.O.T. was actually wiggling a knife between the doorjamb and the back door of the residents' home. *Id*. Therefore, the evidence of guilt is more apparent than in *Solis*. *Id*.

J.O.T. also compares his situation to the facts of *Perez v. State, 695 S.W.2d 51, 52 (Tex. App.—Corpus Christi 1985, no pet.)*. The ruling in *Perez*, though, was based on the "exclusion of reasonable outstanding hypothesis" theory,[n2] which was rejected by the Texas Court of Criminal Appeals as a method of evaluating the sufficiency of evidence. *Geesa v. State, 820 S.W.2d 154, 161* (Tex. Crim. App. 1991, *overruled on other grounds*, *Paulson v. State, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)*). Thus, this precedent cannot be followed when deciding on the legal or factual sufficiency of evidence, since the theory of law that the holding was based on has been overturned.

n2 The "reasonable outstanding hypothesis" theory held that when an appellate court reviewed the sufficiency of evidence supporting a conviction, the court had to consider all other reasonable hypotheses besides the theory of guilt advanced by the state. *Perez, 695 S.W.2d at 54*. If the court found that the credible evidence could support another reasonable hypothesis, then the court would hold that the state had not proved its case beyond a reasonable doubt, and the verdict would be overturned. *Id.*

According to the foregoing analysis, the evidence presented at trial is both legally and factually sufficient to support the court's implied finding of specific intent to commit a felony, theft, or assault. With regard to legal sufficiency, a reasonable trier of fact could have found that J.O.T. had the specific intent to commit a felony, theft, or assault, since he was seen by two witnesses attempting to enter the habitation without permission from the owner. The evidence is also factually sufficient to support a finding of specific intent. J.O.T. was seen attempting to enter the habitation, without permission, by wiggling a knife against the deadbolt lock of the residents' back door. Furthermore, J.O.T. did not leave the premises on his own - it was only when Lu.T. opened the door that he left. The finding is not manifestly unjust, and the great weight and preponderance of the evidence does not undermine the verdict reached by the trial court.

Conclusion: We find that the evidence presented at trial was both legally and factually sufficient to support the adjudication of delinquency for attempted burglary of a habitation. The judgment of the district court is AFFIRMED.

CONFESSIONS— SUFFICIENCY OF THE EVIDENCE— WHEN A CHILD'S CONFESSION IS COMBINED WITH THE CUMULATIVE FORCE OF CIRCUMSTANTIAL AND CORROBORATIVE EVIDENCE, IT CAN BE, AS IN THIS CASE, BOTH LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT THE CHILD'S ADJUDICATION.

¶ 07-3-15. **In the Matter of M.G.G.**, No. 04-06-00740-CV, 2007 Tex.App.Lexis 5575 (Tex.App.—San Antonio, 7/18/07).

Facts: The record shows that during the adjudication phase the State relied on both circumstantial evidence and statements made by M.G.G. to three neighbors of the victim—Ishmal Beard, Elsa Morales, and Lula McCarter. The evidence established that the victim lived at her home at 2123 E. Crockett until her death on May 30, 2005, and M.G.G. and his family lived nearby at 2111 E. Crockett. The burglary occurred on July 5, 2005 while the home was unoccupied. The property identified as stolen in the burglary included: a large brass and glass coffee table with matching end tables; 50 pieces of jewelry, including a solitaire diamond ring, gold chains, large gold rings, several pendants of butterflies, fish and flowers; two handguns, including a derringer; and miscellaneous other items and electronic equipment. Prints obtained from the home did not match M.G.G., and no one saw M.G.G. or anyone associated with him enter or leave the home. However, on the day the burglary was discovered, witnesses observed drag marks on the sidewalk that led from the front steps of the victim's home to the front of M.G.G.'s family home. In addition, Beard testified M.G.G. approached him soon after the burglary and asked him if he wanted to buy some glass tables. Beard saw three glass tables, two small and one large, in M.G.G.'s bedroom. When asked how he had acquired the furniture, M.G.G. told Beard that he, his brother and another person broke into the dead lady's house and stole all her stuff. M.G.G. told Beard that they wore gloves for the burglary and had taken, among other things, a derringer handgun and a .45 caliber handgun. A second neighbor, Morales, testified M.G.G. and his brother tried to sell her a bracelet, a ring, and a necklace with a butterfly design, and had furniture and electronic equipment for sale. A third neighbor, McCarter, testified M.G.G. tried to sell her a gold chain about four or five days after the burglary. Other evidence admitted at trial showed that after the burglary, M.G.G.'s mother pawned 29 items, including a number of jewelry items, some of which were similar to those listed as stolen in the burglary.[n1] These pawned items were never redeemed. None of the property stolen in the burglary was ever recovered.

n1 The evidence further showed that for the entire year of 2004, M.G.G.'s mother pawned only four items.

Held: Affirmed.

Opinion: In his first and second issues, M.G.G. argues no reasonable fact finder could have found beyond a reasonable doubt that he entered the victim's home, or, alternatively, the evidence was factually insufficient to support the adjudication. In support of his position, M.G.G. relies upon *McBride v. State, 803 S.W.2d 741 (Tex. App.—Dallas 1990), pet. dism'd, 819 S.W.2d 552 (Tex. Crim. App. 1991)*, for the proposition that a vague confession to a burglary is legally insufficient to sustain a conviction where no property taken in the burglary is found on the defendant or anyone associated with him. In *McBride,* the defendant confessed to committing several burglaries. The court of appeals found that, despite the confession, the evidence was insufficient to show the defendant had committed the charged burglary, reasoning that the "confession's description of the location of the burglary was vague and imprecise;" "no property taken in the . . . burglary was found in [the defendant's] possession;" and "the State offered no proof that the items described in [the defendant's] confession were the

same or even similar to the items taken" from the charged burglary. *Id. at 743-44*.

We conclude the evidence in the instant case is clearly distinguishable from *McBride.* Here, as contrasted with the confession and evidence presented in *McBride,* M.G.G.'s admission to a neighbor that he broke into the house of "the lady that died down the street" is not vague or imprecise. Instead, the statement identifies with reasonable particularity the owner of the house and the neighborhood location of the house burglarized. In addition, there is evidence in this record, other than the confession, linking M.G.G. to the charged burglary. Several witnesses testified they saw items similar to those stolen in M.G.G.'s possession, including a large glass and brass coffee and end table set. Furthermore, several witnesses testified there were scrape marks in the sidewalk, apparently made by something large and heavy being dragged over it, beginning at the bottom of the front steps of the victim's home and ending at M.G.G.'s home. Evidence was presented that M.G.G.'s mother pawned jewelry which was similar to that stolen.

Conclusion: When M.G.G.'s confession to Beard is combined with the cumulative force of all the circumstantial and corroborative evidence, it is both legally and factually sufficient to support M.G.G.'s adjudication for burglary. *See Powell v. State, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006)*; *Watson v. State, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006)*. M.G.G.'s first and second issues are overruled.

Based on the foregoing reasons, the trial court's judgment is affirmed.

DISPOSITION PROCEEDINGS—
A RESTITUTION AMOUNT, WHICH EXCEEDED THE "BLUE BOOK" VALUE FOR A DAMAGED CAR, WAS (BASED ON THE EVIDENCE) NOT ARBITRARY NOR UNJUSTLY ENRICHING THE RECIPIENTS.

¶ 07-3-16. **In the Matter of R.M.,** MEMORANDUM, No. 05-06-00519-CV, 2007 Tex.App.Lexis 5785 (Tex. App.—Dallas [5th Dist.], 7/24/07).

Facts: In this case, R.M. appeals the order adjudicating him delinquent and ordering him to pay $ 6,386.20 in restitution. R.M. contends the State failed to prove the restitution damages arose as a result of the offense for which he was adjudicated delinquent, the restitution amount was awarded arbitrarily and unjustly enriched the recipients, and the court abused its discretion in failing to weigh his family's ability to pay when ordering the rate of restitution payment. We affirm the trial court's order. The background of the case and the evidence adduced at trial are well known to the parties, and therefore we limit recitation of the facts. We issue this memorandum opinion pursuant to *Texas Rule of Appellate Procedure 47.1* because the law to be applied in the case is well settled.

Appellant pleaded true to unauthorized use of a motor vehicle. Testimony at trial showed he and his cohorts jumped out of the car they had taken while it was still moving. When the car was recovered, it had to be towed to a repair facility. The owners of the car offered testimony and evidence showing a car dealership's estimates for repairing the car. According to the owners, the car was in "perfect" condition before the offense.

R.M. offered evidence showing an independent mechanic's estimates for the same repairs using rebuilt parts. R.M. also offered into evidence a document showing the "blue book" value for a vehicle of the same make, model, and year, in fair condition. R.M.'s father testified the family income was approximately $ 1,200 per month and the family could afford to pay no more than $ 50 in restitution per month.

In making its ruling, the trial judge stated the following about how she determined the restitution amount:

> The Court is also ordering that the family be responsible for the amount of $ 6,386.20 in restitution to Socorro Lopez. That's payable at $ 277.66 per month beginning January the 21st, the year 2006.
>
> What I did was I took the Blue Book value of $ 3,830.00 and, in looking at this assessment, it makes some specific notes about the condition of the car that we could not verify that is the condition of this particular car. For that reason I then took the difference between the two estimates and divided it and added the difference to - [Coughing in the gallery] - that made the difference being $ 6,386.
>
> Now, the testimony seemed to be consistent that the damages to the car were the same. The only difference being you're saying that there was no damage to the ignition, but I remember, specifically, the police officer testifying that the car had to be towed away because there was no key and there was damage to the ignition. So for that reason I found all of the damages to be consistent. The only issue was as to how much it would cost to repair this particular vehicle.
>
> I don't think that the victim should be forced to take inferior parts in order that the Respondent have to pay less, but I also don't think that, for a five-year-old car, that the victim should be compensated with a new - with new parts, necessarily, either. So for that reason I divided the two - divided the difference in the estimates.

Held: Affirmed

Memorandum Opinion: In all three of his issues on appeal, R.M. complains about the trial court's restitution order. A juvenile court has broad discretion to determine the proper disposition of a child who has been adjudicated as engaging in delinquent behavior. *In re C.G., 162 S.W.3d 448, 452 (Tex. App.—Dallas 2005, no pet.).* Absent an abuse of discretion, we will not disturb the juvenile court's findings. *Id.*

Here, R.M. first complains the State failed to prove by a preponderance of the evidence that the damages alleged arose as a result of R.M.'s unauthorized use of a motor vehicle offense. The State offered testimony showing the car was in perfect condition before the offense. Police testimony showed the car was damaged after appellant and his companions abandoned it, and the parties essentially agreed about what damage was caused by the offense. We conclude the court did not abuse its discretion and resolve appellant's first issue against him.

R.M. next argues the restitution amount, which exceeded the "blue book" value for the car, was awarded arbitrarily and unjustly enriched the recipients. Here, the trial judge noted the "blue book" estimate in evidence was based on a car in "fair" condition, but there was no evidence to suggest the car had been only in fair condition before the crime. The judge specifically chose a restitution amount, based on the evidence before her, that would provide the owners of the car with repairs that would be reasonable both to them and to R.M.'s family. We resolve appellant's second issue against him.

In his third issue, R.M. contends the court abused its discretion in not weighing his family's ability to pay when ordering the rate of restitution payment. In fact, the record shows the court carefully considered the family's ability to pay and heard evidence on the matter. We resolve appellant's third issue against him as well.

Conclusion: We affirm the trial court's order adjudicating R.M. as a juvenile engaged in delinquent conduct.

APPEALS—
DETERMINATE SENTENCE TRANSFER—
FAILURE TO RAISE CONSTITUTIONALITY OF DETERMINATE SENTENCE TRANSFER STATUTE AT TRIAL, WAIVES THE ISSUE.

¶ 07-3-17, **In the Matter of E.V.,** 225 S.W.3d 231, 2006 Tex.App.Lexis 945 (Tex.App.—El Paso, 2/2/06).

Facts: Appellant E.V. is a citizen of Mexico. He was first detained while in the United States in connection with the unlawful carrying of a club in violation of Texas law. The State dismissed this indictment in December of 1998. On the same day as the dismissal, the State filed an amended petition alleging that Appellant had intentionally fled from law enforcement officials who were attempting to detain him in connection with another matter. The State subsequently filed a motion to dismiss and the trial court granted the motion.

In October of 2000, the State filed a petition against E.V. for murder. A hearing was set for early November of 2000. Prior to the scheduled hearing, the State filed a second amended petition alleging attempted murder, breaking into a vehicle, and destroying and/or damaging property. The State sought a determinate sentence and the grand jury approved on four counts: (1) murder; (2) attempted murder; (3) burglary of a vehicle; and (4) criminal mischief. A pretrial hearing was set and all parties were ordered to appear. On motion by counsel, Appellant underwent a psychological evaluation. After a hearing, the trial court found that E.V. was fit to proceed to trial. In February of 2001, pursuant to a plea agreement, Appellant was adjudicated delinquent and received a thirty-year determinate sentence to be served at the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.

In September of 2004, the Texas Youth Commission sent a letter to the trial court requesting that a hearing be conducted to determine whether or not Appellant should be transferred to the Institutional Division of the Texas Department of Criminal Justice. The trial court set a date for the transfer hearing and ordered all parties, both Appellant and parents, to attend.

Held: Affirmed

Opinion: In Issue One, Appellant argues that the *Texas Family Code section 54.11* is both unconstitutional on its face and as applied to him. Appellant argues that the court's decision to transfer him to the Institutional Division of the Texas Department of Criminal Justice is actually a sentence enhancement. He relies on *Apprendi v. New Jersey, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 2365 n.19, 147 L. Ed. 2d 435 (2000)* for the proposition that as a sentence enhancement, the factors enumerated under the Texas Family Code must be found by a jury beyond a reasonable doubt to withstand constitutional scrutiny.

When this Court reviews the constitutionality of a statute, we presume that the statute is valid and that the Legislature acted reasonably, not arbitrarily, in enacting the statute. *Rodriguez v. State, 93 S.W.3d 60, 69 (Tex. Crim.App. 2002).* The individual challenging the statute bears the burden of proving it is unconstitutional. *Id.* Further, we must uphold the statute if there is a reasonable construction which will render the statute constitutional and carry out the legislative intent. *Ex parte Flores, 130 S.W.3d 100, 106 (Tex.App.—El Paso 2003, pet. ref'd), citing Ely v. State, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979).*

In order to review an attack on the constitutionality of a statute "as applied," the individual challenging the statute must have raised the issue in the trial court by timely request, objection, or motion stating the grounds

for the ruling the complaining party desired with sufficient specificity to make the trial court aware of the complaint. *TEX.R.APP.P. 33.1(a)(1)*; *Curry v. State, 910 S.W.2d 490, 496 (Tex.Crim.App. 1995)*; *Ex parte Flores, 130 S.W.3d at 106*. Here, the record does not indicate Appellant presented this specific complaint to the trial court. Accordingly, we find that Appellant has failed to preserve this issue for appellate review. Thus, we need not consider whether the statute was unconstitutional as applied to him.

Appellant, by supplemental letter, also argues that *TEX.FAM.CODE ANN. § 54.11* (Vernon Supp. 2005) is unconstitutional on its face. A facial constitutional challenge to a statute may be raised for the first time on appeal. *Ex parte Flores, 130 S.W.3d at 106*. A facial challenge is very difficult because the challenger must establish that no set of circumstances exists under which the statute would be valid. *Ex parte Flores, 130 S.W.3d at 106*. Appellant submitted a one page supplement stating "Appellant attacks *Section 54.11 of the Texas Family Code* and claims it is unconstitutional on its face for the reasons stated in Appellant's brief." Appellant fails to accompany his argument with any substantive analysis or citation to legal authority or the record. When a party raises a point of error without citation of authorities or argument, nothing is presented for appellate review. *State v. Gonzalez, 855 S.W.2d 692, 697 (Tex.Crim.App. 1993)*. Thus, the issue was improperly briefed and is waived. Issue One is overruled.

In Issue Two, Appellant argues that the transfer proceeding was unlawful because Appellant's mother was not notified in accordance with *TEX.FAM.CODE ANN. § 54.11*. *Section 54.11(b)(2)* requires that notice of the transfer hearing be given to, among others, the parents of the individual to be transferred. *See TEX.FAM.CODE ANN. § 54.11(b)(2)*. During the hearing, the following exchange took place between the trial court, Appellant and trial counsel:

> The Court: Are you in contact with your parents?
>
> Appellant: Yes, sir.
>
> The Court: Where are they?
>
> Appellant: My mother is in Mexico and my grandmother is here in El Paso.
>
> The Court: How about your father?
>
> Appellant: I don't got no father, sir.
>
> The Court: They had intentions of being here, do you know?
>
> Trial Counsel: His uncle is here, Your Honor. That is him walking in the door.

We note that during the proceedings, counsel failed to object to a defect in notice during the hearing or to otherwise direct the trial court's attention to a defect in notice as to Appellant's mother.

Assuming, *arguendo*, this issue was properly preserved, the order transferring Appellant to the Institutional Division of the Texas Department of Criminal Justice recited that "after due notice had been issued on all parties as requested by *Section 54.11(b)* and *(d)* Texas Family Code . . . ." We may presume the regularity of recitations like this in judgments. *See Breazeale v. State, 683 S.W.2d 446, 450-51 (Tex.Crim.App. 1985)*(Op. on reh'g); *In re B.D., 16 S.W.3d 77, 80 (Tex.App.—Houston [1st Dist.] 2000, pet. denied)*. However, we will only presume this regularity where the record is absent any controverting material. *Casillas v. State Office of Risk Management, 146 S.W.3d 735, 738 (Tex.App.—El Paso 2004, no pet.)*, *citing Gen. Elec. Capital Assurance Co. v. Jackson, 135 S.W.3d 849, 853 (Tex.App.—Houston [1st Dist.] 2004, pet. denied)*. If the record supports a court's finding, as set forth in a judgment or order, that all parties were notified, notice will be deemed adequate. *See In re R.G., 994 S.W.2d 309, 311-12 (Tex.App.—Houston [1st Dist.] 1999, pet. denied)*. Although the issue in *R.G.* concerned notice to the appellant, we think the reasoning is applicable to situations in which an appellant alleges that notice to other parties, as required by the same statute, was insufficient.

Here, the Texas Youth Commission sent a letter to the trial court requesting a transfer hearing and counsel was appointed to represent Appellant. Prior to that hearing, private counsel was retained for Appellant. Counsel informed the trial court that he knew Appellant's mother, aunt, and uncle. Appellant's uncle actually attended the hearing. The only controverting evidence in this case was the absence of Appellant's parents at the hearing. However, Appellant's uncle did attend the hearing, presumably because his parents could not. Based on the foregoing, we think the record sufficiently supports the recitation in the court's order that notice was served on the parties as required by statute. Therefore, Issue Two is overruled.

Conclusion: Having addressed each of Appellant's issues, we affirm the judgment of the trial court.

EVIDENCE—
THE VALUE OF STOLEN PROPERTY MAY BE SHOWN BY THE FAIR MARKET VALUE, OR, IF THAT CANNOT BE ASCERTAINED, BY SHOWING THE COST OF REPLACING THE PROPERTY (NOT NECESSARILY THE COST OF THE PROPERTY THAT REPLACED IT).

¶ 07-3-18. **In the Matter of D.L.**, ___S.W.3d___, MEMORANDUM, No. 12-06-00431-CV, 2007 Tex. App.Lexis 6059, (Tex.App.— Tyler, 7/31/07).

Facts: Kenneth Carrell is a coach and teacher at John Tyler High School. He also supervises and manages the

athletic department's information technology equipment including computers, servers, and camcorders. Part of the inventory he maintained in a locked storage room included two Sony mini-DVD camcorders. The camcorders were "top of the line" with special lenses of French manufacture, according to Carrell, as well as a number of input and output ports that were useful to him in his duties. The camcorders also had remote sensors that linked them to a tripod remote, which allowed them to be used together and synchronized to provide a wide angle as well as a tight angle view of the same sequence of events. One of Carrell's duties was to make recordings of the school's athletes to provide to college recruiters. Because of the flexible array of outputs available on the camcorders, Carrell used these devices to edit the final recordings to be sent out in support of the school's athletes.

Around the beginning of May 2006, Carrell noticed that the camcorders were missing from the locked storage room. A large number of students had been in an adjoining classroom immediately before for the screening of a movie. D.L. was one of the students present that day. Carrell engaged in some informal investigation in an attempt to recover the camcorders and eventually turned the matter over to the police affiliated with the school. D.L. was identified as a suspect, and juvenile proceedings were begun against him alleging that he stole the camcorders and that they were worth more than $ 1,500. D.L. did not admit the allegations, and an adjudication hearing was held. The jury found the allegations to be true, and the trial court ordered that D.L. be committed to Texas Youth Commission. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

D.L. contends that the evidence is factually insufficient to support the decision of the jury. Specifically, he contends that the evidence does not show that the value of the stolen camcorders was equal to or greater than $ 1,500.

Held: Affirmed

Memorandum Opinion: The State may prove the value of stolen property by showing the fair market value of the property at the time and place of the offense, or, if that cannot be ascertained, by showing the cost of replacing the property within a reasonable time after the theft. *TEX. PENAL CODE ANN. § 31.08(a)(1), (2)* (Vernon 2006). D.L. argues that the State did not prove that the value of the stolen camcorders was more than $ 1,500 because there was no testimony about the fair market value of the camcorders and the replacement cost was less than $ 1,500.

From the evidence, the relevant data points regarding the value of these camcorders are as follows:

1) $ 1,500 to 1,600 - original purchase price, four or five years prior to the theft

2) $ 2,998 - replacement cost for new camcorders with the same features as those stolen

3) $ 1,600 - replacement cost of the camcorders actually purchased including tax and accessories

Fair market value is "the dollar amount the property would sell for in cash, given a reasonable time for selling it." *See Simmons v. State, 109 S.W.3d 469, 473 (Tex. Crim. App. 2003).* There was no testimony about the fair market value of the stolen camcorders. The original purchase price can be an approximation of the fair market value if the item has been purchased recently. *See Nitcholas v. State, 524 S.W.2d 689, 690-91 (Tex. Crim. App. 1975)*; *Anderson v. State, 871 S.W.2d 900, 903 (Tex. App.—Houston [1st Dist.] 1994, no writ).* However, as D.L. notes, these camcorders had not been purchased recently.

In cases where the fair market value cannot be ascertained,[n2] *section 31.08(a)(2)* provides that the cost of replacing the property a reasonable time after the theft is the measure of value. There were two prices offered as a replacement cost. Carrell testified that exact replacements of the stolen camcorders cost $ 1,499 each, for a total of $ 2,998. Carrell also testified that he purchased inferior camcorders, without all of the features he needed, along with accessories to give the functionality he required, and that the total cost was $ 1,600.

n2 Other than Carrell's assertion that the camcorders were worth more than $ 1,500 to him, the State did not establish the fair market value of the camcorders. D.L. does not argue that the fair market value can be ascertained.

As D.L. points out, there are arithmetic computations that can bring the second amount, $ 1,600, under the $ 1,500 threshold. Specifically, D.L. argues that accessories purchased with the camcorders, as well as the sales tax paid, should not be included. There is a basis for this argument. For example, the replacement value of a compact disc player does not include the cost of installation and "other intangibles necessary to compete replacement," *Drost v. State, 47 S.W.3d 41, 46 (Tex. App.—El Paso 2001, pet. ref'd)*, and replacement value does not include the cost to replace other items that might have been stolen along with the item alleged to have been stolen. *See Ballinger v. State, 481 S.W.2d 421, 422 (Tex. Crim. App. 1972).* [n3]

n3 D.L. argues that sales tax cannot be included in the replacement cost, citing *Drost v. State, York v. State, 721 S.W.2d 605, 607 (Tex. App.—Fort Worth 1986, pet. ref'd)*, and *Ballinger v. State*. Although in *Townsend v. State, No. 06-05-00130-CR, 2006 Tex. App. LEXIS 8217, at *12 (Tex. App.—Texarkana 2006, pet. ref'd)* (mem. op., not designated for publication), the Sixth Court of Appeals called the inclusion of tax "highly questionable," based on *Drost*, we are not convinced

> that sales tax must be excluded. None of these cases specifically hold that sales tax cannot be included in the replacement cost of a stolen item. *Ballinger* began with the unassailable proposition that the value of a stolen item could not include property not alleged to be stolen. *Ballinger, 481 S.W.2d at 422*. *York* and *Drost* expanded that to disallow the cost of installation and "intangibles" when determining value. *York, 721 S.W.2d at 607*; *Drost, 47 S.W.3d at 46*. We are not persuaded that this line of cases establishes that sales tax is not part of the replacement cost. After all, it is part of what must be paid to purchase a replacement. Furthermore, unlike wholly different items, the cost associated with sales tax is fairly implied, we think, in the allegation of the theft of an item. *See also Robalin v. State, 224 S.W.3d 470* (Tex. App.—Houston (1st Dist.) 2007, no pet.) (including sales tax in valuation of automobile).

We need not resolve this issue, however, because the jury was entitled to rely on Carrell's statement that direct, one for one, replacements of the two stolen camcorders would cost nearly $ 3,000. The fact that Carrell elected to cobble together another replacement, the value of which was closer to the $ 1,500 floor, is of no moment. The level of offense committed by a thief who takes a Rolex timepiece is not determined by the price of the replacement the victim purchases.

Conclusion: Even though he testified that he could not afford to purchase them, Carrell testified that the replacement cost of camcorders with the same functionality as those stolen was well in excess of $ 1,500. Therefore, we hold that there was sufficient evidence that the replacement cost, the appropriate measure of the value of the stolen property, was more than $ 1,500. Furthermore, the evidence supporting this conclusion is not so weak or so outweighed by contrary evidence that we conclude the verdict is clearly wrong or is a manifest injustice. We overrule D.L.'s sole issue.