

**STATE BAR  
SECTION REPORT  
JUVENILE LAW**

**VOL. 21, NO. 5  
DECEMBER 2007**

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Kameron Johnson	Edinburg	Laura Parker	San Antonio

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## CHAIR'S MESSAGE by Brian Fischer

The 21<sup>st</sup> Robert O. Dawson Juvenile Law Institute is fast approaching. It will be held on February 18-20, 2008 at the Omni Bayfront Hotel in Corpus Christi, Texas. Registration information and hotel registration information is available on the section website at [www.juvenilelaw.org](http://www.juvenilelaw.org). Additionally, Kristi Almagar, our conference coordinator will be sending out 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 in a portfolio which will include the materials on CD in Word, Wordperfect and PDF and the CD will be searchable.

Council met on November 9, 2007, for the final planning committee meeting for the February conference and all of the speakers and topics are confirmed. The Conference Brochures have been mailed to all of the members of the Section and the response has been encouraging, even at this early date. As of the date of the writing of this Chair's Message, November 8, 2007, we have already received over 100 registrations.

As an additional benefit for juvenile practitioners, the Forms section of the section web site has been updated and now allows the downloading of all of the forms in Word and PDF. This means that you can now download forms directly to your word processor and edit the forms for use in your practice. You can access the Forms section of the web site [www.juvenilelaw.org](http://www.juvenilelaw.org) by clicking on "Forms" at the header of the site. Thanks to Kristi Almagar, our section webmaster, for all her hard work for the section and section members.

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. Her address is listed on the section web site under "Officers".

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.

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**EDITOR'S FOREWORD**  
by Pat Garza

Oh my goodness, December already! What have we done with 2007? Don't look at me, I have no idea where it went. This year I plan on doing my Christmas shopping on line. It's probably time to get started, my PC calendar keeps flashing—**WARNING: DATES IN CALENDAR ARE CLOSER THAN THEY APPEAR.** By the way, can someone tell me who General Failure is, and why he keeps reading my hard drive?

On a lighter note, am I wrong when I ask my wife why should we have to wash bath towels if we only use them when we're clean? For visitors to my home, don't worry, my wife makes me wash them anyway (ok, she washes them anyway). Which brings up the query... If a man speaks in the forest and there is no woman to hear him, is he still wrong?

**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 Hotel in Corpus Christi, Texas. Chair-Elect Tim Menikos and his planning committee have been working on the conference and it should be one of the best. Registration information is enclosed later in this newsletter.

**Officer and Council Nominees.** The annual Juvenile Law Section Meeting will be held in conjunction with the February Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Chair-Elect - Bill Connolly, Houston

Secretary - Nydia Thomas, Austin

Treasurer - Chris Hubner, Austin

Terms to Expire 2011

Kameron Johnson, Austin

Marisela Ledesma, Edinburg

Laura Peterson, Garland

Additional nominations for the council may be made by any juvenile law section member during the annual meeting which will be held on February 18, during the Robert Dawson Juvenile Law Institute in Corpus Christi.

*If you think the grass is greener on the other side,  
it's time you water your own lawn.*

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## **New Publication: *Indigent Defense in the Texas Juvenile Justice System***

The Task Force on Indigent Defense and Texas Juvenile Probation Commission (TJPC) jointly published an information booklet summarizing the key requirements for providing counsel to indigent youth in juvenile court. The booklet is designed to do the following:

- Provides an overview of the key provisions of the Fair Defense Act as applied to juvenile court cases;
- Answers many of the questions families and juveniles have about the right to counsel, processes used to determine who qualifies for counsel and the time-frame for appointment;
- Answers questions for attorneys who practice before juvenile courts containing information on who can serve as appointed counsel, how attorney appointment lists are created and maintained, how appointments are made from the list, and the process for paying attorneys;
- Details the juvenile board requirements for the indigent defense plans that each board must create and maintain; and
- Provides an overview of key statutes and resource materials.

You may download, print or distribute the booklet from TJPC's website at:  
<http://www.tjpc.state.tx.us/publications/reports/TJPCMISC0107.pdf>.



**21<sup>ST</sup> ANNUAL JUVENILE LAW CONFERENCE**  
**ROBERT O. DAWSON JUVENILE LAW INSTITUTE**  
**FEBRUARY 18-20, 2008**  
**OMNI BAYFRONT HOTEL ★ CORPUS CHRISTI**

**FOR A FULL BROCHURE OR TO REGISTER, VISIT US ONLINE AT**  
**[HTTP://WWW.JUVENILELAW.ORG/CLE.HTM](http://www.juvenilelaw.org/CLE.htm)**

## TENTATIVE AGENDA

Below is a tentative agenda. All sessions are subject to change. For a more detailed agenda, including confirmed speakers, go online to [www.juvenilelaw.org/CLE](http://www.juvenilelaw.org/CLE). The final agenda will be available online a minimum of one month prior to the conference.

### MONDAY, FEBRUARY 18, 2008

- 10:30 a.m. Registration
- 1:00 p.m. Welcoming Remarks
- 1:15 p.m. Keynote Address: Multi-System Approaches for Multi-System Children
- 1:45 p.m. Advanced Search and Seizure
- 2:45 p.m. Break
- 3:00 p.m. Ethics in Juvenile Cases
- 4:00 p.m. Intensive Community-Based Programs
- 4:30 p.m. TYC Reform
- 5:00 p.m. Adjourn
- 5:10 p.m. Election of Officers

### TUESDAY, FEBRUARY 19, 2008

- 8:00 a.m. Continental Breakfast (*provided*)
- 8:30 a.m. Juvenile Offenders with Mental Health Disorders
- 9:30 a.m. Forensic v. Clinical Psychology in Juvenile Sex Offender Cases
- 10:30 a.m. Break
- 10:45 a.m. Practical Application of Forensic and Clinical Psychology
- 11:45 a.m. TYC Scholarship Committee Presentation
- 12:00.m. Lunch (*provided*)

### MAKE YOUR VOICE HEARD AT THE JUVENILE LAW SECTION'S ELECTION OF OFFICERS...

The Juvenile Law Section will hold its annual election of officers on **Monday, February 18** at 5:10 p.m. in the Ballroom of the Omni Hotel. All members of the Juvenile Law Section are encouraged to attend the election. The nominations include:

Tim Menikos, Chair  
 Bill Connolly, Chair-Elect  
 Chris Hubner, Treasurer  
 Nydia Thomas, Secretary  
 Brian Fischer, Immediate Past Chair

There will be three slots available for Council members whose terms will expire 2011. Those currently being nominated include:

Kameron Johnson, Austin  
 Marisela Ledesma, Edinburg  
 Laura Peterson, Garland

Additional nominations from the floor will be accepted.

On behalf of the Juvenile Law Section, we would like to thank our outgoing Council members for their countless hours of commitment to improving services for juveniles and enhancing practices for juvenile justice practitioners.

	<b>Track A: Juvenile Trial Issues</b>	<b>Track B: Juvenile Probation Issues</b>	<b>Track C: DFPS Trial Issues</b>
1:15 p.m.	Pre-Trial Proceedings	Pre-Trial Detention Issues and Taking Into Custody	Representing the Absent Parent
1:45 p.m.	Charging Decisions	Juvenile Probation Officer Responsibilities and Authority	Case Law Update
2:45 p.m.	Break	Break	Break
3:00 p.m.	Diversionary Programs	Juvenile Probation Officer as a Witness	Current Issues and Trends in DFPS Termination/Conservatorship Cases
3:30 p.m.	Ethics: Ethical Considerations in Plea Bargains	Ethics: Confidentiality of Pre-Trial Contact	Ethics: Attorney Ad Litem v. Guardian Ad Litem in CPS Cases
4:30 p.m.	Sex Offender Registration	Immigration Issues in Juvenile Court	Defending Parents in the DFPS Case

5:00 p.m. Adjourn

5:30 p.m. Reception and Silent Auction

**WEDNESDAY, FEBRUARY 20, 2008**  
**APPROXIMATELY 3.25 HOURS (NO ETHICS)**

8:00 a.m. Continental Breakfast (*provided*)

8:30 a.m. Adam Walsh Act

9:15 a.m. Prison Rape Elimination Act (PREA): An Understanding of Its Impact to the Juvenile Justice System in Texas

10:00 a.m. Break

10:15 a.m. Case Law Update

12:00 p.m. Adjourn

**HELP SUPPORT THE  
TYC SCHOLARSHIP FUND...**

What better way to spend an evening than to have the opportunity to network with other conference attendees and support a great cause? The reception and silent auction, scheduled for Tuesday evening from 5:30 p.m. – 7:30 p.m., is now in its 3<sup>rd</sup> year of existence and with your help, the amount of money the Juvenile Law Section has raised has increased tremendously. All proceeds from the silent auction go directly to the TYC scholarship fund to assist TYC parolees in attending college.

This year promises to be even bigger and better! For additional information, or if you would like to donate items to the silent auction, please contact Susan Clevenger at 281.580.4501 or [gtclevenger@yahoo.com](mailto:gtclevenger@yahoo.com).

# MEETING REGISTRATION

## REGISTRATION FEES AND DEADLINES

	<b>EARLY</b> Registration <u>and</u> Payment Re- ceived By Jan 15	<b>ADVANCED</b> Registration <u>and</u> Payment Received By Feb 11	<b>ON-SITE</b> Registration <u>or</u> Payment Re- ceived After Feb 11
Members of the Juvenile Law Section and Judges, Associate Judges, Referees, and Masters	\$225	\$250	\$300
Non-Members of the Juvenile Law Section	\$250	\$275	\$300
CD of Conference Materials Only	\$75	\$75	\$75

Conference fees are inclusive of attendance to any or all scheduled days. No special rate is available for partial attendance, students or non-profit agencies.

If you need clarification on whether or not you are a member of the Juvenile Law Section, please contact the State Bar of Texas Sections Division at 512.427.1420 or view your MyBarPage online at [www.texasbar.com](http://www.texasbar.com). *NOTE: You cannot register for this conference through the State Bar.*

### REGISTRATION

Register online at <http://www.juvenilelaw.org/CLE.htm>. If you do not have access to email or if you have problems with the form, please fill out the attached registration form and fax it to Kristy Almager at 512.424.6718. If you fax your form, please allow for 48-72 hours for an email confirmation.

### FEES

The registration fee may be paid by check or money order. All payments should be made to the following:  
Juvenile Law Section I c/o Kristy Almager  
P.O. Box 13547 I Austin, Texas 78711

### REGISTRATION FEE INCLUDES

Portfolio of Information with Materials on a CD I  
Continental Breakfast I Breaks for three days I  
Lunch on Tuesday I Silent Auction Reception

### CONFIRMATION

You will receive an electronic confirmation that your registration was received. Please include a copy of your confirmation when you mail in your payment.

### MATERIALS EMAILED EARLY

NEW THIS YEAR...Course materials will be distributed only on a CD and in electronic format. If registration AND payment is received by February 1, you will receive an email with a link to all materials received to date. Subsequently, you may then print the materials if you would like to bring a hard copy to the conference.

### CANCELLATION I REFUNDS I NO SHOWS

Conference cancellations and refund requests must be made in writing to the Conference Coordinator. Please e-mail or fax your request for a refund to Kristy Almager at 512.424.6718 or [Kristy.Almager@tjpc.state.tx.us](mailto:Kristy.Almager@tjpc.state.tx.us). Cancellations received by February 11 will be refunded, less a \$50 processing fee. Refunds will not be granted for no shows, however, course materials on a CD will be mailed within two weeks after the conclusion of the Conference.

### SUBSTITUTIONS

Before the Conference, you may submit a substitution request. Please contact Kristy Almager at 512.424.6710 or [Kristy.Almager@tjpc.state.tx.us](mailto:Kristy.Almager@tjpc.state.tx.us) and request that the substitution be made and the existing payment be transferred. **NOTE:** Substitutions cannot be made for individual sessions and/or days.

### REGISTRATION CHECK-IN

When you check-in, you can pick up your name badge, portfolio of information and CD of materials. The registration desk will be available the entire span of the Conference, so you may register at any time upon arrival.

## AUDIO/VIDEO RECORDING

This course will not be audio or video recorded.

## CHILDCARE

The Omni Bayfront Hotel does not offer childcare services.

## TEMPERATURE

The average temperature in Corpus Christi for February is 70 High I 49 Low

## CONTINUING EDUCATION CREDITS

The Juvenile Law Section has requested continuing education credits from the following agencies, organizations or associations for approximately 13.5 hours (including 2 hours of ethics):

- ★ State Bar of Texas
- ★ Texas Association of Counties
- ★ Texas Center for the Judiciary
- ★ Texas Juvenile Probation Commission
- ★ Texas Municipal Courts Education Center
- ★ TCLEOSE

## PERSONS WITH DISABILITIES

Persons with disabilities who plan to attend this conference and who need auxiliary aids or services are required to contact Kristy Almager at 512.424.6710 at least seven (7) working days prior to the conference so that appropriate arrangements may be made.

## CONFERENCE QUESTIONS AND CORRESPONDENCE

Juvenile Law Section I c/o Kristy Almager  
P.O. Box 13547 I Austin, Texas 78711

Phone: 512.424.6710 I Fax: 512.424.6718

Email: Kristy.Almager@tjpc.state.tx.us

## SPONSORS I EXHIBITORS

Interested in being a sponsor or exhibitor?

Contact Susan Clevenger at 281.580.4501 or gtclevenger@yahoo.com.

## EXHIBIT

Increase your exposure and take advantage of this opportunity to market your product or service through the rental of an exhibit booth for the duration of the conference. This is a great venue to share your information and meet face to face with key decision makers.

## SPONSOR

Social events and food functions at our conferences help our members interact informally and network with each other. Special identity items reinforce the conference's educational content and enhance attendee convenience. Your support of these activities, along with general conference support, will be appreciated and recognized by all attendees. Prominent signage and conference materials will identify sponsors, letting our attendees know of your support. A variety of sponsorship levels are available.

## DONATE

Each year, the silent auction held at the annual conference continues to grow in its success. This provides your organization with the opportunity to donate items to be auctioned off. ALL proceeds raised at the silent auction are used to provide scholarships for Texas Youth Commission (TYC) youths continuing their education after being paroled from TYC facilities. The scholarship fund is a worthwhile and successful program directly benefiting youth who have been through the Texas juvenile justice system and spent time in TYC. See attachment for additional details on the scholarship program.

## ACCOMMODATIONS

The Conference will be held at the Omni Bayfront Tower located in the downtown Marina district of Corpus Christi. Each room offers a spectacular bay view.

### OMNI BAYFRONT HOTEL

900 North Shoreline Boulevard  
Corpus Christi, Texas 78401  
Phone 361.887.1600  
Fax 361.887.6715  
www.omnihotels.com

Check-In is at 3:00 p.m. | Check-Out is at 12:00 p.m.

### RATES

The hotel is offering a discounted rate as follows:

\$129 Flat (Single, Double, Triple, Quad)  
\$85 State Rate (Single) – Limited Number Only and State ID Required

*The limited number of rooms available at the state rate will be available on a first come, first served basis only. No additional state rate rooms will become available.*

Once the room block is full or if reservations are made after the January 28, 2008 deadline, the hotel cannot guarantee availability and the rack rate of \$249 per night will apply.

### ROOM RATE DEADLINE

In order to guarantee conference rates, accommodations must be made by January 28, 2008.

### IDENTIFICATION REQUIRED FOR STATE RATE

Since the hotel is offering only a limited number of rooms at the state rate, the hotel will honor the rate only to those individuals who made reservations under the state rate room block **AND** present a valid county or state issued form of employment identification at check-in. If the attendee does not have a proper form of identification at check-in, the conference rate of \$129 per night will apply.

### RESERVATIONS

Make your reservations with the Omni by calling them directly at 800.843.6664 or 361.887.1600 or online at <http://www.omnihotels.com>.

When making accommodations, please specify that you are with the Juvenile Law Section to ensure the special conference rates apply.

### MAKE IT A VACATION

For your convenience, the hotel is extending the conference rate of \$129 for guests staying up to three days prior to or after the conference.

### HOTEL AMENITIES

The hotel offers a variety of amenities to its guests including, but not limited to:

- ★ Complimentary fully equipped health club with indoor racquetball courts
- ★ Outdoor heated swimming pool and jacuzzi
- ★ Bike rentals
- ★ Kids eat free
- ★ In-house massage therapist and beauty salon
- ★ Express check-in | check-out
- ★ High-speed wireless Internet access

### IMPORTANT TO NOTE...

- ★ MAKE YOUR RESERVATIONS BY JANUARY 28, 2008.
- ★ ALL STATE-RATE ROOMS WILL REQUIRE A STATE ISSUED ID UPON CHECK-IN, OTHERWISE SPECIAL CONFERENCE RATE OF \$129 WILL PREVAIL.

## OVERFLOW HOTEL

If the block of rooms at the Omni Hotel is full, a limited number of rooms has been reserved as an overflow hotel at the Holiday Inn Emerald Beach Hotel.

### HOLIDAY INN EMERALD BEACH

1102 South Shoreline  
Corpus Christi, Texas 78401  
Phone 361.883.5731  
www.holidayinn.com

Check-In is at 4:00 p.m. I Check-Out is at 12:00 p.m.

### RATES

The hotel is offering a discounted rate as follows:  
\$85 Single I \$99 Double

### NOTE:

The only rooms blocked are with two double beds. No king beds are available. Rates cannot be guaranteed before or after the conference dates.

Once the room block is full or if reservations are made after the January 28, 2008 deadline, the hotel cannot guarantee availability and the rack rate of \$189 per night will apply.

### ROOM RATE DEADLINE

In order to guarantee conference rates, accommodations must be made by January 28, 2008.

### RESERVATIONS

Make your reservations with Holiday Inn Emerald Beach by calling them directly at 361.883.5731 or 800.315.2624. When making accommodations, please refer to the group code JUV to ensure the special conference rate applies.

### TRANSPORTATION FROM OVERFLOW HOTEL

You will be responsible for your own transportation to and from the host hotel, Omni Bayfront Hotel. The Juvenile Law Section is not providing a shuttle. The Holiday Inn Emerald Beach is approximately 1.5 miles away from the Omni.

## TRANSPORTATION

### DIRECT FLIGHTS AVAILABLE

Corpus Christi now offers direct flights from several major cities in Texas including **Austin** (Express Jet), **Dallas** (American and Continental), and **Houston** (Southwest).

### AIRLINES FLYING INTO CORPUS CHRISTI

- ★ American / American Eagle
- ★ ASA / Delta Air Lines, Inc.
- ★ Austin Express
- ★ Continental Airlines
- ★ Express Jet
- ★ Mercury Air Center
- ★ Southwest Airlines
- ★ Signature Flight Support, Inc.

### APPROXIMATE AIRFARES

Below are the approximate roundtrip airfares to travel from major cities via air transportation to Corpus Christi. Prices are for 21 day advance purchase, per person, round trip, and are for e-tickets and include all taxes and fees.

Austin \$119 I Dallas \$197 I Houston \$108

### DISTANCE FROM AIRPORT

The hotel is approximately 12 miles or 15 minutes from the airport.

### AIRPORT SHUTTLE SERVICE

For those individuals flying in to the Corpus Christi International Airport, the Omni Bayfront Hotel offers a complimentary hotel shuttle service from 4:30 a.m. – midnight daily. A telephone call board in the baggage claim area is provided to contact the Omni to request shuttle service. There is an approximate 15-20 minute wait.

### TAXICABS

Fares to and from the airport is approximately \$18 per person per way.

Green N' Go I 361.299.9999  
Star Cab Company I 361.884.9451  
Super Cab I 361.299.9999  
United Yellow Checker Cab I 361.884.3211

### PARKING

The Omni Bayfront offers complimentary on-site covered parking. Valet parking is available for approximately \$7 per day with in and out privileges.

**21<sup>ST</sup> ANNUAL JUVENILE LAW CONFERENCE**  
**ROBERT O. DAWSON JUVENILE LAW INSTITUTE**  
**FEBRUARY 18-20, 2008 I CORPUS CHRISTI, TEXAS**

**CONFERENCE REGISTRATION FORM**  
**PLEASE TYPE OR PRINT**

*Online Registration is Preferred, however, if you have difficulty accessing or sending the registration form, please fax this form back to Kristy Almager at 512.424.6718.*

**STEP 1: GENERAL INFORMATION**

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Job Title: \_\_\_\_\_ Bar Card No: \_\_\_\_\_

Email (*Required for Confirmation*): \_\_\_\_\_

Agency / Organization: \_\_\_\_\_

County: \_\_\_\_\_ Daytime Phone: (    ) \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

**STEP 2: REGISTRATION FEES**

	<b>EARLY</b> Registration <u>and</u> Payment Received By <b>Jan 15</b>	<b>ADVANCED</b> Registration <u>and</u> Payment Received By <b>Feb 11</b>	<b>ON-SITE</b> Registration <u>or</u> Payment Re- ceived After <b>Feb 11</b>
Members of the Juvenile Law Section and Judges, Associate Judges, Referees, and Masters	<input type="checkbox"/> \$225	<input type="checkbox"/> \$250	<input type="checkbox"/> \$300
Non-Members of the Juvenile Law Section	<input type="checkbox"/> \$250	<input type="checkbox"/> \$275	<input type="checkbox"/> \$300
CD of Conference Materials Only	<input type="checkbox"/> \$75      The cost of the materials on CD will not change, regardless of when ordered. Materials will be mailed after we have received payment and approximately one week after the Conference.		

*You should receive an electronic confirmation via email within 48-72 hours.  
Please note that this confirmation is for receipt of your registration, not your registration fee.  
Please print a copy of your confirmation or this form and mail it along with payment  
(as specified in the email confirmation).*

**CONFERENCE QUESTIONS AND CORRESPONDENCE**

Juvenile Law Section I c/o Kristy Almager  
P.O. Box 13547 I Austin, Texas 78711  
Phone: 512.424.6710 I Fax: 512.424.6718 I Email: Kristy.Almager@tjpc.state.tx.us

<b>TABLE OF CASES</b>
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## REVIEW OF RECENT CASES

### Official Citations to Cases Previously Reported

- ¶ 07-1-1A. **In the Matter of D.O.**, 226 S.W.3d 483, No. 01-05-00989-CV, 2006 Tex.App.Lexis 9710 [Tex.App.—Houston (1<sup>st</sup> Dist.), 11/9/06], rel. for pub. 7/24/07.
- ¶ 07-2-13. **In the Matter of S.A.G.**, \_\_\_S.W.3d\_\_\_, MEMORANDUM, No. 04-06-00503-CV, 2007 Tex.App.Lexis 1929 (Tex.App.—San Antonio, 3/14/07), rel. for pub. 7/26/07.
- ¶ 07-3-13. **In the Matter of S.C.**, 229 S.W.3d 837, 2007 Tex.App.Lexis 5194 (Tex.App.—Texarkana, 7/5/07), rehearing overruled by *In re S.C.*, 2007 Tex. App. Lexis 6628 (Tex. App.—Texarkana, 8/14/07)

#### **CONFESSIONS—**

**A STATEMENT TAKEN IN ILLINOIS, WHICH VIOLATED THE TEXAS FAMILY CODE, WAS STILL ADMISSABLE BECASUE IT ACHIEVED A FITTING AND RIGHT BALANCE OF CONSIDERATIONS SUCH THAT BOTH PARTIES WERE ASSURED A FAIR HEARING.**

¶ 07-4-1. **Vega v. State**, \_\_\_S.W.3d\_\_\_, No. 13-98-044-CR, 2007 Tex.App.Lexis 6315 (Tex.App—Corpus Christi, 8/9/07).

**History:** On June 26, 2002, the Court of Criminal Appeals considered the question of the admissibility of a statement given by respondent to the Chicago Police Department that complied with Illinois law but not with Texas law. In finding Texas law applied, the court remanded the case to the Court of Appeals to decide the question (under Texas law) as to the admissibility of such a statement. *Vega v. State*, 84 S.W.3d 613, 2002 WL 1379247, 2002 Tex.Crim.App.Lexis 139 (Tex. Crim.App. 6/26/02), Tex. Juv. Rep. ¶ 02-3-15. [Texas Juvenile Law (5th Edition 2000).]

**Facts:** In late December 1994, Vega, who was sixteen at the time, and her boyfriend, nineteen-year-old Jaime Nonn, were implicated in a capital murder in Starr County, Texas. They had fled to Chicago, Illinois. On December 28, 1994, Vega and Nonn were arrested by the Chicago police after Starr County deputies advised the Chicago Police Department that Texas warrants had been issued for the two suspects. Both Nonn<sup>2</sup> and Vega gave statements in Illinois. The trial court overruled Vega's motion to suppress the written statement she made to the Illinois authorities.

<sup>2</sup> Nonn was later convicted, and his conviction was upheld by this Court and the court of criminal appeals. *See*

*Nonn v. State*, 117 S.W.3d 874, 875, 883 (Tex. Crim. App. 2003) (setting out history of case and affirming).

On direct appeal following the convictions, Vega raised eighteen issues, thirteen of which complained of the trial court's admission of her written statement obtained in Illinois by Illinois law enforcement officers. Vega also complained that the trial court erred by admitting evidence of extraneous offenses and giving an inappropriate limiting instruction regarding the extraneous offenses. Relying on *Davidson v. State*, 25 S.W.3d 183 (Tex. Crim. App. 2000) (en banc), a panel of this Court held that the trial court abused its discretion when it admitted Vega's Illinois statement into evidence. *See Vega v. State*, 32 S.W.3d 897, 906 (Tex. App.—Corpus Christi 2000), reversed and remanded, 84 S.W.3d 613 (Tex. Crim. App. 2002) (en banc). We reversed all three judgments of the trial court and remanded for a new trial. *Id.*

On the State's petition for discretionary review, the Texas Court of Criminal Appeals held that this case is not a *Davidson* case by statute, circumstances, or command to "strictly construe," and that *Davidson* is inapplicable here.<sup>3</sup> *Vega v. State*, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002) (en banc). The court also concluded that "[b]ecause appellant was a juvenile at the time she gave her statement, its admissibility must be determined under Title 3 of the Family Code." *Id.* And we are not to "strictly" construe Title 3 because the legislature did not so mandate. *Id.* Additionally, although Vega and the State take the position that the issue on remand is the review of the fairness factor in a conflict-of-laws analysis, we believe that the court of criminal appeals has decided that issue. In its opinion, the court determined that procedural issues in this case were governed by the law of Texas, the forum state, and that substantive issues were also governed by Texas law because the conflict-of-law schemes of both Illinois and Texas militate for such application.<sup>4</sup> *See id. at 617; see also id. at 621* (Keller, J., dissenting).

3 The *Vega* Court summarized its holding in *Davidson* as follows:

[B]ecause *art. 38.22 § 3(a) of the Texas Code of Criminal Procedure* was procedural in nature, a trial judge is required to apply Texas law to determine the admissibility of an oral confession obtained in another state. [The *Davidson* Court] also held that because the mandatory requirement of *art. 38.22 § 3(a)*, that an oral custodial statement must be recorded before it can be used against a defendant, was not followed by the authorities in Montana, appellant's oral confession was inadmissible at his Texas trial. *Vega v. State*, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002) (en banc) (citing *Davidson v. State*, 25 S.W.3d 183, 185-86 n.2 (Tex. Crim. App. 2000)). In *Vega*, the court of criminal appeals concluded *Davidson* did not apply because (1) the challenged statement was written and, thus, did not violate the provisions of *article 38.22*, and (2) "pursuant to the Code Construction Act, the sections of the Family Code relevant to confessions prevail over *article 38.22*." *Id.*

4 The court of criminal appeals reasoned that the question of which directives in Title 3 are substantive and which are procedural is not relevant because, if procedural in nature, the issues are governed by the laws of the forum state, or Texas in this instance, and, if substantive in nature, the conflict-of-law schemes of both Illinois and Texas militate for the application of Texas substantive law. *See Vega*, 84 S.W.3d at 617. The court arrived at its Texas substantive law conclusion by considering five factors Texas courts review in determining which forum has the most significant relationship to the case and by deciding that four of the five factors, including (1) where the injury or unlawful conduct occurred, (2) the place where the relationship between the parties is the strongest, (3) the number and nature of contacts that the non-forum state has with the parties and with the transaction involved, and (4) the relative materiality of the evidence that is sought to be excluded, favor Texas law, and that only resolution of the issue of fairness, the fifth factor, was not obvious. *See id.* (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, 145* (1971); *Gonzalez*, 45 S.W.3d 101, 104 n.4 (Tex. Crim. App. 2001) (citing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139* (1971)). Because Illinois has a similar method of determining which state has the most significant relationship to the case, the court of criminal appeals determined that all of the Illinois factors also favored application of Texas law to the substantive issues. *See id.*

The court of criminal appeals remanded this case for an analysis, but not for our analysis of how fairness should be factored into a conflict-of-laws analysis. Rather, we have been charged to analyze how the absence of a magistrate impacts the fairness to the parties, with our focus being on the purpose expressed in *section 51.01 of the family code*: "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other

legal rights recognized and enforced."<sup>5</sup> *Id.* at 619; *see Acts 1973, 63rd Leg., p. 1460, ch. 554, § 1, eff. Sept. 1, 1973* (current version at *TEX. FAM. CODE ANN. § 51.01(6)* (Vernon 2002)).

5 In 1994, *section 51.01* read as follows:

This title shall be construed to effectuate the following public purposes:

(1) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;

(2) to protect the welfare of the community and to control the commission of unlawful acts by children;

(3) consistent with the protection of the public interest, to remove the children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation;

(4) to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and when a child is removed from his family, to give him the care that should be provided by parents; and

(5) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

*Acts 1973, 63rd Leg., p. 1460, ch. 554, § 1, eff. Sept. 1, 1973* (current version at *TEX. FAM. CODE ANN. § 51.01* (Vernon 2002)).

The court of criminal appeals asks only that we focus on subsection (5). *Id.* Therefore, we will limit our review to the purpose expressed in that subsection. As stated in our original opinion, [t]his appears to be a case of first impression in the state of Texas. This case presents the issue of whether a sister state's law enforcement officers must adhere to Texas's scheme of processing juvenile offenders for a statement taken by those officers to be admissible against the juvenile in a Texas court. *Vega*, 32 S.W.3d at 900.

On remand, however, as directed by the court of criminal appeals, we will not apply *Davidson*; we will apply Texas law—specifically, Title 3 of the Texas Family Code—but we will not apply it strictly; and we will analyze fairness to the parties focusing on the purpose of *section 51.01*.

**Held:** Affirmed

**Opinion:** In her first thirteen issues, *Vega* argues that, because her written statement was not procured in conformance with the Texas Family Code, it should have been excluded. The trial court denied *Vega's* motion to suppress her statement.

### A. Standard of Review

In this case, because there is no disagreement about the facts surrounding Vega's statement given to the Chicago police or the credibility of the witnesses in this case, the trial court's ruling on these matters did not involve an assessment of the credibility and demeanor of the witnesses. *See Ramirez v. State*, 44 S.W.3d 107, 109 (Tex. App.—Austin 2001, no pet.). Therefore, we will conduct a *de novo* review of the denial of Vega's motion to suppress.

### B. Analysis

#### 1. Issues Determined by the Court of Criminal Appeals

Vega contended that she was not taken without unnecessary delay to a place designated in this code section, that the Chicago police failed to interview her in an approved juvenile processing office, and that she was not detained in a facility approved by Texas authorities. Addressing these issues, the court of criminal appeals noted that Vega was taken to an equivalent Illinois facility and concluded that "[t]o hold that such actions were not sufficient to satisfy Texas's concerns would make impossible any apprehension of a Texas juvenile offender any place outside of Texas and would not advance Texas public policy as expressed in § 51.01." *See id.* at 617-18.

In issue four, Vega contended that her written statement did not contain all of the warnings required by section 51.09.<sup>7</sup> However, the court of criminal appeals found that Vega did receive the warnings, essentially the *Miranda* warnings, at least three times. *Id.* Additionally, she "was informed of Illinois law, which while technically incorrect, accurately conveyed the possibility of being treated as an adult when accused of murder." *Id.*

<sup>7</sup> Now TEX. FAM. CODE ANN. § 51.095 (Vernon Supp. 2006).

Finally, in issue twelve, Vega complained that she was detained in an area where adults arrested for, or charged with, a crime are detained, in violation of section 51.12.<sup>8</sup> From the language of the statute, the court of criminal appeals determined that "[a] reasonable inference is that the legislature intended to prohibit putting a juvenile into circumstances in which the juvenile might be victimized by adult offenders." *Id.* "Vega was held in an interrogation room. She was at all times kept separate from adult offenders." *Id.*

<sup>8</sup> Now TEX. FAM. CODE ANN. § 51.12(a) (Vernon 2002).

Having been resolved by the court of criminal appeals, these issues are not now before this Court.

#### 2. Issues Remanded by the Court of Criminal Appeals

The court of criminal appeals has remanded the following issues for our review:

Issue five: Vega's written statement does not contain a certificate by a magistrate that Vega knowingly, intelligently and voluntarily waived her rights before making the statement as required by section 51.09;<sup>9</sup>

Issue six: Vega was never advised of her rights by a magistrate before being interrogated as set out in section 51.09;<sup>10</sup>

Issue seven: Vega was never presented before a magistrate at any time before giving her statement as provided for in section 51.09;<sup>11</sup>

Issue nine: Vega was detained for more than six hours before the conclusion of her statement in violation of section 52.025;<sup>12</sup>

Issue ten: Vega's statement was not signed in the presence of a magistrate with no law enforcement officer present as required by section 51.09;<sup>13</sup>

Issue eleven: Vega's statement was signed in the presence of at least one law enforcement official who was armed in violation of section 51.09;<sup>14</sup> and

Issue thirteen: Vega was improperly left unattended in the interview in violation of section 52.025.<sup>15</sup>

<sup>9</sup> Now TEX. FAM. CODE ANN. § 51.095(a)(1)(D) (Vernon Supp. 2006).

<sup>10</sup> Now TEX. FAM. CODE ANN. § 51.095(a)(1)(A) (Vernon Supp. 2006).

<sup>11</sup> Now TEX. FAM. CODE ANN. § 51.095(a)(1)(A)-(C) (Vernon Supp. 2006).

<sup>12</sup> Now TEX. FAM. CODE ANN. § 52.025(d) (Vernon 2002).

<sup>13</sup> Now TEX. FAM. CODE ANN. § 51.095(a)(1)(B)(i) (Vernon Supp. 2006).

<sup>14</sup> Now TEX. FAM. CODE ANN. § 51.095(a)(1)(B)(i) (Vernon Supp. 2006).

<sup>15</sup> Now TEX. FAM. CODE ANN. § 52.025(c) (Vernon 2002).

In remanding these issues, the court of criminal appeals determined that the following circumstances violated provisions of Title 3:

Vega arrived at the police station at about 10:45 a.m. Her written statement was signed at about 9:40 p.m. As permitted by Illinois law, the youth officer who presided at the signing was an armed

police officer. Vega was left alone in the interrogation room for several periods before she was taken to the juvenile holding facility. From the record at hand, it appears that Vega was not taken before a magistrate.

*Vega*, 84 S.W.3d at 618.

The court further concluded, however, that a violation of the family code, in this particular case, did not necessarily dispose of the issue of admissibility. *Id.*

#### *a. Absence of a Magistrate*

On remand, the court of criminal appeals has directed this Court to analyze the effect of the absence of a magistrate on the admissibility of the challenged statement in a context of fairness to the parties, focusing on the purpose expressed in *section 51.01 of the family code*, which is "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." *Vega*, 84 S.W.3d at 619 (quoting Acts 1973, 63rd Leg., p. 1460, ch. 554, § 1, eff. Sept. 1, 1973).

Our analysis begins with the word, "fair." It is not defined by statute; therefore, we must give the language its plain and ordinary meaning. *See TEX. GOV'T CODE ANN. § 312.002(a)* (Vernon 2005); *In re Kasschau*, 11 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist.] 1999, *no pet.*); *Nevarez v. State*, 767 S.W.2d 766, 768 (Tex. Crim. App. 1989) (en banc). Black's Law Dictionary defines "fair" as "1. Impartial; just; equitable; disinterested," and "2. Free of bias or prejudice." BLACK'S LAW DICTIONARY 505 (8th ed. 2004). The Supreme Court of Wyoming clarifies the definition by comparing "fair" with the following similar terms:

FAIR, the most general of the terms, implies a disposition in a person or group to achieve a fitting and right balance of claims or considerations that is free from undue favoritism even to oneself, or implies a quality or result in an action befitting such a disposition.

\* \* \* \* \*

JUST stresses, more than FAIR, a disposition to conform with or conformity with the standard of what is right, true, or lawful, despite strong, esp. personal, influences tending to subvert that conformity . . . (a just statement of the facts) . . .

\* \* \* \* \*

IMPARTIAL stresses an absence of favor or prejudice in judgment.

*Casteel v. News-Record, Inc.*, 875 P.2d 21, 24 (Wyo. 1994) (emphasis added) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

The ordinary and obvious meaning of fair does not require that the process, which in this case is the process utilized to obtain Vega's statement, be precise or accurate. *See id.* (concluding that the meaning of fair does not require the report to be true or accurate). What is required is that the process have the qualities of impartiality and honesty. *See id.* It is a process that is free from prejudice, favoritism, and self-interest. *See id.* These parameters help define what is a fitting and right balance of considerations. Therefore, determining fairness to Vega and the State, we ask whether the process of taking Vega's statement in Illinois in the absence of a magistrate was exercised and enforced in a manner that achieved a fitting and right balance of considerations such that both parties were assured a fair hearing where the parties' legal rights were recognized and enforced.

In order to identify Vega's considerations, we must review the responsibilities of the magistrate as set out in *section 51.09 of the family code*.<sup>17</sup> Under *section 51.09*, the magistrate is to ascertain whether the accused juvenile wishes to waive her constitutional rights. *Hill v. State*, 78 S.W.3d 374, 386 (Tex. App.—Tyler 2001, *pet. ref'd*). *Section 51.09* provides that the magistrate must provide appropriate warnings to the juvenile before the making of the statement.<sup>18</sup> *See Act of May 22, 1991, 72nd Leg., ch. 429, § 1, eff. Sept. 1, 1991; Act of May 24, 1991, 72nd Leg., ch. 557, § 1, eff. Sept. 1, 1991; Act of May 27, 1991, 72nd Leg., ch. 593, § 1, eff. Aug. 26, 1991.* The statement must be signed in the presence of the magistrate with no law enforcement officer or prosecuting attorney present except for a bailiff or law enforcement officer who is unarmed, if the magistrate determines it necessary. *Id.*; *see Berkemer v. McCarty*, 468 U.S. 420, 438, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) ("The authority of an armed, uniformed officer exerts some pressure to respond to questions."); *Ancira v. State*, 516 S.W.2d 924, 926 (Tex. Crim. App. 1974) (holding that potential for compulsion existed when an armed officer interviewed a suspect who was detained inside a police vehicle). Additionally, the magistrate must certify that she has determined "that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights." *See Act of May 22, 1991, 72nd Leg., ch. 429, § 1, eff. Sept. 1, 1991; Act of May 24, 1991, 72nd Leg., ch. 557, § 1, eff. Sept. 1, 1991; Act of May 27, 1991, 72nd Leg., ch. 593, § 1, eff. Aug. 26, 1991.*

17 For convenience, we will refer only to *section 51.09* as it was written at the time Vega gave her statement.

18 In reviewing Vega's fourth issue, the court of criminal appeals determined that the warnings Vega received were sufficient to comply with Texas law to the extent necessary to carry out Texas's intended purpose and public policy. Therefore, we do not address the sufficiency of the *Miranda* warnings; rather, we address the absence of a magistrate during the warnings.

Therefore, under *section 51.09*, Vega's considerations involve her legal right to have her constitutional rights thoroughly explained so that any waiver of those rights is made voluntarily and uncoerced, and knowingly and intelligently.<sup>19</sup> *See id.* An additional consideration under *section 51.09* is to reduce the impact of armed law enforcement personnel on Vega. *See id.* Also, under *section 51.01*, Vega's considerations include being assured that a fair hearing will result from the simple judicial procedure through which this statutory right is recognized, executed, and enforced. *See Acts 1973, 63rd Leg., p. 1460, ch. 554, § 1, eff. Sept. 1, 1973.*

19 While arguing that provisions of the family code were violated, Vega does not contend that her constitutional rights were violated.

*(1) Voluntary and Uncoerced*

A voluntary statement is the product of a free and deliberate choice rather than intimidation, coercion, or deception. *See Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).* A court must examine the totality of the circumstances surrounding the interrogation to determine if a confession was voluntary and uncoerced. *See id.; Ashcraft v. State, 934 S.W.2d 727, 738 (Tex. App.—Corpus Christi 1996, pet. ref'd).*

At the motion to suppress hearing, Detective Gregory Biochi testified that he issued *Miranda* warnings to Vega during her first interview with law enforcement officers at 12:45 p.m. Vega did not ask for an attorney or seek to remain silent; instead, she agreed to talk. Assistant State's Attorney Michael Falagario interviewed Vega at 3:30 p.m. ASA Falagario testified that he advised Vega of her rights and explained that he was a prosecutor, an attorney assisting the police, and not Vega's attorney. Vega said that she understood who he was. ASA Falagario testified that he spoke to Vega alone to make sure she was being treated "okay," that she did not need anything, and that she had no complaints. He explained to Vega the possibilities concerning giving a statement. Vega said that she had been treated well, and agreed to give a handwritten statement. After Vega agreed to make a statement, ASA Falagario left the interview room in order to take a statement from Nonn and did not return until 7:30 p.m. when he took Vega's statement.

Chicago Police Youth Officer Linda Paraday introduced herself to Vega at approximately 4:00 p.m. and read Vega her rights. Youth Officer Paraday also informed Vega that she would be tried as an adult. Vega replied that she had heard those warnings before. Youth Officer Paraday talked with Vega while they waited for ASA Falagario, and she explained to Vega that she was there for her if she needed anything. Youth Officer Paraday testified that she wore a weapon under her blazer, but it was not visible to Vega.

When ASA Falagario returned to the interview room at 7:30 p.m., he again asked Vega if she wanted to

give a statement. Vega indicated that she wanted to give a handwritten statement. ASA Falagario read the written warnings on the statement form to Vega, and he also included the warning that she would be tried as an adult. Vega never said that she wanted to remain silent or asked for an attorney and, instead, agreed to talk to the prosecutor. ASA Falagario explained that he was going to write down what Vega was saying as she told him what had happened. He also told Vega he would make any changes, corrections, or additions she wanted. The following written warnings were given:

I understand that I have the right to remain silent and that anything I say can be used against me in a court of law. I understand that I have the right to talk to a lawyer and have him present with me during questioning, and if I cannot afford to hire a lawyer one will be appointed by the court to represent me before any questioning. I understand that although I am 16 years [sic] I will be tried as an adult.

Understanding these rights, I wish to give a statement.

After saying that she understood the above warnings and wanted to make a statement, Vega signed on the line below the warnings. ASA Falagario wrote out Vega's statement as Vega told him what happened. Youth Officer Paraday, who was present when Vega made her statement, noted that a detective interrupted the taking of the statement to inform them that Vega's mother had called. The State's attorney asked Vega if she wanted to talk to her mother, and, after Vega said that she wanted to do so, Youth Officer Paraday took Vega to a phone. Vega did not ask to stop or to be given an attorney after talking with her mother. She, instead, continued with the statement.

When ASA Falagario finished writing the statement, Vega read the warnings and the first paragraph of the statement aloud. ASA Falagario read the rest of the statement as Vega followed along. Vega requested changes and corrections to the statement, which ASA Falagario made. After Vega was satisfied with the changes and corrections, she signed each page of the statement. Youth Officer Paraday testified that no one used any tricks, coercion, or promises to get Vega to sign the statement.

Considering all of the testimony in the record, the totality of the circumstances surrounding Vega's interrogation suggests that her statement was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *See Moran, 475 U.S. at 421.* Vega's rights were explained to her. In addition, before making her statement, Vega was read the written warnings on the statement, stated that she understood the warnings, and signed on the line below the warnings. Vega never invoked her right to remain silent or to seek counsel. ASA

Falagarío and Youth Officer Paraday testified that they each spoke with Vega privately and asked if she was being treated okay and if she needed anything. During these discussions, Vega did not make any indication that she was treated unfairly or was coerced in any way. Vega was also allowed to speak with her mother before signing the statement. Furthermore, because Youth Officer Paraday's weapon was not visible to Vega, its presence during the making of the statement does not suggest coercion. Accordingly, we conclude that Vega's statement was voluntary and uncoerced.

(2) *Knowingly and Intelligently*

To knowingly and intelligently abandon a constitutional right, the accused must be aware of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See id.* A court must examine the totality of the circumstances surrounding the interrogation to determine if the accused had the requisite level of comprehension to knowingly and intelligently abandon a constitutional right. *See id.*; *Ashcraft*, 934 S.W.2d at 738.

In addition to the facts set out above, Youth Officer Paraday testified that Vega appeared very bright and rather calm and matter-of-fact. Vega indicated that she understood the warnings. She also had the opportunity to read warnings aloud before she signed the statement.

Considering all of the testimony in the record, the totality of the circumstances surrounding the interrogation suggests that Vega was aware of both the nature of the rights that she abandoned and the consequences of the decision to abandon those rights. *See Moran*, 475 U.S. at 421. We therefore conclude that Vega made her statement knowingly and intelligently.

Accordingly, Vega's legal rights were explained to her so that her statement was made voluntarily, uncoerced, knowingly, and intelligently. We cannot conclude that Vega's considerations were affected by the absence of a magistrate. The procedures utilized were sufficient to carry out the underlying purpose of the Texas requirements. We therefore conclude that Vega's constitutional and other legal rights were recognized and enforced, and she was assured a fair hearing as directed by *section 51.01 of the family code*.

Vega contends that Texas law enforcement officers should have explained the provisions of the Texas Family Code to the Illinois authorities so that they would employ the correct procedures. However, this would have placed an extreme burden on the Texas and Illinois authorities. Out-of-state law enforcement personnel are not expected to learn and apply the intricacies of Texas statutory law or vice versa. It would be nearly impossible for Texas authorities to fully explain the necessary procedures to be followed when questioning a juvenile to authorities in every state that may apprehend a juvenile for a crime committed in Texas. Also, Texas law enforcement officers have no control over the actions of authorities in other states. Finally, as noted by the court

of criminal appeals, since the identified violations of the Texas Family Code were committed by Illinois law enforcement officers, excluding Vega's statement would not deter Illinois law enforcement officers from future violations because the Illinois police will continue to comply with their own laws and procedures. *See Vega*, 84 S.W. at 619 (citing *State v. Mayorga*, 901 S.W.2d 943, 946 (Tex. Crim. App. 1995)). A ruling that the statement was properly admitted is most consistent with principles of "fairness" to all involved. The circumstances surrounding the taking of Vega's statement, although in violation of Texas statutes, upheld the constitutional rights the Texas procedures were designed to protect.

Vega argues that the Texas officials should have advised the Illinois authorities of Texas's procedures for taking juvenile statements. This ignores a number of practical concerns at the time, including the lack of any clear precedent concerning which state's procedures should apply. She asserts that said officers should have so analyzed a complex legal issue that this Court is still reviewing. This argument also ignores significant practical concerns, such as the need to not only decide that Texas law applies, but rather to also convince the Illinois authorities, including a magistrate, to follow Texas law rather than Illinois law. It also does not recognize that an Illinois magistrate would have had to educate himself concerning the role a magistrate plays under Texas juvenile law and also that the magistrate and everyone else involved would have had to then properly carry out their unfamiliar role under said law.

Vega contends that a plain reading of *section 51.09* evinces a desire by the legislature to protect juveniles' rights and elevate those rights above those accorded an adult. She contends that the legislature intended to protect children from coercion, and that the presence of a magistrate is a safeguard against the waiver of a juvenile's rights by those minors who lack the experience or judgment to waive them. We believe, however, that Vega's statutory rights were protected when, in the absence of a magistrate, Illinois authorities spoke with Vega and determined that she not only understood the nature and contents of her statement, but that she was also signing it knowingly, intelligently, and voluntarily. Vega was afforded the procedural safeguards of the family code.

The Texas provisions are not constitutionally mandated; they were added to provide a mechanism to make sure that a juvenile's right against self-incrimination was protected when an attorney was not present during questioning. The underlying purposes of the Texas requirements were accomplished and Vega's constitutional rights upheld. The process of taking Vega's statement in Illinois in the absence of a magistrate was exercised and enforced in a manner that achieved a fitting and right balance of considerations such that both parties were assured a fair hearing where the parties' legal rights were recognized and enforced. While the process was not precise and violations of the Texas Family

Code occurred, based on the record before us, the process was fair to both Vega and the State. It was impartial, honest, and free from prejudice, undue favoritism, and self-interest. *See Casteel*, 875 P.2d at 24. It achieved a fitting and right balance of considerations. *Id.*

Our evaluation of the "fairness" issue compels a conclusion that Vega's statement was properly admitted under Texas law. Accordingly, we conclude the trial court correctly determined that those actions adequately protected Vega, notwithstanding the absence of the magistrate, making the statement admissible. Thus, the trial court did not err in denying her motion to suppress. We overrule issues five, six, seven, ten, and eleven.

#### *b. Section 52.025 Violations*

In issues nine and thirteen, Vega contends that her statement should be suppressed because the Illinois authorities violated *section 52.025 of the family code*. Specifically, she contends that she was detained more than six hours before the conclusion of her statement,<sup>20</sup> and that she was improperly left unattended in the interview room.<sup>21</sup> *See* Acts 1991, 72nd Leg., ch. 495, § 2, eff. Sept. 1, 1991 (current version at *TEX. FAM. CODE ANN.* § 52.025 (Vernon 2002)). The court of criminal appeals agreed that these circumstances violated provisions of Title 3, specifically those found in *section 52.025*. *See Vega*, 84 S.W.3d at 619.

<sup>20</sup> Now *TEX. FAM. CODE ANN.* § 52.025(d) (Vernon 2002).

<sup>21</sup> Now *TEX. FAM. CODE ANN.* § 52.025(c) (Vernon 2002).

However, unlike *section 51.095(a)* discussed above, *section 52.025* is not an independent exclusionary statute. *Gonzales v. State*, 67 S.W.3d 910, 912 (*Tex. Crim. App.* 2002). Therefore, as the court of criminal appeals explained in *Gonzales*, in order for a juvenile's written statement to be suppressed because of a *section 52.025* violation, there must be some exclusionary mechanism. *Id.* That mechanism is *section 51.17 of the family code* which provides that "Chapter 38, Code of Criminal Procedure, applies in a judicial proceeding under this title." *Id.* Thus, at the direction of the *Gonzales* Court, "if evidence is to be excluded because of a *section 52.025* violation, it must be excluded through the operation of *article 38.23(a)*." *Id.*

*Article 38.23(a)* provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence." Our decisions have established that evidence is not "obtained . . . in violation" of a provision of law if there is no causal connection between the illegal conduct and the acquisition of the evidence. *Id.* The defendant has the burden to show a causal connection between that violation and her ensuing confession. *Gonzales v. State*, 125 S.W.3d 616,

619 (*Tex. App.—Houston [1st Dist.] 2003*) (en banc), *aff'd sub nom. Pham v. State*, 175 S.W.3d 767 (*Tex. Crim. App.* 2005).

Here, Vega had the burden to prove that the violations of *section 52.025* caused her to make her statement. Although Vega acknowledges the causal connection requirement, she has not claimed that these violations caused her to give her statement. Further, even had she raised this contention, Vega points to no evidence in the record demonstrating a causal connection between the violations and her decision to give a statement to the police, and we have found none. Accordingly, we overrule issues nine and thirteen.

**Conclusion:** Accordingly, we affirm the judgment of the trial court.

#### **SEARCH & SEIZURE— TERRY STOP PROPER WHERE JUVENILES APPEARED TO BE UNDERAGE, OUT AFTER THE CITY'S CURFEW, AND IN POSSESSION OF A STALLED CAR.**

¶ 07-4-2. **Macias v. State**, MEMORANDUM, No. 13-04-00027-CR, 2007 Tex.App.Lexis 6307 (*Tex.App.—Corpus Christi—Edinburg*, 8/9/07).

**Facts:** Francisco Macias, Megan Adams, and Christopher Lozano ("the defendants") were convicted for the murder of Jan Barnum, Adams's maternal grandmother. The defendants were fifteen years old when the murder occurred, but were tried together as adults. A jury convicted all three and sentenced Macias to life in prison. The trial court entered a judgment of conviction and punishment effectuating the jury's verdict and sentence. By two points of error, Macias appeals the trial court's judgment.

**Held:** Affirmed.

**Memorandum Opinion:** By his first point of error, Macias contends that the trial court lacked jurisdiction to prosecute him as an adult because the juvenile court failed to admonish him according to *section 54.03 of the family code* prior to transfer and such failure constitutes a violation of his (1) due process, (2) due course of law, and (3) equal protection rights. *See TEX. FAM. CODE ANN.* § 54.03 (Vernon Supp. 2006). The State responds that the family code provisions relied on by Macias are inapplicable because no juvenile adjudication hearing took place. We agree.

Macias's reliance on *section 54.03 of the family code* is misplaced because the juvenile court never conducted an adjudication hearing. *Section 54.03(b)* provides that "[a]t the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and

his parent, guardian, or guardian ad litem (1) the allegations made against the child; (2) the nature and possible consequences of the proceedings . . . and (6) the child's right to trial by jury." *Id.* § 54.03(b) (emphasis added). Instead of conducting an adjudication hearing on whether Macias engaged in delinquent conduct, the juvenile court waived its exclusive jurisdiction and transferred Macias's case to district court. *See id.* § 54.02 (Vernon 2002). A proceeding to declare a juvenile a delinquent and a proceeding to waive jurisdiction and certify the juvenile as an adult for criminal prosecution are separate and distinct proceedings.<sup>2</sup> *Grayless v. State*, 567 S.W.2d 216, 219 (Tex. Crim. App. 1978). Therefore, section 54.03 of the family code is inapplicable.

2 Even if the transfer hearing could be construed as an adjudication hearing, a direct appeal of the juvenile court's failure to admonish Macias is also precluded because no objection was lodged, as required by the family code.

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

TEX. FAM. CODE ANN. § 54.03(i) (Vernon Supp. 2006).

Macias also contends that the juvenile court's failure to admonish him constitutes constitutional error. The State claims any constitutional violations stemming from a failure to admonish Macias were not preserved for appellate review. TEX. R. APP. P. 33.1; *see Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000). Because Macias fails to articulate an argument and does not cite appropriate authority, we find his "constitutional argument" inadequately briefed. TEX. R. APP. P. 38.1(h) (providing that the brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record). Macias's first point of error is overruled.

## II. Point of Error 2

### *Macias's Motion to Suppress*

By his second point of error, Macias argues that the trial court erred in denying his motion to suppress a written statement he made during his detention after Barnum's murder was discovered by authorities. He argues that the officers (1) had no reasonable suspicion that he engaged in delinquent conduct to detain him at the convenience store, (2) had no probable cause to take him into custody at the convenience store, and (3) lacked probable cause to take him back into custody after he had

been dropped off at his parents' house. He also argues that his statements were taken without the benefit of statutory and constitutional rights and that family code violations occurred. The State contends that both reasonable suspicion and probable cause existed in each instance, that he was given appropriate warnings, and that no family code violations occurred.

### A. Standard of Review

A bifurcated standard of review is applied to a trial court's ruling on a motion to suppress evidence. *See Randolph v. State*, 152 S.W.3d 764, 769 (Tex. App.—Dallas 2004, no pet.). This standard of review gives almost total deference to a trial court's determination of historical facts and applies a de novo review of a trial court's application of the law to those facts. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Smith v. State*, 176 S.W.3d 907, 913 (Tex. App.—Dallas 2005, pet. ref'd); *Randolph*, 152 S.W.3d at 769. A trial court is the sole trier of fact, the judge of witness credibility, and the determiner of the weight given to witness testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *Randolph*, 152 S.W.3d at 769.

### B. Terry-Stop & Detention at the Convenience Store

Presumably Macias's reasonable suspicion argument refers to his initial detention at the convenience store. He argues that at the time Officer Javier Gallegos approached him there were no reasonable and articulable facts to warrant an intrusion and thus his detention was unjustified. Macias also articulates an argument regarding lack of probable cause to take him into custody and return him to his parents' house.

A police officer may detain a person for a brief time for questioning when the officer has reasonable suspicion to believe that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997). To justify an investigative detention, the officer must have a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime." *Terry*, 392 U.S. at 21-22. The officer must have specific and articulable facts which, in light of his experience and personal knowledge, together with inferences from those facts, would reasonably warrant the intrusion on the freedom of the person detained for investigation. *Id.* at 30; *Woods*, 956 S.W.2d at 38; *Roy v. State*, 55 S.W.3d 153, 157 (Tex. App.—Corpus Christi 2001), pet. dismissed, improvidently granted, 90 S.W.3d 720 (Tex. Crim. App. 2002).

Macias's detention argument fails because the circumstances surrounding his detention provided for reasonable suspicion. Juvenile Investigator Santiago Solis and Officer Gallegos testified at the suppression hearing regarding the events surrounding Macias's detention. On the evening of March 5, 2003, Officer Gallegos, the de-

taining officer, was dispatched to the convenience store after Officer John Vargas, an off-duty officer, requested an on-duty officer. When Officer Gallegos arrived, Macias, Adams, and Lozano appeared to be underage, out after the city's curfew, and in possession of a stalled car; none had a driver's license, much less formal identification. From what Officer Gallegos encountered, there was reasonable suspicion to believe that criminal activity might be afoot—namely a violation of the city's curfew.

The probable cause argument against taking Macias into custody at the convenience store also fails. The family code provides that a child may be taken into custody by a law enforcement officer if there is probable cause to believe that the child has engaged in (1) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state, or (2) delinquent conduct or conduct indicating a need for supervision. *TEX. FAM. CODE ANN. § 51.01(a)(3)* (Vernon Supp. 2006). Officers have probable cause when "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993).

Upon detaining the teens, Officer Gallegos ascertained that their car had stalled at the gas pump and that they were planning to go to Louisiana. He also noticed that they had clothes, a backpack, and a hamster in a cage inside of the car. From this first-hand knowledge, a person of reasonable caution could have believed that the teens were planning on running away. Therefore, the teens had not only violated the city's curfew, but they were engaged in conduct indicating a need for supervision—running away from home. *TEX. FAM. CODE ANN. § 51.03(b)(3)* (Vernon Supp. 2006) (conduct indicating a need for supervision is the voluntary absence of a child from the child's home without the consent of the child's parent). Probable cause existed at the convenience store to take Macias into custody and return him to his parents.

In light of the facts before it, we find no error with the trial court's denial of Macias's suppression motion based on his detention at the convenience store.

### C. Custody after Barnum's Body is Discovered

Macias argues that there was no probable cause to take him into custody after he had been returned to his home. The State responds that the facts show probable cause. We agree.

As already noted, officers have probable cause when "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). The record in this case is replete

with facts and circumstances within the knowledge of Officer Gallegos and Sargent De la Tejera, Officer Gallegos's supervisor, and of which they had reasonably trustworthy information that were sufficient to warrant them to believe that Macias was involved in Barnum's murder. The record shows that at the time Macias was taken into custody from his home, the officers knew (1) that Macias, Lozano, and Adams were detained earlier that day for trespassing in a vacant house and as run-aways; (2) that they had been apprehended earlier that night under circumstances indicating that they had violated the city's curfew and were attempting to run away again; (3) that they were in possession of Barnum's car; (4) that Adams attempted to stay with Lozano and then with Narvaez in order to prevent authorities from discovering Barnum's body in the apartment; (5) that Barnum was found strangled in an apartment with no signs of forced entry; and (6) that the blood at the crime scene was still fresh, indicating that the murder had been committed very recently. Therefore, the officers had probable cause to detain Macias in connection with Barnum's murder.

### D. Failure to Provide Mandatory Warnings or Follow the Family Code

Macias's final two arguments on appeal are (1) that law enforcement officers interrogated him "without the benefit of his statutory and Constitutional prophylactic rights" and (2) that the interrogating officers failed to comply with *section 52.02 of the family code*.<sup>3</sup> *TEX. FAM. CODE ANN. § 52.02* (Vernon Supp. 2006) (providing for the release or delivery to a court of a child taken into custody).

#### 3 Macias's family code violation argument reads:

Where an officer deems it necessary to take a child into custody, § 52.02 dictates what he must do "without unnecessary delay." See V.T.C.A. *Family Code*, § 53.02, see also §§ 52.04 & 53.01, and § 53.02 "with investigative aid of law enforcement officers when requested." § 52.04(b), or by the juvenile court itself, V.T.C.A. *Family Code*, § 51.01. The record is devoid of evidence indicating any compliance with § 52.02.

The record does not support Macias's argument that he was interrogated without his statutory and constitutional warnings. At the suppression hearing Investigator Solis testified that the juveniles were magistrated—in other words given statutory and constitutional warnings by a magistrate—shortly after they arrived at the police station and before they made their statements. Additionally, Macias's written statement is certified by the magistrate that it was made in compliance with *Section 51.09 of the family code*. See *TEX. FAM. CODE ANN. § 51.09* (Vernon 2002), § 51.095 (Vernon Supp. 2006).

Finally, Macias's contention that the family code was violated presumably centers around an "unnecessary delay." See generally *TEX. FAM. CODE ANN. § 52.02*

(Vernon Supp. 2006). However, he fails to specify how he was subject to an unnecessary delay and, thus we conclude this contention is inadequately briefed. *TEX. R. APP. P. 38.1(h)*. Macias's final two arguments fail to show the trial court error.

We hold that the trial court did not err in denying Macias's motion to suppress. Macias's second point of error is overruled.

**Conclusion:** The judgment of the trial court is affirmed. *TEX. R. APP. P. 43.2(a)*.

**CONFESSIONS—  
INADMISSABLE TESTIMONY BY A THERAPIST  
REGARDING PREVIOUS SEXUAL ASSAULTS  
(ADMITTED BY RESPONDENT TO THERAPIST)  
WAS CONSIDERED HARMLESS WERE THE JU-  
VENILE PROBATION DEPARTMENT'S PREDIS-  
POSITION INVESTIGATION REPORT CON-  
TAINED THE SAME ADMISSIONS.**

¶ 07-4-3. **In the Matter of C.E.**, No. 03-05-00495-CV, 2007 Tex.App.Lexis 6367 (Tex.App.—Austin, 8/9/07).

**Facts:** C.E. was detained in a juvenile-detention center after the trial court entered an order finding probable cause to believe that C.E. had engaged in delinquent conduct, that C.E. might be a danger to himself or threaten the safety of the public if released, and that C.E. resided in the same home with the victim. The court entered subsequent detention orders holding C.E. until the juvenile probation department verified that the victim was removed from the home. C.E. was later released on house arrest with electronic monitoring.

At the adjudication hearing, C.E. pleaded true to the State's petition, which alleged that he had engaged in delinquent conduct on or about September 20, 2004, by committing the offense of aggravated sexual assault on a child younger than 14 years of age. *See Tex. Penal Code Ann. § 22.021*. The State's petition had previously been approved by a grand jury. *See Tex. Fam. Code Ann. § 53.045* (West 2002). C.E. waived reading of the allegations in the State's petition, stipulated to the State's evidence, and waived trial by jury. Based on C.E.'s plea and the evidence, the court found that C.E. had engaged in the delinquent conduct alleged in the State's petition and proceeded to conduct the disposition phase of the hearing.

During the disposition phase, the State called C.E.'s therapist, John Morris, who stated that he began counseling C.E. on December 20, 2004, after C.E. was released from the detention center. The record is unclear about who initiated these counseling sessions. Morris testified that he thought that C.E. "would be at a high risk to reoffend." When the prosecutor asked why Morris believed that, Morris began by responding, "The number of victims—"

Anticipating the therapist's testimony, defense counsel interrupted and requested to take Morris on voir dire examination "[t]o determine whether or not the statements that were made by [C.E.] were—are admissible." After questioning Morris briefly, counsel objected to the admission of "any statements" from C.E., arguing that Morris saw C.E. through the juvenile probation department, "and it was somewhat a condition—[C.E.] had to be ordered to." Counsel further argued that Morris was an arm of the State and that any statements by C.E. were made during a custodial interrogation that should have been preceded by a "Miranda warning." *See Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. Although he objected to C.E.'s statements "coming in," defense counsel stated twice that he did not object to Morris's opinion. The trial court overruled the objection but allowed a running objection on Morris's comments regarding his discussions with C.E.

When Morris continued with his testimony, he recalled C.E. stating that "he was there originally for committing a sexual offense against . . . a four-year-old boy" whom C.E. claimed to have assaulted two times. Morris then testified that on January 19, 2005, C.E. disclosed his sexual assaults of two additional victims: a four-year-old girl in Tennessee and a six-year-old boy in Texas. Morris opined that C.E. had a high risk to reoffend based on the number of his victims, his pattern of misbehavior, his violation of electronic monitoring, and the "cognitive distortions" that he used to justify his behavior. He stated that C.E. required long-term sex-offender treatment in a supervised, structured setting.

C.E.'s probation officer, Alissa Payne, also testified during the disposition hearing. She stated that C.E.'s supervision within the home was "very poor and inadequate, considering that the offense took place in the home with dad in the next room." Payne also noted that C.E.'s father had not visited C.E. in the "last couple of months in detention."

The court also heard testimony from C.E.'s father, who stated that C.E. had been living with him for nine months. Previously, C.E. had been living with his mother, whom he had lived with since he was five years old. C.E.'s father agreed to make every effort to prevent C.E. from violating conditions of probation that the court might order.

In addition to the witnesses' testimony, the record reflects that the court considered the juvenile probation department's predisposition investigation report, which states, "[C.E.] has since disclosed victimizing two other children, a six-year-old boy cousin and a 4-year-old girl." Defense counsel did not object to this statement.

After hearing the testimony and considering the predisposition investigation report, the trial court ordered C.E. confined for 10 years in the Texas Youth Commission and the Texas Department of Criminal Justice, Institutional Division, and ordered him to register as a sex offender for life. This appeal followed.

**Held:** Affirmed

**Memorandum Opinion:** In his sole issue, C.E. contends that the trial court violated his *Fifth Amendment* privilege against self-incrimination by admitting Morris's testimony concerning C.E.'s disclosure of two prior sexual assaults on children. C.E. asserts that he was not given a *Miranda* warning before the counseling session. *See id.* The State asserts that C.E. was not in a custodial-interrogation situation and that Morris was not acting as an agent of the State when C.E. made his disclosure. Alternatively, the State argues that the admission of C.E.'s statements was harmless because the defense waived any objection to Morris's consideration of those statements in rendering his opinion about C.E.'s risk to reoffend.

In reviewing claims of *Miranda* violations, we grant almost total deference to the trial court's determination of the historical facts that the record supports—especially when the court's factual findings are based on an evaluation of the witnesses' credibility and demeanor—and review *de novo* the trial court's rulings on application-of-law-to-fact questions that are not based on credibility and demeanor. *Ripkowski v. State*, 61 S.W.3d 378, 381-82 (Tex. Crim. App. 2001) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *In re L.M.*, 993 S.W.2d 276, 286 (Tex. App.—Austin 1999, *pet. denied*).

The *Fifth Amendment* provides, "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." *U.S. Const. amend. V*. This privilege against self-incrimination applies to adults and juveniles. *In re Gault*, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *In re V.P.*, 55 S.W.3d 25, 31 (Tex. App.—Austin 2001, *pet. denied*). Further, the privilege is applicable at both the sentencing and guilt-or-innocence phases of a criminal proceeding. *See Mitchell v. United States*, 526 U.S. 314, 328-29, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (applying *Fifth Amendment* privilege to sentencing phase of adult criminal proceeding); *In re J.S.S.*, 20 S.W.3d 837, 844 (Tex. App.—El Paso 2000, *pet. denied*) (holding that *Fifth Amendment* privilege applies from conclusion of adjudication hearing through conclusion of disposition hearing in juvenile-delinquency proceeding).

The privilege against self-incrimination is implicated if the prosecution is allowed to use statements stemming from the defendant's custodial interrogation without applying procedural safeguards effective to secure the privilege. *See Miranda*, 384 U.S. at 444. In the absence of other fully effective safeguards, a defendant's statements during custodial interrogation may only be used if, prior to interrogation, the defendant is given a *Miranda* warning—advising the defendant of the right to remain silent, that any statement made can be used against the defendant, and that the defendant has the right to counsel. *Id.*

A *Miranda* warning is only necessary when the defendant is subject to custodial interrogation. *Id.* Statements made by the defendant in this setting are inadmissible at trial unless proper *Miranda* warnings were given. *Id.* "Custodial interrogation" refers to questioning that is initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.*

Questioning "initiated by law enforcement officers" may include questioning by a court-ordered psychiatrist. *See Estelle v. Smith*, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if the defendant's statements may be used against the defendant at a criminal proceeding. *Id.* at 468. Unless they are preceded by a *Miranda* warning, the statements to the psychiatrist will be inadmissible when offered against the defendant to prove the defendant's future dangerousness. *See id.*

But *Fifth Amendment* concerns are not necessarily presented by all types of interviews and examinations that might be ordered or relied on to inform a sentencing determination. *Id.* at 469 *n.13*. For instance, if the defendant initiates or requests a psychiatric evaluation or presents psychiatric evidence, then the prosecution may use statements from that same evaluation for rebuttal. *Buchanan v. Kentucky*, 483 U.S. 402, 422-23, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987). A psychiatric evaluation that is not court-ordered but is initiated by the defendant does not constitute custodial interrogation and need not be preceded by *Miranda* warnings. *See id.*

Thus, the threshold question in this case is whether C.E. was ordered by the court or otherwise compelled to attend psychiatric counseling with Morris. If C.E. was not so ordered or compelled, then he was not subject to custodial interrogation or entitled to *Miranda* warnings, and his incriminating statements to Morris cannot receive *Fifth Amendment* protection.

Nothing in this record clearly proves that C.E. was under court order or was otherwise compelled to attend psychiatric counseling with Morris. The order releasing C.E. from juvenile detention to house arrest does not contain any condition requiring C.E. to attend counseling nor is there any order initiating C.E.'s counseling. During his objection to the admission of C.E.'s statements, defense counsel stated that counseling was "somewhat a condition—[C.E.] had to be ordered to." There is a docket sheet entry on October 7, 2004, stating, "Counseling to be set-up immediately." A detention order signed on February 15, 2005, states "the child and/or family was previously referred to . . . counseling or psychological services" with "Dr. McNeil—Psychological Evaluation" and "New Braunfels Counseling Center—John Morris, RSOTP." The source of that referral is unspecified. Additionally, while Morris testified that he had seen C.E. "essentially through the juvenile probation department," C.E. acknowledges in his brief that the purpose of the

regular meetings was for his treatment, "rather than for a law enforcement interrogation." The evidence in this record could suggest that C.E. was ordered to seek counseling by the probation department or—just as likely—that C.E. was encouraged to seek counseling and the probation department connected C.E. with Morris at C.E.'s request.

We need not decide this question, however, because we determine beyond a reasonable doubt that, even if the counseling were compelled and if the admission of the therapist's testimony about C.E.'s disclosure should not have been admitted, any such error was harmless and did not contribute to C.E.'s conviction or punishment. *See Tex. R. App. P. 44.2(a)*.

C.E.'s disclosure of his previous sexual assaults on two other children was included in the juvenile probation department's predisposition investigation report. *Section 54.04 of the family code* authorizes the court to consider "written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses" at the disposition hearing. *See Tex. Fam. Code Ann. § 54.04(b)*; *see also In re J.A.W.*, 976 S.W.2d 260, 264 (Tex. App.—San Antonio 1998, no pet.) (concluding that court could consider detention center reports that neither party offered into evidence during disposition hearing); *In re A.F.*, 895 S.W.2d 481, 486 (Tex. App.—Austin 1995, no writ) (holding that court could consider social history report during disposition hearing).

In reaching its disposition, the court was entitled to consider the juvenile probation department's predisposition report, independent of Morris's testimony about what C.E. disclosed during his therapy session. Accordingly, any error in the court's ruling concerning the admissibility of Morris's testimony about C.E.'s previous sexual assaults was harmless. *See McNac v. State*, 215 S.W.3d 420, 424-25 (Tex. Crim. App. 2007) (citing *Leday v. State*, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998) (holding that improper admission of evidence is not reversible error if same facts are shown by other evidence that is unchallenged)); *see also Tex. Fam. Code Ann. § 54.04(b)*. Because we have determined that any error in the admission of Morris's testimony about C.E.'s disclosure of two prior sexual assaults on children was harmless, we overrule C.E.'s sole issue.

**Conclusion:** Having overruled C.E.'s sole issue on appeal, we affirm the trial court's judgment.

**MODIFICATION OF DISPOSITION—  
BY FAILING TO OBJECT TO CONDITIONS OF  
PROBATION WHEN THEY WERE IMPOSED,  
RESPONDENT WAIVED THAT THEY WERE "SO  
DEFECTIVE, DEFICIENT AND UNCERTAIN"  
THAT THEY FAILED TO PUT HIM ON NOTICE  
OF WHAT HIS OBLIGATIONS WERE.**

¶ 07-4-4. **In the Matter of J.B.**, No. 2-06-396-CV, 2007 Tex.App.Lexis 6607 (Tex.App.—Fort Worth, 8/16/07).

**Facts:** Appellant J.B., a juvenile, appeals the trial court's judgment revoking his probation and committing him to the Texas Youth Commission. Because we hold that the trial court did not abuse its discretion in making this decision, we affirm.

J.B. was adjudicated delinquent for aggravated sexual assault of a child on December 1, 2005, and the trial court placed him on two years' probation. The trial court's order required that J.B. participate in the Specialized Treatment of Offenders Program ("STOP"), a long-term residential treatment program for juveniles who have committed sexual offenses, beginning on January 13, 2006. J.B. did not make satisfactory progress in the program's course of sex offender treatment, so he was unsuccessfully discharged from STOP on August 23, 2006.

The State then filed a Motion to Modify Disposition, alleging that J.B. had violated the terms of his probation and requesting the trial court to commit him to TYC. After a hearing, the trial court found that J.B. had violated the terms and conditions of his probation by causing his unsuccessful discharge from STOP and sex offender treatment, revoked his probation, and committed him to TYC for an indeterminate sentence. J.B. now appeals.

**Held:** Affirmed

**Opinion:** In his first point, J.B. complains that the trial court abused its discretion by committing him to TYC because he did not knowingly or willingly violate any valid condition of his probation. The terms of probation imposed by the trial court are contained in an exhibit to the trial court's order of probation, including a list of "Special Conditions" that J.B. was "to participate in and successfully complete." These conditions included the directive, "You will attend counseling for sex offender counseling." In addition, under the heading "Additional Conditions Ordered" is written, "STOP ordered."

J.B. first argues that the language of the probation order imposing the conditions of his probation was "so defective, deficient and uncertain" that the order failed to put him on notice of what his obligations were. However, J.B. admits that the record does not show that he objected to the conditions of probation in the trial court when they were imposed. To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. *TEX. R. APP. P. 33.1(a)*. If a party fails to do this, error is not preserved, and the complaint is waived. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). Because J.B. does not show that he objected to the conditions of probation when they were imposed, J.B. has

waived any complaint about the content of the conditions of probation. *See In re R.P.*, 37 S.W.3d 76, 80 (Tex. App.—San Antonio 2000, no pet.) (holding that juvenile waived complaint about the constitutionality of a condition of probation by failing to object to the condition in the trial court when it was imposed).

J.B. also complains that his bipolar condition and the STOP professionals' failure to properly medicate and stabilize his mental health problems show that he did not have the capacity to understand the probation order or to violate its conditions knowingly or willfully. While there was evidence that J.B. had been diagnosed with bipolar disorder and that his doctors changed his medication doses several times while he was in STOP, there was no evidence that these circumstances caused J.B. to be unable to comprehend the order or how his conduct would violate it. There was, however, evidence showing the opposite—that J.B. did understand what was expected of him: Juan Lajara, J.B.'s intake probation officer, testified that when he reviewed the terms and conditions of probation with J.B. and J.B.'s mother, J.B. did not appear to have any problems understanding what Lajara was talking about because J.B. was able to explain the terms and conditions back to Lajara after Lajara initially presented them. Accordingly, we hold that the trial court did not abuse its discretion by committing J.B. to TYC based on its finding that J.B. had violated the terms and conditions of his probation.<sup>2</sup> We overrule J.B.'s first point.

<sup>2</sup> *See In re J.P.*, 136 S.W.3d 629, 632 (Tex. 2004) (holding that the trial court's decision to modify a juvenile's disposition is reviewed under an abuse of discretion standard); *In re C.J.H.*, 79 S.W.3d 698, 702 (Tex. App.—Fort Worth 2002, no pet.) (explaining that to determine whether a trial court has abused its discretion, we must decide whether it acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable).

In his second point, J.B. argues that the trial court abused its discretion by committing J.B. to TYC because the trial court's decision to "warehouse" him in TYC was a disposition made without reference to guiding rules, reason, and principles. We disagree.

When a juvenile court modifies a disposition by committing the juvenile to TYC, it must determine that it is in the child's best interests to be placed outside the child's home; that reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home; and that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation. *TEX. FAM. CODE ANN. § 54.05(m)* (Vernon Supp. 2006).

J.B. contends that TYC is the most severe form of juvenile punishment and that the judge should have considered "the full range of punishment," including community-based supervision and outpatient treatment,

instead of automatically sentencing him to TYC. However, the trial court noted that J.B. had already received "numerous" outpatient services in the past. Furthermore, Denise Anderson, J.B.'s STOP treatment coordinator, testified that in her opinion, J.B. posed a high risk of reoffending in the community; and Juan Lajara, the probation officer, testified that J.B. possessed multiple risk factors of reoffending due to his lack of progress in treatment, including impulsivity, a chaotic home environment, anger issues, and sexual risk factors of both male and female victims as well as the degree of violence involved in the offenses. Accordingly, there was evidence that returning J.B. to his home and placing him in outpatient treatment was not a viable solution due to J.B.'s risk of reoffending.

J.B. also contends that there was no testimony that TYC could provide any better protection for the public, or any better sex offender treatment, than confinement in STOP. But the trial court heard evidence that STOP was the most restrictive program that the juvenile probation department had, and even this program was not successful in treating J.B. The county's juvenile services resource staffing committee recommended that J.B. should not be released into the community and instead should be sent to a more restrictive placement. Furthermore, the committee felt that, after J.B.'s unsuccessful performance at STOP, there was no other viable placement that would be appropriate to meet J.B.'s needs.

After reviewing the evidence, we conclude that the trial court's decision to modify J.B.'s disposition by committing him to the custody of TYC was not an abuse of discretion.<sup>3</sup> We overrule J.B.'s second point.

<sup>3</sup> *See J.P.*, 136 S.W.3d at 632; *C.J.H.*, 79 S.W.3d at 702.

**Conclusion:** Having overruled both of J.B.'s points on appeal, we affirm the trial court's judgment.  
PER CURIAM

**ORDERS AND JUDGEMENTS—  
A TRIAL COURT'S PLENARY POWER ENDS  
THIRTY DAYS AFTER THE FIRST FILED MOTION FOR NEW TRIAL IS OVERRULED, AND ANY MOTIONS FILED AFTER THAT DATE ARE OF NO EFFECT.**

¶ 07-4-5. **In the Matter of A.M.**, MEMORANDUM, No. 04-06-00483-CV, 2007 Tex.App.Lexis 6676 (Tex.App.—San Antonio, 8/22/07).

**Facts:** A.M., a juvenile, was charged with aggravated sexual assault of a child. The State sought determinate sentencing and, following a jury trial, the trial court entered an Order of Adjudication finding that A.M. did engage in delinquent conduct, specifically, aggravated sexual assault of a child. After holding a disposition

hearing, the trial court signed an order sentencing A.M. to a determinate sentence of forty years. A.M. contends on appeal that (1) the trial court erred in refusing his request for an evidentiary hearing on his motion for new trial; and (2) he received ineffective assistance of counsel under the United States and Texas Constitutions. The Order of Disposition was signed on March 31, 2006. On April 19, 2006, A.M.'s trial counsel, Gloria Early, filed a "Motion to Withdraw as Counsel, a Motion for New Trial, and a Notice of Appeal." Early's motion to withdraw as counsel was granted on April 19, 2006, and the motion for new trial was overruled on April 20, 2006. An order substituting new counsel, Kenneth Baker, was entered on April 27, 2006. Before the order substituting Baker was even entered, however, on April 21, 2006, Baker apparently filed an "Amended Motion for New Trial" containing the wrong cause number. Because of this error, the motion was filed in the wrong cause number.<sup>1</sup> And, because it was not filed in the cause number which is now on appeal, the "Amended Motion for New Trial" is not contained in the appellate record.

1 Baker has provided a copy of the amended motion for new trial, which he contends was filed on April 21, 2006, under the wrong cause number, in an appendix to his brief.

On June 27, 2006, A.M.'s new counsel, Baker, filed a second "Amended Motion for New Trial," which was overruled on July 3, 2006. Also on June 27, 2006, Baker filed "Defendant's Motion to Set Aside Order Denying Motion for a New Trial, Striking the First Filed Motion for New Trial and Deeming Respondent's Motion for a New Trial Timely Filed." This motion was likewise denied on July 3, 2006. Now, on appeal, A.M. contends the trial court was required to hold a hearing on his amended motion for new trial and that he received ineffective assistance of counsel.

**Held:** Affirmed

**Memorandum Opinion:** In his first issue, A.M. argues that the trial court should have granted his request for an evidentiary hearing on his motion for new trial. He contends that the "Amended Motion for New Trial," which he filed on April 21, 2006, under the wrong cause number, was timely and, therefore, the trial court was required to consider it.

As a general rule, juvenile appeals proceed under the rules governing civil cases. *TEX. FAM. CODE ANN. § 56.01(b)* (Vernon 2002) ("The requirements governing an appeal are as in civil cases generally."); *In re J.C.H.*, 12 S.W.3d 561, 562 (Tex. App.—San Antonio 1999, no

*pet.*) (applying Rules of Appellate Procedure governing civil cases in juvenile case); *J.E.S. v. State*, No. 05-95-00834-CV, 1995 Tex. App. LEXIS 2638, 1995 WL 634154, at \*1 (Tex. App.—Dallas 1995, no writ) (applying in juvenile case motion for new trial rules set forth in *Texas Rule of Civil Procedure 329b*). In a juvenile case, the rules require that a motion for new trial be filed within thirty days after the order of disposition is signed. See *In re J.C.H.*, 12 S.W.3d at 562; see *TEX. R. CIV. P. 329b(a)*. *Texas Rule of Civil Procedure 329b(b)* allows a party to file an amended motion for new trial without leave of the trial court as long as the trial court has not yet overruled an earlier new trial motion, and the amended motion is filed within thirty days after the trial court signs the judgment. *Moritz v. Preiss*, 121 S.W.3d 715, 719-20 (Tex. 2003); see *TEX. R. CIV. P. 329b(b)*.

In this case, A.M.'s trial attorney, Early, filed a motion for new trial within thirty days of the disposition order, and the trial court overruled it the following day. The subsequently filed amended motion for new trial, filed on April 21, 2006, by Baker, was timely in the sense that it was filed within thirty days of the disposition order. But, regardless of whether the amended motion was filed in the correct cause, the trial court was not required to consider it because the trial court had already overruled a previously filed motion for new trial. See *TEX. R. CIV. P. 329b(b)*; *Moritz*, 121 S.W.3d at 719-20. Once the first motion for new trial was overruled, the rules do not allow the filing of an amended motion without leave of court. *TEX. R. CIV. P. 329b(b)*. Furthermore, the amended motion for new trial filed by Baker on April 21, 2006, is not properly before us because it is not contained in the record on appeal.

A.M. emphasizes that he eventually filed a "Second Amended Motion for New Trial" in the correct cause number on June 27, 2006. Also on June 27, 2006, he filed "Defendant's Motion to Set Aside Order Denying Motion for a New Trial; Striking the First Filed Motion for a New Trial and Deeming Respondent's Motion for a New Trial Timely Filed." In that motion, he contended that Early had not been authorized to file a motion for new trial.

**Conclusion:** Because the trial court's plenary power ended thirty days after the first filed motion for new trial was overruled, none of these motions filed on June 27, 2006, were timely. See *TEX. R. CIV. P. 329b(e)*. The first filed motion for new trial was overruled on April 20, 2006, and, therefore, the trial court's plenary power expired on May 22, 2006. Thus, any motions filed after May 22, 2006, were of no effect.

A.M.'s first issue on appeal is overruled.

**Other Issues Omitted.**

**CONFESSIONS—  
APPELLANT WAS NOT DENIED THE RIGHT TO  
HAVE HIS PARENTS WITH HIM WHILE HE  
WAS BEING HELD IN THE JUVENILE PROC-  
ESSING OFFICE, THERE WAS NO SHOWING OF  
A CAUSAL CONNECTION, AND ANY ERROR IN  
THE ADMISSION OF THESE STATEMENTS  
WERE HARMLESS.**

¶ 07-4-6A. *Cortez v. State*, \_\_\_S.W.3d \_\_\_, No. 03-06-00359-CR, 2007 Tex.App.Lexis 6800 (Tex.App.—Austin, 8/21/07).

**Facts:** On Friday afternoon, September 23, 2005, a group of Austin High School students had just gotten off the school bus when a Honda Accord pulled to the curb beside them. Witnesses to the shooting testified that the front passenger in the car said something to sixteen-year-old Christopher Briseno, who had just gotten off the bus. Then, several shots were fired from the car. Briseno was fatally shot in the head. His sixteen-year-old cousin, Adam Cantu, was shot in the legs.

As the investigation continued over the coming days and weeks, it was learned that six persons had been in the car when the shots were fired. In the front seat were Alan Ruiz, who was the driver, and appellant, who was the front passenger. In the back seat were Alan Ruiz's brother Humberto, his sister Pamela, Juan Soliz, and Victor Saramiento.

*Saturday, September 24*

Initially, the only occupant of the Accord identified to the police was Humberto Ruiz. The day after the shooting, Austin police officers went to the Ruiz residence, where they met Humberto, Alan, and appellant, who was sixteen years old. The three boys agreed to speak to the officers and were taken to the downtown police station, where they arrived between 1:30 and 2:00 p.m., according to the officer's testimony at the suppression hearing. The officers also testified that they were not then aware of appellant's involvement in the shooting. Appellant was not under arrest or restraint, and he was allowed to wait in the lobby while the Ruiz brothers were being questioned.

Later that afternoon, Pamela Ruiz was also brought to the police station, accompanied by her mother. At trial, a police officer testified that when Pamela walked past appellant, who was still sitting in the lobby, she did a "doubletake."

Shortly after 4:00 p.m., appellant left the police station and walked to a nearby convenience store, where he called a friend for a ride. Meanwhile, statements by the Ruiz siblings gave investigators reason to believe that appellant was the person who had fired the shots that killed Briseno and wounded Cantu.<sup>1</sup> Officers began to look for appellant and found him at the convenience store. Detective Armando Balderama testified that at 4:50 p.m., appellant was returned to the police station,

advised that he was under arrest, and placed in an interview room that was designated as a juvenile processing office. *See Tex. Fam. Code Ann. § 52.025(a)* (West 2002).<sup>2</sup>

1 It is clear that the Ruizes not only incriminated appellant, but they also minimized their own involvement in the shooting. There is evidence that the police allowed the Ruizes to leave the station on Saturday because there was no probable cause to hold them. By the time the police learned that they had played a culpable role in the shooting, the Ruiz family had fled to Mexico. Some months later, the three siblings returned to Austin and were arrested. They were awaiting trial for Briseno's murder at the time of appellant's trial.

2 Appellant testified that he was taken to the police station at 12:30 p.m. and told that he was being detained because he "did not have a license." Appellant said that he asked to call his parents, but the officers would not allow it. Appellant also testified that he was not allowed to call his parents after he was returned to the police station and placed in the juvenile processing office.

Balderama testified that he asked appellant if he wanted his parents to be notified. Appellant said that he did. Balderama tried to call appellant's mother, but he got no answer. Balderama successfully called appellant's father and told him that appellant was about to be transferred to the Gardner-Betts juvenile detention facility. Appellant was then taken to another location to await transfer. While they were waiting, appellant asked Balderama "how long I thought he was going to have to . . . remain in jail." Balderama told appellant that "he was getting ahead of himself, that he needed to wait and see." Appellant's question to Balderama is the first of the three statements that appellant urges should have been suppressed.

Detective Frank Rodriguez testified that minutes after appellant was returned to the police station and placed in the interview room, he encountered appellant's mother and brother in the downstairs lobby. They asked the officer for appellant's whereabouts, and he told them that appellant had been detained for a crime that had been committed the day before. Appellant's mother responded that the police should also arrest Alan Ruiz because appellant had been with him all day on Friday. Rodriguez testified that he needed to go back upstairs where the interviews were taking place, so he excused himself but told appellant's mother that he would be "right back." Rodriguez said that when he later returned to the lobby, appellant's mother and brother were gone.

Appellant's mother testified that she went to the police station at 2:00 p.m. after receiving a telephone call from Alan Ruiz saying that appellant had been arrested. She said that Rodriguez told her that appellant was being questioned and that she could not see him. She testified that after she returned to her home, a police officer called her and told her that appellant was being charged with

murder, that she could not see him, and that he was going to be taken to Gardner-Betts.<sup>3</sup> She said that she made no effort to see appellant that day because she did not have permission to do so.

<sup>3</sup> Appellant's mother testified that this call came from Rodriguez. The officer testified, however, that he had no further conversations on Saturday with members of appellant's family after appellant's mother left the police station.

Richard Bratton was the intake officer at Gardner-Betts on the evening of September 24, 2005. Bratton testified that upon appellant's arrival, he advised appellant of his rights while in detention and called his family. Bratton spoke to a person who he believed was appellant's brother, who was in turn speaking to appellant's mother in Spanish. Bratton told appellant's family some of the details of the offense for which appellant had been arrested, explained appellant's rights, and informed them of the visitation hours at the facility. Appellant's family was not able to visit him at Gardner-Betts that night because the intake process was not completed until after 9:00 p.m., when visitation ended.

#### *Sunday, September 25*

At 11:00 a.m. Sunday morning, Rodriguez and another officer, Hector Reveles, transported appellant from Gardner-Betts to the police station so that he could be advised of his rights by a magistrate. *See id.* § 51.095(a) (West Supp. 2006). Rodriguez and Reveles testified that appellant was not questioned during the drive, but that appellant asked Reveles if the police "wanted the gun" or wanted to know "where the gun was." Reveles said that he told appellant that they would "talk about that later." Appellant's question regarding the gun is the second statement that he sought to have suppressed.

After being advised of his rights by the magistrate, appellant was taken to the juvenile processing office. He refused to give the officers a statement and asked to speak to his parents. There was no telephone in the room, so Rodriguez dialed the number on his cell phone, gave the phone to appellant, and stepped outside. Through a microphone located in the room, Rodriguez heard appellant tell his mother that he had fired two shots but had not hit anyone, and that Alan Ruiz had fired the fatal shots. This is the last of the three challenged statements.

#### *The trial*

The juvenile court waived its jurisdiction and transferred appellant to district court for trial. *See id.* § 54.02 (West 2002). At the trial, Cantu identified appellant as the front passenger in the Accord and as the person who shot him and Briseno. Jose Ortiz, another student who witnessed the shooting, also identified appellant as the front passenger and shooter. Both Cantu and Ortiz were certain that the driver of the car had not fired

the shots. Another bystander, Esteban Zuniga, did not identify appellant, but he did testify (with some equivocation during cross-examination) that the front passenger was the person who fired the shots.

In his own testimony, appellant acknowledged being the front passenger in the Accord. He said that after he accepted a ride from Alan Ruiz, Ruiz showed him a pistol in the console and told him that "he had to kill two students who were in school because they were messing with his sister." After picking up the other passengers at the school, Ruiz followed the bus. As they drove, Ruiz handed the pistol to appellant and told him, "You're going to kill him." When appellant protested, Ruiz said, "Okay. Well, just tell him—ask him some questions, things I want to know." When Briseno got off the bus, Pamela Ruiz pointed and said, "Look, it's him." At Alan Ruiz's insistence, appellant asked Briseno if he was a Blood. Briseno denied it. Pamela Ruiz said, "He's telling lies. He's the one that was messing with me." Then she said, "Kill him. Kill him." With that, Alan Ruiz reached across appellant and began firing. According to appellant, Ruiz then handed the pistol to him and ordered him to shoot. Appellant testified that he was afraid of Ruiz, and that he fired two shots into the air.

The court's jury charge included an instruction on the law of parties. *See Tex. Penal Code Ann.* §§ 7.01, .02 (West 2003). The charge authorized appellant's conviction for murder if the jury found that appellant, acting alone or with others as a party, caused Briseno's death. Appellant does not challenge the sufficiency of the evidence to sustain the jury's verdict.

#### *Statements to Officers*

In point of error one, appellant contends that the officers who took him into custody on the afternoon of September 24 failed to promptly notify his parents. *See id.* § 52.02(b)(1) (West Supp. 2006) (providing that person taking child into custody shall promptly give notice of action and statement of reason to child's parent, guardian, or custodian). In point of error two, appellant further contends that he was not allowed to have his parents with him in the juvenile processing office. *See id.* § 52.025(c) (West 2002) (providing that child detained in juvenile processing office is entitled to be accompanied by parent, guardian, custodian, or attorney). Appellant argues that his question to Balderama about how long he would remain in jail was the inadmissible fruit of these violations. *See Tex. Code Crim. Proc. Ann. art. 38.23* (West 2005) (exclusionary rule). In point of error three, appellant contends that his remark to Reveles regarding the gun should also have been suppressed as the product of these juvenile code violations.

**Held:** Affirmed

**Opinion:** A child being held in a juvenile processing office may not be left unattended and is entitled to be accompanied by his parent. *Tex. Fam. Code Ann.* §

52.025(c). The statute does not require that a parent be present, however. *See Leonard v. State, No. 01-93-01066-CR, 1997 Tex. App. LEXIS 51, at \*3 (Tex. App.—Houston [1st Dist.] Jan. 9, 1997, no pet.)* (not designated for publication). The record before us supports a finding that appellant did not ask for his parents and that appellant's parents did not ask to be present.

Rodriguez testified that appellant was monitored for the entire time that he was held in the juvenile processing office and that he never asked to have his parents with him. Balderama testified to the same effect. Even appellant, who testified that he asked to speak to his parents, did not testify that he wanted one or both of them to be present with him in the processing office.<sup>5</sup> The evidence supports the trial court's implied finding that appellant did not request the presence of his parents in the processing office.

<sup>5</sup> Appellant testified that he was not told that he had a right to have his parents with him. He was not asked and did not say whether he would have invoked that right. Appellant does not contend that the police were obligated to advise him of his right to have his parents present, and we express no opinion regarding that issue.

There is no evidence that appellant's father asked to speak to or be with his son while he was detained in the processing office. Appellant's mother testified that she asked to see appellant while she was at the police station on the afternoon he was arrested, but this request was denied. Her testimony was contradicted by Rodriguez, who testified that appellant's mother did not ask to see her son before leaving the police station. The trial court, as trier of fact at the suppression hearing, could reasonably conclude from the officers' testimony that neither of appellant's parents asked to be with appellant while he was detained in the processing office.

#### *Causal connection*

Even if appellant's parents were not promptly notified of his arrest or appellant was denied the right to have his parents with him in the juvenile processing office on Saturday afternoon, no causal connection has been shown between these alleged violations and appellant's statements to the two officers. *See Gonzales, 67 S.W.3d at 913* (holding that suppression required only when there is causal connection between violation of parental notice requirement and receipt of juvenile's statement). Neither statement was made while appellant was in the juvenile processing office, and thus his parents would not have been present. This distinguishes the instant case from *State v. Simpson, 105 S.W.3d 238 (Tex. App.—Tyler 2003, no pet.)*, on which appellant relies. In *Simpson*, a juvenile was interrogated and gave a written confession to participating in a capital murder before his parents were notified, more than forty-eight hours following his arrest. *Id. at 240*. The court found a causal connection between the lack of notice and the statement, saying that

there was "nothing in the record to indicate that either of [Simpson's] parents would have advised [him] to make or sign a statement implicating himself in the commission of capital murder" had they been present during the interrogation. *Id. at 243*.

Appellant hypothesizes that if his parents had come to the juvenile processing office, they would have advised him against making any statements or having any conversations with the police. Accepting this hypothesis as true, we are not persuaded that this advice would have deterred appellant from making the two statements at issue. The trial court found that the statements were not the products of interrogation, and the evidence supports this finding. In fact, the evidence reflects that on both occasions, appellant and the officers were not even engaged in conversation when he spontaneously made the challenged remarks. We find no causal connection between the two statements and the officers' alleged failure to promptly notify appellant's parents of his arrest and the alleged denial of appellant's right to have his parents with him in the juvenile processing office.

#### *Harmless error*

Even if appellant's rights under the juvenile code were violated and even if there were a causal connection between these violations and appellant's statements to the officers, we conclude that the admission of the statements did not affect appellant's substantial rights. *See Tex. R. App. P. 44.2(b)*. Appellant's question to Balderama inquiring how long he would have to remain in jail showed that appellant was curious about the seriousness of his situation. This curiosity is understandable and not particularly incriminating. The statement to Reveles regarding the gun was a more serious matter because it implicitly showed that appellant had some knowledge about the shooting and the weapon. Still, the statement does not necessarily compel the conclusion that appellant was guilty of the murder. Appellant could have been offering to disclose information he had learned from someone else, such as Alan Ruiz.

In any event, appellant's involvement in the shooting was not a contested issue at his trial; only the nature of that involvement was in question. In his own trial testimony, appellant admitted being in the car and firing two shots, albeit into the air. Even if the challenged statements had not been admitted, appellant would have had little choice but to admit his involvement in light of the eyewitness testimony identifying him as the front passenger and his mother's statement to the police that appellant had spent the day of the shooting with Alan Ruiz. In light of appellant's testimony, any error in the admission of appellant's question to Balderama regarding how much time he might spend in jail and his question to Reveles as to whether the police wanted the gun may be disregarded as harmless. These remarks to the officers merely confirmed what appellant did not contest: that he was present in the car from which the shots were fired.

**Conclusion:** Viewing the record in the light most favorable to the trial court's rulings, we conclude that appellant's parents were promptly notified after he was taken into custody and that appellant was not denied the right to have his parents with him while he was being held in the juvenile processing office. Moreover, there is no showing of a causal connection between the alleged violations and the spontaneous statements appellant made to the officers. Finally, any error in the admission of these statements was harmless. Points of error one, two, and three are overruled.

**CONFESSIONS—**

**APPELLANT DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE JUVENILE PROCESSING OFFICE, AND THE OFFICER DID NOT VIOLATE THE FOURTH AMENDMENT BY LISTENING TO THE STATEMENTS APPELLANT MADE TO HIS MOTHER DURING THEIR TELEPHONE CONVERSATION IN THE JPO.**

¶ 07-4-6B. *Cortez v. State*, \_\_\_ S.W.3d \_\_\_, No. 03-06-00359-CR, 2007 Tex.App.Lexis 6800 (Tex.App.—Austin, 8/21/07).

**Facts:** See ¶ 07-4-6A.

**Held:** Affirmed

**Opinion:** In his fourth point of error, appellant contends that Rodriguez unlawfully eavesdropped on his telephone conversation with his mother on Sunday afternoon, September 25, after he had been taken before the magistrate. He argues that the use of a hidden microphone to listen to his conversation violated his reasonable expectation of privacy under the *Fourth Amendment*. He further argues that the officer's conduct constituted an unlawful, unauthorized interception of an oral communication. See *Tex. Code Crim. Proc. Ann. art. 18.20* (West Supp. 2006).

*Fourth Amendment*

The *Fourth Amendment* serves to safeguard an individual's privacy from unreasonable governmental intrusions. *Richardson v. State*, 865 S.W.2d 944, 948 (Tex. Crim. App. 1993). A defendant may challenge the admission of evidence obtained by governmental intrusion only if he had a legitimate expectation of privacy in the place invaded. *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To determine whether a person had a reasonable expectation of privacy, it must be determined whether the person exhibited a subjective expectation of privacy and, if so, whether that subjective expectation is one that society is willing to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). In this case, appellant exhibited a subjective expectation of privacy while

speaking to his mother; the question presented is whether this expectation was reasonable.

Whether a subjective expectation of privacy is one that society recognizes as reasonable is a question of law. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). Among the factors to consider in answering this question are whether the accused: had a property or possessory interest in the place invaded; was legitimately in the place invaded; had complete dominion or control and the right to exclude others; took normal precautions customarily taken by those seeking privacy; put the place to some private use; and has a claim of privacy consistent with historical notions. *Calloway v. State*, 743 S.W.2d 645, 651 (Tex. Crim. App. 1988). A consideration of these factors leads us to conclude that appellant did not have a reasonable expectation of privacy in the police interview room that doubled as the juvenile processing office.<sup>6</sup> Appellant had no property or possessory interest in the office, no dominion or control of the office, and no right to exclude others from the office. Appellant was legitimately in the office only in the sense that he had been lawfully taken into custody by the police. Although appellant put the office to a private use, there is no evidence that he asked Rodriguez to leave the room or took any precautions to ensure his privacy. Finally, appellant's claim of privacy in a police station interview room is not consistent with historical notions of privacy.

<sup>6</sup> There was no telephone in the interview room. Therefore, we assume that there was no sign warning that telephone calls from the room were monitored.

A similar case was recently considered by the court of criminal appeals. In *State v. Scheineman*, Scheineman and his co-defendant were arrested and placed in separate interview rooms. 77 S.W.3d 810, 811 (Tex. Crim. App. 2002). The co-defendant asked a deputy if he could speak alone with Scheineman. *Id.* The deputy agreed, moved Scheineman into the room occupied by the co-defendant, and left the two of them alone. *Id.* The two men then discussed their criminal conduct while, unbeknownst to them, officers monitored and recorded their conversation. *Id.* Scheineman argued that the deputy's conduct had "lulled" him and his co-defendant into believing that their conversation was private and thereby gave them a legitimate expectation of privacy. *Id.* The court of criminal appeals disagreed. The court observed that a loss of privacy is an inherent incident of confinement, whether in a jail cell or a police station interview room. *Id.* at 813. After noting that there was no evidence that the deputy had given the two defendants any verbal assurance of privacy, the court held that society is not prepared to recognize a legitimate expectation of privacy in a conversation between two arrestees in a county law enforcement building, even if the arrestees are the only persons present and subjectively believe that they are unobserved. *Id.*

The evidence before us shows that Rodriguez dialed appellant's mother's telephone number, handed appellant the cell phone, and left the room. Appellant argues this conduct "tricked" him into believing that his telephone conversation with his mother was private. But as in *Scheinman*, there is no evidence that the officer gave appellant any express assurance that what he said to his mother would not be heard by others. The evidence supports the trial court's finding that Rodriguez did not engage in any dishonesty or deliberately mislead appellant into believing that the conversation was private. Although appellant's juvenile status may have entitled him to rights and considerations not afforded adults under the same circumstances, we do not believe that society is prepared to accept as reasonable appellant's subjective belief that he could sit in a police interview room and discuss on the telephone his role in a murder for which he had been arrested without being overheard by the police, at least in the absence of any evidence of police conduct intended to give appellant the impression that his conversation would be private.

#### *Article 18.20*

Appellant's contention that *article 18.20* was violated was not raised below. No violation of the statute is shown in any case. An "oral communication" subject to the statute is one that is "uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." *Tex. Code Crim. Proc. Ann. art. 18.20, § 1(2)*. We have held that *article 18.20* protects persons engaged in oral communications under circumstances justifying an expectation of privacy. *Meyer v. State*, 78 S.W.3d 505, 509 (*Tex. App.—Austin 2002, pet. ref'd*) (also holding that defendant did not have reasonable expectation of privacy in back seat of patrol car). Because appellant did not have a reasonable expectation of privacy under the circumstances shown, he was not justified in the expectation that his statements would not be intercepted. *See id.*

#### *Harmless error*

As recounted by Rodriguez in his testimony at trial, appellant's statements to his mother over the telephone were entirely consistent with appellant's own testimony. According to Rodriguez, appellant told his mother that he had fired two shots that did not hit anyone, and that Alan Ruiz had fired the shots that struck the two victims. Appellant testified to the same facts. Defense counsel argued to the jury that the statements appellant made to his mother tended to corroborate his trial testimony by showing that he had consistently told the same story. Under the circumstances, if Rodriguez violated appellant's *Fourth Amendment* or statutory rights by listening to appellant's conversation with his mother, we are satisfied beyond a reasonable doubt that the admission of appellant's statements during that conversation did not contribute to his conviction or punishment. *See Tex. R. App. P. 44.2(a)*.

**Conclusion:** Appellant did not have a reasonable expectation of privacy in the juvenile processing office, and the officer did not violate the *Fourth Amendment* by listening to the statements appellant made to his mother during their telephone conversation. For the same reason, *article 18.20* was not violated. And because the statements appellant made to his mother during the conversation were consistent with appellant's trial testimony, any error in the admission of the statements was harmless. Point of error four is overruled.

#### **SEARCH & SEIZURE—**

**WHEN POLICE MAKE A TRAFFIC STOP, A PASSENGER IN THE CAR, LIKE THE DRIVER, IS SEIZED FOR FOURTH AMENDMENT PURPOSES AND AS A RESULT MAY CHALLENGE THE CONSTITUTIONALITY OF THE STOP.**

¶ 07-4-7. **Brendlin v. California**, 127 S. Ct. 2400, 168 L. Ed. 2d 132, 2007 U.S. Lexis 7897 (U.S. Sup. Ct., 6/18/07).

**Note:** While this is not a "per se" juvenile case, it is a Supreme Court holding, and its ramifications will extend to stops made of juveniles in similar situations. As a result, I have elected to include it as part of our cases at this time.

**Facts:** After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized defendant, a passenger in the car. Upon verifying that defendant was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. The State conceded that the police had no adequate justification to pull the car over. Defendant was charged with various methamphetamine offenses and moved to suppress the evidence obtained in searches of his person and the car in which he was a passenger as fruits of an unconstitutional seizure. The trial court denied the motion to suppress.

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which they held unlawful. By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority." The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, that a passenger cannot submit to an officer's show of authority while the driver controls the

car, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present,"

**Held:** Vacated and Remanded

**Opinion:** The State concedes that the police had no adequate justification to pull the car over, see n. 2 *supra*, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick, supra*, at 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. Cf. *Drayton, supra*, at 197-199, 203-204, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).<sup>3</sup>

<sup>3</sup> Of course, police may also stop a car solely to investigate a passenger's conduct. See, e.g., *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627, 629, n. 1 (Md. 2001) (passenger's violation of local seatbelt law); *People v. Roth*, 85 P. 3d 571, 573 (Colo. App. 2003) (passenger's violation of littering ordinance). Accordingly, a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop.

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could

jeopardize his safety. In *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414-415, 117 S. Ct. 882, 137 L. Ed. 2d 41; cf. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (*per curiam*) (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Wilson, supra*, at 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (quoting *Michigan v. Summers*, 452 U.S. 692, 702-703, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)). What we have said in these opinions probably reflects a societal expectation of "unquestioned [police] command" at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson, supra*, at 414, 117 S. Ct. 882, 137 L. Ed. 2d 41.<sup>4</sup>

<sup>4</sup> Although the State Supreme Court inferred from Brendlin's decision to open and close the passenger door during the traffic stop that he was "awar[e] of the available options," 38 Cal. 4th 1107, 1120, 45 Cal. Rptr. 3d 50, 136 P. 3d 845, 852 (2006), this conduct could equally be taken to indicate that Brendlin felt compelled to remain inside the car. In any event, the test is not what Brendlin felt but what a reasonable passenger would have understood.

Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. See *United States v. Kimball*, 25 F.3d 1, 5 (CA1 1994); *United States v. Mosley*, 454 F.3d 249, 253 (CA3 2006); *United States v. Rusher*, 966 F.2d 868, 874, n. 4 (CA4 1992); *United States v. Grant*, 349 F.3d 192, 196 (CA5 2003); *United States v. Perez*, 440 F.3d 363, 369 (CA6 2006); *United States v. Powell*, 929 F.2d 1190, 1195 (CA7 1991); *United States v. Ameling*, 328 F.3d 443, 446-447, n. 3 (CA8 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (CA9 2000); *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1163-1164 (CA10 1995); *State v. Bowers*, 334 Ark. 447, 451-452, 976 S.W.2d 379, 381-382 (1998); *State v. Haworth*, 106 Idaho 405, 405-406, 679 P.2d 1123, 1123-1124 (1984); *People v. Bunch*, 207 Ill. 2d 7, 13, 796 N.E.2d 1024, 1029, 277 Ill. Dec. 658 (2003); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *State v. Hodges*, 252 Kan. 989, 1002-1005, 851 P.2d 352, 361-362 (1993); *State v. Carter*, 69 Ohio St. 3d 57, 63, 1994 Ohio 343, 630 N.E.2d 355, 360 (1994) (*per curiam*); *State v. Harris*, 206 Wis. 2d 243, 253-258, 557 N.W.2d 245, 249-251 (1996). And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, e.g., 6 W. LaFare, Search and Seizure §

11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007) ("If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, *Searches & Seizures, Arrests and Confessions* § 11:20, p. 11-98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").<sup>5</sup>

<sup>5</sup> Only two State Supreme Courts, other than California's, have stood against this tide of authority. See *People v. Jackson*, 39 P. 3d 1174, 1184-1186 (Colo. 2002) (en banc); *State v. Mendez*, 137 Wn. 2d 208, 222-223, 970 P.2d 722, 729 (1999) (en banc).

The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a show of authority toward Brendlin. The court saw Brokenbrough's "flashing lights [as] directed at the driver," and pointed to the lack of record evidence that Brokenbrough "was even aware [Brendlin] was in the car prior to the vehicle stop." 38 Cal. 4th, at 1118, 136 P. 3d, at 851. But that view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court's approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis. See, e.g., *Whren*, 517 U.S., at 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); *Chesternut*, 486 U.S., at 575, n. 7, 108 S. Ct. 1975, 100 L. Ed. 2d 565 ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"); *Mendenhall*, 446 U.S., at 554, n. 6, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (principal opinion) (disregarding a Government agent's subjective intent to detain *Mendenhall*); cf. *Rakas*, 439 U.S., at 132-135, 99 S. Ct. 421, 58 L. Ed. 2d 387 (rejecting the "target theory" of Fourth Amendment standing, which would have allowed "any criminal

defendant at whom a search was directed" to challenge the legality of the search (internal quotation marks omitted)).

California defends the State Supreme Court's ruling on this point by citing our cases holding that seizure requires a purposeful, deliberate act of detention. See Brief for Respondent 9-14. But *Chesternut*, *supra* 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565, answers that argument. The intent that counts under the Fourth Amendment is the "intent [that] has been conveyed to the person confronted," *id.*, at 575, n. 7, 108 S. Ct. 1975, 100 L. Ed. 2d 565, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized. Our most recent cases are in accord on this point. In *Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043, we considered whether a seizure occurred when an officer accidentally ran over a passenger who had fallen off a motorcycle during a high-speed chase, and in holding that no seizure took place, we stressed that the officer stopped Lewis's movement by accidentally crashing into him, not "through means intentionally applied." *Id.*, at 844, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (emphasis deleted). We did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger. Nor is *Brower*, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628, to the contrary, where it was dispositive that "Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped." *Id.*, at 599, 109 S. Ct. 1378, 103 L. Ed. 2d 628. California reads this language to suggest that for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority, see Brief for Respondent 12, as if the thrust of our observation were that *Brower*, and not someone else, was "meant to be stopped." But our point was not that *Brower* alone was the target but that officers detained him "through means intentionally applied"; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock. Neither case, then, is at odds with our holding that the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business.

Second, the Supreme Court of California assumed that Brendlin, "as the passenger, had no ability to submit to the deputy's show of authority" because only the driver was in control of the moving vehicle. 38 Cal. 4th, at 1118, 1119, 136 P. 3d, at 852. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the road-

way, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it "would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority." *Id.*, at 1120, 136 P. 3d, at 853. But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who can't even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual's "sense of security and privacy in traveling in an automobile." *Prouse*, 440 U.S., at 662, 99 S. Ct. 1391, 59 L. Ed. 2d 660. Nor would the consequential blockage call for a precautionary rule to avoid the kind of "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals" that the Fourth Amendment was intended to limit. *Martinez-Fuerte*, 428 U.S., at 554, 96 S. Ct. 3074, 49 L. Ed. 2d 1116.<sup>6</sup>

<sup>6</sup> California claims that, under today's rule, "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light." Brief for Respondent 23. But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger's position would feel free to take steps to terminate the encounter.

Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.<sup>7</sup> The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 273, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973) (stop and search by Border Patrol agents without a warrant or probable cause violated the Fourth Amendment); *Prouse*, *supra*, at 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (police spot check of driver's license and registration without reasonable suspicion violated the Fourth Amendment).

<sup>7</sup> Compare *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) (requiring "at least articulable and reasonable suspicion" to support ran-

dom, investigative traffic stops), and *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-884, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975) (same), with *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), and *Atwater v. Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

**Conclusion:** Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

#### CRIMINAL PROCEEDINGS—

**ONCE THE STATE ESTABLISHES A PRIMA FACIE SHOWING OF A PRIOR CONVICTION, IT BECOMES THE DEFENDANT'S BURDEN TO MAKE AN AFFIRMATIVE SHOWING OF ANY DEFECT IN THE JUDGMENT.**

¶ 07-4-8. **Terrell v. State**, 228 S.W.3d 343, 2007 Tex. App. Lexis 4142 (Tex.App.—Waco, 5/23/07).

**Facts:** Defendant challenged a decision from the 85th District Court Brazos County, Texas, which convicted him of indecency with a child. He also challenged the enhancement of his sentence with a prior juvenile conviction.

#### *Issue One Omitted*

In his second issue, Terrell asserts that the evidence is legally insufficient to support the trial court's "true" finding on the enhancement paragraph. At punishment, the State introduced, without objection, a penitentiary packet containing Terrell's fingerprints and a judgment for Terrell's 1982 "aggravated rape" conviction. He was sentenced to thirty years in prison for that offense. After both sides rested, Terrell's counsel argued that Terrell was only age sixteen when the 1982 judgment was rendered and concluded that the State failed to prove a final conviction. On appeal, Terrell contends that the pen packet affirmatively shows that he was sixteen at the time that offense was committed, and thus the judgment is void because Terrell was too young to be convicted of the offense. See *Tex. Fam. Code Ann.* § 51.02(2)(A) (Vernon Supp. 2006).

**Held:** Affirmed

**Opinion:** The State establishes a prima facie showing of a prior conviction by introducing a copy of the judgment and sentence in each case used for enhancement and connecting them with the defendant. *Johnson v. State*, 725 S.W.2d 245, 247 (Tex. Crim. App. 1987). Once the State introduces a judgment and sentence and connects the defendant with them, we presume regularity in the judgment. *Id.* The burden then shifts to the defendant, who must make an affirmative showing of any defect in the judgment, whether that is to show no waiver of indictment or no transfer order. *Id.* Terrell does not argue that the pen packet was inadmissible; he contends that he was not required to do anything further because the pen packet affirmatively showed on its face that his age was sixteen. He must do more, however. The defect that he must show was that there was no order transferring him from juvenile court to district court. *See id.*; *Tex. Fam. Code Ann.* §§ 51.08, 54.02 (Vernon 2002 and Supp. 2006). He did not make that showing. Because the State made a prima facie showing of Terrell's prior conviction, the evidence is legally sufficient to support the trial court's finding. We overrule Terrell's second issue.

**Conclusion:** Having overruled Terrell's two issues, we affirm the trial court's judgment.

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**MODIFICATION OF DISPOSITION—  
TRIAL COURT RECITING THE NECESSARY  
STATUTORY LANGUAGE AND SPECIFICALLY  
STATING THE REASONS FOR MODIFYING THE  
DISPOSITION WAS SUFFICIENT FOR A COM-  
MITMENT TO TYC.**

¶ 07-4-9. **In the Matter of L.T.H.**, No. 03-06-00433-CV, 2007 Tex.App.Lexis 7340 (Tex.App.—Austin, 9/6/07).

**Facts:** On April 21, 2005, the juvenile court, after finding that L.T.H. had engaged in delinquent conduct by committing the offense of assault, placed L.T.H. on probation for nine months. On September 7, 2005, the State moved to modify the disposition, alleging that L.T.H. had violated a condition of his probation by failing to report to his probation officer. On October 6, after hearing evidence on the State's motion, the juvenile court modified the disposition, extending the probation until May 2006.

As a term and condition of his probation, L.T.H. was required to be inside the residence of his grandparents between the hours of 9:00 p.m. and 6:00 a.m. On February 28, 2006, the State moved to modify the disposition, alleging that L.T.H. failed to comply with this condition from November 1, 2005 to the date of the motion. At the July 6, 2006 modification hearing, L.T.H. pleaded true to the State's allegation.

Following L.T.H.'s plea, the juvenile court heard evidence from Cathy McLaugherty, a caseworker with the Travis County Juvenile Probation Department. McLaugherty testified that the department's recommendation was commitment to TYC. McLaugherty explained the department's reasoning to the juvenile court. After L.T.H. was placed on probation, L.T.H. had first spent 90 days in the department's "Impact Program," which is a "brief behavior modification program." Upon completion of that program, L.T.H. was allowed to return home. However, according to McLaugherty, L.T.H. "has absconded at least twice for a period of time." Additionally, the "family has a history of moving without notifying the Probation Department." McLaugherty continued,

We've . . . had psychological evaluations completed, attempted to engage the family in services through MHMR. We've also attempted to hook him up, if you will, with Southwest Key tracking to improve his accountability. And we've also tried an electronic monitor to improve his accountability and to get him to stay at home.

All of these efforts, McLaugherty testified, were unsuccessful in keeping L.T.H. at home.

When asked by the juvenile court if there were any other reasonable efforts that might be taken by the department, McLaugherty replied, "None that I'm aware of at this time. We've also attempted to staff him for our Intensive Supervision Probation program. And he was declined based on a history of both him and his family not cooperating and not following through with probation."

McLaugherty also testified that she believed commitment to TYC would be in the child's best interest because L.T.H. "has difficulty functioning in the community. We have not been able to get him to engage in probation." McLaugherty also believed that commitment to TYC was in "the community's best interest" because L.T.H.'s "offenses speak to the fact that he appears to be a danger to other people in the community."

On cross-examination, McLaugherty testified that the offenses to which she was referring were two misdemeanor assaults involving L.T.H.'s "peers at school." L.T.H. had never been accused of a felony offense, and L.T.H.'s last alleged misdemeanor assault occurred prior to his probation, in February 2005. McLaugherty also acknowledged that L.T.H. had been diagnosed as suffering from mild mental retardation and "cannabis abuse."

On redirect, McLaugherty testified that because of L.T.H.'s "absconder status," L.T.H. had been unavailable and out of contact with the department for approximately six months during the previous year. The juvenile court inquired as to the reason the department was unable to find L.T.H., and McLaugherty explained that during the period of time when he absconded, attempts were made to locate the family at their last known address.

The department discovered that the family had moved but was unable to obtain a new address.

L.T.H.'s grandmother was present at the hearing but, when given the opportunity by the juvenile court to speak, declined the opportunity. L.T.H.'s uncle, who had been considered as a possible placement, was not present at the hearing.

At the conclusion of the hearing, the juvenile court committed L.T.H. to TYC. This appeal followed.

**Held:** Affirmed

**Memorandum Opinion:** In his first point of error, L.T.H. asserts that the juvenile court's order was deficient because it failed to specifically state the reasons for the modification of the prior disposition. *Section 54.05(i) of the family code* provides, "The court shall specifically state in the order its reasons for modifying the disposition and shall furnish a copy of the order to the child." *Tex. Fam. Code Ann. § 54.05(i)* (West Supp. 2006). *Section 54.05(m)* requires that the juvenile court's order committing a child to the TYC include a determination that:

(A) it is in the child's best interests to be placed outside the child's home;

(B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home; and

(C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

*Id.* § 54.05(m) (West Supp. 2006).

The modifying order must specifically recite the conduct which prompted the trial court to modify its prior order of disposition. *K.W.H. v. State*, 596 S.W.2d 248 (Tex. Civ. App.—Texarkana 1980, no writ). Providing specific reasons for the disposition provides the child with notice of the court's reasons so that the child can determine the need for an appeal. *In re J.R.*, 907 S.W.2d 107, 110 (Tex. App.—Austin 1995, no writ). Additionally, a record is created for the appellate court to rely on in making its decision about whether sufficient evidence supports the juvenile court's findings and determinations. *In re L.R.*, 67 S.W.3d 332, 336-37 (Tex. App.—El Paso 2001, no pet.). Therefore, merely reciting statutory language will not be sufficient to justify the juvenile court's ruling. *In re J.T.H.*, 779 S.W.2d 954, 959 (Tex. App.—Austin 1989, no writ). However, statutory language supplemented by additional findings is sufficient to meet the requirements of the family code. *See In re P.L.*, 106

*S.W.3d 334, 338* (Tex. App.—Dallas 2003, no pet.) (order tracking language of *section 54.05* and explaining court's reasons was appropriate). The inclusion of the offense and its surrounding circumstances in an order consisting of mainly statutory language is sufficient. *J.T.H.*, 779 S.W.2d at 959.

In this case, the juvenile court's order specified that L.T.H. violated the condition of probation requiring him to "be inside the residence of [his] grandparents each day between 9:00 p.m. and 6:00 a.m., unless accompanied by [his] parent or guardian." The order further specified that L.T.H. "failed to be inside the residence of his [grandparents] on November 1, 2005 to present." Additionally, the order specified that L.T.H. "will not accept parental supervision and has demonstrated a disregard for all authority." The order then recited the necessary statutory language:

[L.T.H.], in [L.T.H.]'s home, cannot be provided the quality of care and level of support and supervision that [L.T.H.] needs to meet the conditions of probation. All reasonable efforts were made to prevent or eliminate the need for [L.T.H.]'s removal from home and to make it possible for [L.T.H.] to return home. The Court further finds that [L.T.H.] has been removed from his home and the Court approves of the removal. The Court further finds that the local resources of this Court are not adequate to meet such needs or accomplish the necessary protection of the public.

It therefore appears to the Court that the best interest of [L.T.H.] and of society will be served by committing [L.T.H.] to the care, custody, and control of the Texas Youth Commission.

**Conclusion:** In addition to reciting the necessary statutory language provided for in *section 54.05(m)*, *see id.*, the order complies with *section 54.05(i)* by specifically stating the reasons for modifying the disposition. L.T.H. "failed to be inside the residence of his [grandparents] on November 1, 2005 to present," which was a direct violation of one of the conditions of his probation. Additionally, the order specified that L.T.H. "will not accept parental supervision and has demonstrated a disregard for all authority." Finally, the juvenile court specified that the best interest "of society" would also be served by committing L.T.H. to TYC. *See J.T.H.*, 779 S.W.2d at 959 (holding that juvenile court's "listing of protection of the public as a factor" in committing juvenile to TYC, when combined with other reasons, satisfied specificity requirement). We hold that the order satisfies the specificity requirement of *section 54.05(i)*. We overrule L.T.H.'s first point of error.

**CRIMINAL PROCEEDINGS—  
JUVENILE TYC FELONY CONVICTIONS COM-  
MITTED PRIOR TO JANUARY 1, 1996, CANNOT  
BE CONSIDERED FOR ENHANCEMENT PUR-  
POSES IN ADULT COURT.**

¶ 07-4-10. **Jackson v. State**, No. 04-07-00083-CR, 2007 Tex.App.Lexis 7550 (Tex.App.—San Antonio, 9/19/07).

**Facts:** Jackson was indicted for murder, a first-degree felony with a punishment range of between five and ninety-nine years or life in prison. The indictment listed two previous felony convictions that were available for enhancement purposes: (1) a 1994 juvenile conviction for arson; and (2) a 1998 conviction for aggravated assault with a deadly weapon. During the punishment phase of trial, Jackson pleaded "not true" to both of the enhancement allegations. Pursuant to the Texas Penal Code, the trial court instructed the jury that it was to enhance Jackson's punishment range to between fifteen and ninety-nine years or life if it found that one of the enhancement allegations was true and to between twenty-five and ninety-nine years or life if it found that both enhancement allegations were true. The jury found both enhancement allegations true and assessed punishment at life in prison. This appeal followed.

**Held:** Affirmed

**Opinion:** Jackson contends that the trial court erred in including his 1994 juvenile conviction for enhancement purposes in the charge on punishment. When reviewing charge errors, we first determine whether error exists in the charge and then determine whether sufficient harm resulted from the error to require reversal. *Abdnor v. State*, 871 S.W.2d 726, 731-32 (Tex. Crim. App. 1994). Here, the State concedes that Jackson's 1994 juvenile conviction could not be used for enhancement purposes. Juvenile felony convictions can be considered for enhancement purposes only if the offense was committed on or after January 1, 1996. See *TEX. FAM. CODE ANN. § 51.13(d)* (Vernon Supp. 2007). Because Jackson's juvenile conviction occurred in 1994, the trial court erred in including the conviction as an enhancement in the charge.

We turn now to an analysis of the harm caused by the error. If the defendant made a timely objection at trial, he need only prove that he suffered "some harm" from the error in order to obtain a reversal. See *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). On the other hand, if the defendant did not make a proper objection, he must prove that the error caused him to suffer "egregious harm." See *id.* Because Jackson did not object to the trial court's inclusion of his 1994 conviction in the charge on punishment, we must determine whether the error caused "egregious harm." See *id.* To demonstrate "egregious harm," a defendant must show that the trial court's error affects the very basis of the case, de-

prives the defendant of a valuable right, or vitally affects a defensive theory. See *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). In determining the degree of harm caused by the error, we consider: (1) the entire jury charge; (2) the state of the evidence, including the contested issues and weight of probative evidence; (3) the argument of counsel; and (4) any other relevant information in the record. *Almanza*, 686 S.W.2d at 171.

In reviewing the jury charge, we note that even without the erroneous enhancement paragraph, a proper enhancement paragraph still remained in the charge. That is, even without the instruction as to Jackson's 1994 arson conviction, the jury could still properly consider Jackson's 1998 felony conviction for aggravated assault with a deadly weapon, which if found true would raise the minimum prison sentence from five to fifteen years. We also note that a murder conviction by itself authorized the jury to sentence Jackson to life in prison. See *TEX. PENAL CODE ANN. § 12.32* (Vernon 2003). Regarding the state of the evidence, the record shows that the murder at issue was violent and gruesome. The victim, a twenty-six-year-old mother of three, was stabbed fifty-four times. The record also shows considerable evidence of Jackson's guilt. Shortly before the victim died of her wounds, she told a neighbor and a police officer that "Tracy" stabbed her. In addition, the victim's blood was found on a bracelet and pair of shoes that Jackson was wearing when he was detained by police two days after the murder. Jackson did not provide any evidence to contradict the evidence against him. Regarding the State's closing arguments during the punishment phase of trial, the record shows that the prosecutor began her argument by stating:

We know how violent the murder was. We know that he struck her fifty-four times. Thirty-five deep stab wounds. Seven penetrating the lungs. We know that one of the wounds resulted in the knife staying in her body. How much time is enough time for that. Just that alone, the gruesome nature of this murder, that alone is worth life.

Although the prosecutor then added that Jackson had a prior history of crime and that twenty-five years was the minimum sentence for a habitual offender, the record shows that she did not overly emphasize the minimum sentence and that she instead focused on the "horrendous" nature of the murder and the impact of the murder on the victim's three children, one of whom witnessed the victim dying.

Considering the entire record, we hold that the trial court's error in including an instruction as to Jackson's 1994 conviction did not cause "egregious harm." See *Almanza*, 686 S.W.2d at 171. Accordingly, we overrule Jackson's sole issue.

**Conclusion:** We affirm the trial court's judgment.

**APPEALS—  
MANDAMUS GRANTED – TRIAL JUDGE MUST  
RULE ON WRIT OF HABEAS CORPUS.**

¶ 07-10-11. **In Re Altschul**, \_\_\_ S.W.3d \_\_\_, No. 10-07-00202-CV, 2007 Tex.App.Lexis 7758 (Tex.App.—Waco, 9/26/07).

**Facts:** In this original proceeding, Relator Todd-Warren Altschul seeks mandamus relief in the form of ordering Respondent, the Honorable Ralph T. Strother, Judge of the 19th District Court of McLennan County, to rule on Altschul's petition for writ of habeas corpus. Altschul's situation is familiar to us. *See In re Altschul*, 207 S.W.3d 427 (Tex. App.—Waco 2006, orig. proceeding). We discussed the subject matter of the habeas corpus relief that he seeks:

Altschul is currently imprisoned at the Eastham Unit of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). It is unclear what state felony sentence he is currently serving in TDCJ-ID, but he asserts that under the United States Sentencing Guidelines, his allegedly void prior juvenile conviction increased two federal sentences that he is apparently serving concurrently with his state felony sentence: an 87-month sentence for mail fraud, and a 120-month sentence for assaulting a federal officer. *See U.S.S.G. § 4A1.2(d)(2)(A), (B); § 4A1.3(a)* (providing for upward departures based in part on defendant's criminal history); *see, e.g., United States v. Holland*, 26 F.3d 26, 27-29 (5th Cir. 1994) (holding that district court properly used defendant's juvenile adjudications to calculate his criminal history score). Altschul, citing U.S. Supreme Court decisions and a U.S. Sentencing Guideline note, claims that before he can re-open his federal convictions and seek relief on the ground of a void state conviction, he must first successfully obtain relief in the state court of conviction. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994); *U.S.S.G. § 4A1.2, Application Note 6*.

Altschul's complaints center on his prior Texas juvenile adjudication. He alleges that in March 1989, in his juvenile delinquency trial (for criminal mischief, possession of a prohibited weapon, and burglary of a building), the jury found him not responsible by means of mental illness. *See TEX. FAM. CODE ANN. § 55.51* (Vernon 2002). Altschul alleges that the trial court disregarded the jury's verdict and found that he had engaged in delinquent conduct and ordered him into the custody of the Texas Youth Commission. Altschul claims that he was released from custody shortly thereafter. He also alleges that his appointed lawyer provided ineffective assistance

because he did not object to the trial court's alleged actions and did not appeal the adjudication. *Id. at 428-29* (footnotes omitted).

After noting that a habeas corpus proceeding is the proper forum for Altschul's complaints (in either the Court of Criminal Appeals or the court of Altschul's original juvenile adjudication—the 19th District Court of McLennan County), we held that we lacked jurisdiction over Altschul's original proceeding for a writ of habeas corpus. *Id. at 430-31*.

Thereafter, Altschul sought habeas corpus relief in the Texas Supreme Court, which has appellate jurisdiction over juvenile proceedings because they are considered civil actions. *See TEX. FAM. CODE ANN. § 56.01* (Vernon 2002). The supreme court transferred the habeas proceeding to the Court of Criminal Appeals. *In re Altschul*, No. 06-1048, <http://www.supreme.courts.state.tx.us/historical/2006/dec/122906.htm> (Tex. Dec. 29, 2006) (order). According to Altschul, the Court of Criminal Appeals declined to docket the transferred proceeding. He filed a petition for discretionary review of our decision, but the Court of Criminal Appeals refused it. *In re Altschul*, No. PD-0145-07, <http://www.cca.courts.state.tx.us/opinions/handdown.asp?FullDate=20070627> (Tex. Crim. App. June 27, 2007).

Altschul therefore filed an application for writ of habeas corpus in the 19th District Court of McLennan County, the court of his original juvenile adjudication. He complains in the instant proceeding that Respondent will not act on his application for writ of habeas corpus and that, because he has exhausted our suggested remedies and cannot file his application in another court, we should order Respondent to consider and rule on his application.

**Opinion:** "A court with mandamus authority 'will grant mandamus relief if relator can demonstrate that the act sought to be compelled is purely 'ministerial' and that relator has no other adequate legal remedy.'" *In re Piper*, 105 S.W.3d 107, 109 (Tex. App.—Waco 2003, orig. proceeding) (quoting *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 197-99 (Tex. Crim. App. 2003) (orig. proceeding)). In this case, Altschul tends to show that Respondent has a mandatory or ministerial duty to issue the writ.<sup>1</sup> *See id. at 109-10*. Given and assuming as true Altschul's allegations that the trial court in his juvenile proceeding disregarded a jury finding of "not responsible by means of mental illness" and that his attorney was ineffective in not objecting to or appealing the trial court's action, we view Respondent as having a duty to issue the writ and consider Altschul's allegations. *See id.* ("Assuming the facts as Piper states them, it would be beyond question that Judge Neill has a duty to issue the writ. . . . Assuming that this record speaks the true facts, Judge Neill thus would have a mandatory duty to issue the writ of habeas corpus. . . ."); *cf. TEX. CODE CRIM. PROC. CODE ANN. art. 11.15* (Vernon 2005) ("The writ of ha-

beas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever.").

1 Respondent did not file a response to Altschul's petition for writ of mandamus. The State filed a response asserting that *article 11.07* applies and that, from the face of Altschul's application, the trial court could have determined that there are no "controverted, previously unresolved facts material to the legality of the applicant's confinement." *TEX. CODE CRIM. PROC. CODE ANN. art. 11.07, § 3(c)* (Vernon 2005). But we seriously question the direct application of *article 11.07* to Altschul's juvenile adjudication that is the subject of his underlying habeas application because *article 11.07*, by its own terms, is limited to habeas relief from a felony judgment. *Id. art. 11.07, § 1*; see *Ex parte Valle*, 104 S.W.3d 888, 888-89 (Tex. Crim. App. 2003) (holding that *article 11.07* governing applications for writs of habeas corpus in which applicant seeks relief from felony judgment may not be used to challenge juvenile's imprisonment because adjudication of delinquency is not felony conviction). Altschul's underlying habeas application is brought under the authority of the Family Code (*section 56.01(o)*) and the *Texas Constitution (art. I, § 12, and art. V, § 8)*.

Generally, an appellate court may not afford mandamus relief over a trial court's refusal to consider a writ of habeas corpus application because the applicant can present the application to another district court. See *Piper*, 105 S.W.3d at 110; *In re Davis*, 990 S.W.2d 455, 457 (Tex. App.—Waco 1999, orig. proceeding). But a "technically available legal remedy will not defeat a petitioner's entitlement to mandamus relief when the remedy is 'so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate.'" *Davis*, 990 S.W.2d at 457 (citing *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 394 (Tex. Crim. App. 1994) (quoting *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987)), and *Kozacki v. Knize*, 883 S.W.2d 760, 762 (Tex. App.—Waco 1994, orig. proceeding)); see *Ex parte Hargett*, 819 S.W.2d 866, 868 (Tex. Crim. App. 1991) (under proper circumstances, applicant may pursue writ of mandamus when trial court refuses to consider habeas application) (citing *Von Kolb v. Koehler*, 609 S.W.2d 654 (Tex. Civ. App.—El Paso 1980, orig. proceeding)).

Given Altschul's predicament, *i.e.*, that his juvenile record is affecting his ability to re-open his federal sentences, and the fact that he can file his application only in the court of his juvenile adjudication,<sup>2</sup> he has no other available legal remedy, technically or otherwise, and he is entitled to mandamus relief.<sup>3</sup> See *Davis*, 990 S.W.2d at 457; see also *In re Debrow*, 2005 Tex. App. LEXIS 1769, 2005 WL 544031 (Tex. App.—San Antonio Mar. 9, 2005, orig. proceeding) (discussing juvenile's attempt to mandamus trial court to consider juvenile's habeas application); *In re Debrow*, 2004 WL 2612533,

2004 Tex. App. LEXIS 7146, (Tex. App.—San Antonio Aug. 11, 2004, orig. proceeding) (same); *In re Solis*, 2004 Tex. App. LEXIS 5245, 2004 WL 1336266 (Tex. App.—San Antonio June 16, 2004, orig. proceeding) (holding that defendant was entitled to writ of mandamus ordering trial court to consider and rule on his habeas corpus application).

2 See *MCLENNAN (TEX.) DIST. CT. LOC. R. 1.01.B*. ("all juvenile cases shall be filed in the 19th District Court"); see also *Altschul*, 207 S.W.3d at 430 ("And under *Valle*, the court of Altschul's original juvenile adjudication has authority to address Altschul's complaints in a habeas corpus proceeding because he alleges collateral consequences.") (citing *Valle*, 104 S.W.3d at 889-90, and *TEX. FAM. CODE ANN. § 56.01(o)*).

3 Should a party appeal the trial court's ruling on Altschul's habeas application, we would then appear to have appellate jurisdiction. See *Valle*, 104 S.W.3d at 890 & nn.12-13.

**Conclusion:** We conditionally grant the petition for writ of mandamus. Respondent is ordered to rule on Altschul's application for writ of habeas corpus within thirty days of the date of this opinion. The writ will issue only if Respondent does not timely act on the application.

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**MODIFICATION OF DISPOSITION—  
ANY ONE PROBATION VIOLATION (EVEN A  
“TECHNICAL” CONDITION) WILL SUPPORT A  
JUVENILE COURT’S ORDER TO REVOKE PRO-  
BATION.**

¶ 07-4-12. **In the Matter of E.B.R.**, No. 01-06-00955-CV, 2007 Tex.App.Lexis 7885 (Tex.App.—Houston [1st Dist], 10/4/07).

**Facts:** On September 1, 2006, the State filed a petition to modify E.B.R.'s disposition. In the petition, the State sought to revoke E.B.R.'s probation and requested that E.B.R. be committed to the TYC. In support of its request, the State alleged 20 violations of the conditions of E.B.R.'s probation. Specifically, the State alleged 20 separate instances of E.B.R.'s failure to comply with the rules of either the JJAEP or the residential center.

At the modification hearing, Belinda Gaines, principal of the JJAEP, testified for the State. Gaines testified that she met with E.B.R. three to five times in response to staff reports that E.B.R. had violated JJAEP rules. In conjunction with Gaines's testimony, eight disciplinary forms were admitted into evidence detailing E.B.R.'s rule-violative behavior at the JJAEP and at the residential center. When the first three of these forms were offered into evidence, the defense objected on hearsay grounds. The juvenile court sustained the objection for the first two forms, which had been authored by JJAEP

staff other than Gaines, but overruled the hearsay objection regarding a disciplinary form authored by Gaines ("the Gaines disciplinary form"). Ultimately, in addition to the the Gaines disciplinary form, seven other disciplinary forms were admitted as JJAEP business records through Gaines.

The Gaines disciplinary form described E.B.R.'s insubordinate behavior directed at Gaines and personally observed by her on August 23, 2006. Gaines testified that the reason she wrote the discipline report was because E.B.R. was rude and disrespectful toward her while she was in the process of correcting him for another rule infraction that had been reported by the staff. Although she did not witness the behavior that caused E.B.R. to be sent to her, Gaines personally observed the behavior she identified on the disciplinary form. The disciplinary form authored by Gaines's provides,

When correcting [E.B.R.] and another student he proceeded to tell me that the reason he is in trouble is because I always come in and scream at him like another teacher. He is rude and disrespectful. To my knowledge [E.B.R.] has been escorted from the class on 2 previous incidents today. He is chronically refusing to do what is asked without compliance. I had previously tried to assist him with math and he refused to comply.

In addition to the written explanation, Gaines also checked the following infractions on the form: "Insubordination/Disrespect towards staff or peers" and "Talking without permission." At the modification hearing, Gaines testified that E.B.R.'s conduct toward her, as described in the disciplinary form, violated the JJAEP's rules.

At the conclusion of the hearing, the juvenile court verbally identified seven violations of E.B.R.'s probation conditions. Specifically, the juvenile court found that E.B.R. had, in seven separate instances, violated either the JJAEP's rules or the residential center's rules.

The juvenile court signed an order modifying E.B.R.'s disposition. The court revoked E.B.R.'s probation and committed him to the TYC until his twenty-first birthday. In the modification order, the juvenile court identified the following five probation violations:

(1) On August 23, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Alternative Education Program by insubordination, disrespect towards staff or peers and talking without permission.

(2) On August 23, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Alternative Education Program by insubordination, disrespect towards staff or peers and gang activity.

(3) On August 11, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Residential Center by carving letters into the plaster on the wall.

(4) On August 23, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Residential Center by cursing, disrespect to staff and disrespect to juvenile.

(5) On August 27, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Residential Center by horse playing.

**Opinion:** Here, the the Gaines disciplinary form was not the proper subject of a *Confrontation Clause* objection because Gaines testified at the modification hearing. See *Grant v. State*, 218 S.W.3d 225, 232 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (clarifying that court's holding concerning testimonial statements is concerned only with descriptions made by non-testifying witnesses). The record reflects that the disciplinary form authored by Gaines, along with her testimony regarding E.B.R.'s insubordinate conduct toward her, supports the juvenile court's first written finding of a probation violation: "On August 23, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Alternative Education Program by insubordination, disrespect towards staff or peers and talking without permission." This one finding of a probation violation alone is sufficient to support the juvenile court's revocation of E.B.R.'s probation. See *In re T.R.S.*, 115 S.W.3d 318, 321 (Tex. App.—Texarkana 2003, no pet.) ("When the state's proof of any of the alleged violations of probation is sufficient to support a revocation of probation, the revocation should be affirmed."); see also *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. 1980) (holding in adult criminal case that probation may be revoked for violation of single condition).

As mentioned, on August 23, 2006, Gaines met with E.B.R. to address E.B.R.'s rule-violative behavior in the classroom. Gaines did not witness E.B.R.'s conduct in the classroom. E.B.R. argues that the first probation violation found by the juvenile court was partly based on hearsay because Gaines did not witness the incidents in the classroom that led E.B.R. to be sent to Gaines for corrective measures. Contrary to E.B.R.'s assertion, Gaines testified that the reason she wrote the August 23, 2006 disciplinary report was because appellant was rude and disrespectful toward her while she was in the process of correcting him for the classroom violations. Although she did not witness the behavior that caused E.B.R. to be sent to her, Gaines personally observed the rude and disrespectful behavior she detailed in the disciplinary form, which supports the juvenile court's first probation—violation finding.

E.B.R. acknowledges that, "it is true that the State's proof of any of the alleged violations is sufficient

to support a revocation of probation" but questions whether there is a reasonable probability that, but for such errors, the juvenile court would have revoked his probation based only on evidence that he was rude and disrespectful to Gaines. E.B.R. makes no argument that such conduct was not a violation of the JJAEP's rules and thus a violation of his probation. Rather, E.B.R. implies that the juvenile court would not have revoked his probation based on such a technical or minor violation alone.

The juvenile court 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.). More particularly, in a juvenile probation revocation hearing, the decision whether to revoke rests within the discretion of the trial court. *T.R.S.*, 115 S.W.3d at 320. When reviewing a court's modification of a juvenile's disposition on appeal, the controlling issue is whether the evidence is sufficient to support the court's finding, by a preponderance of the evidence, that the juvenile violated a condition of probation. *Id.* Here, the evidence, namely Gaines's testimony and the disciplinary form she authored, sufficiently support the juvenile court's first written finding.

We find no current law prohibiting a juvenile court from revoking juvenile probation for a technical violation. By analogy, courts have held, in criminal cases, that community supervision may be revoked for a violation of any condition, including violations of any single "technical" condition. *Nurridin v. State*, 154 S.W.3d 920, 924 (Tex. App.-Dallas 2005, no pet.).

Here, the probation revocation was supported by the juvenile court's first written finding. This finding was supported by evidence not subject to a *Confrontation Clause* objection. Thus, we conclude that, even if E.B.R.'s counsel erred by failing to lodge a *Confrontation Clause* objection to the disciplinary forms containing statements of non-testifying witnesses, appellant has not shown that there is a reasonable probability that, but for any such errors, the outcome of the modification hearing would have been different. *See Andrews*, 159 S.W.3d at 102.

In his first point of error, E.B.R. contends that two of the juvenile court's oral findings made at the conclusion of the modification hearing, describing E.B.R.'s probation violations, "cannot be used as support for the revocation" of E.B.R.'s probation because they were "deleted" from the juvenile court's written findings in the modification order. In his third point of error, E.B.R. asserts that the juvenile court abused its discretion when it found, "On August 27, 2006, [E.B.R.] failed to comply with the rules of the Juvenile Justice Residential Center by horseplaying."

As discussed, there is one sufficient ground for revocation: E.B.R.'s failure to follow the JJAEP's rules on August 23, 2006 by being insubordinate and disrespectful towards Gaines and by talking without permis-

sion. Thus, because one probation violation will support the juvenile court's order to revoke probation, we need not address E.B.R.'s contentions raised in points of error one and three. *See Sanchez*, 603 S.W.2d at 871.

**Conclusion:** We affirm the judgment of the juvenile court.

#### APPEALS—

**IF A JUVENILE'S PARENTS ARE CAPABLE OF RETAINING AN ATTORNEY ON APPEAL, BUT ELECT NOT TO DO SO, THE TRIAL COURT CAN ORDER THEM TO PAY FOR JUVENILE'S COUNSEL ON APPEAL.**

¶ 07-4-13. **In the Matter of A.G.N.**, No. 07-07-0312-CV, 2007 Tex.App.Lexis 7819 (Tex.App.—Amarillo, 9/28/07).

**Facts:** A.G.N., a juvenile, appeals an order of commitment to the Texas Youth Commission. Finding he is without appellate counsel and the record is incomplete, we abate and remand the case for proceedings consistent with this opinion.

On June 22, 2007, A.G.N. was committed to the Texas Youth Commission by indeterminate order modifying disposition. *Tex. Fam. Code Ann. § 54.05* (Vernon Supp. 2006).<sup>1</sup> His trial counsel, Vance Edward Ivy, filed a notice of appeal on July 9, 2007, and was thereafter granted leave to withdraw from the representation. On August 7, 2007, the juvenile court denied the application of A.G.N.'s mother for court-appointed counsel. We find no indication that A.G.N. has subsequently received appointed or retained appellate counsel.

<sup>1</sup> Further citation to *Tex. Fam. Code Ann.* (Vernon 2002 & Supp. 2006) shall be by the abbreviation "Section" followed by the relevant number.

The appellate record was due in this court by August 21, 2007. *Tex. R. App. P. 35.1*. We received the clerk's record on September 21, 2007, but have not received the reporter's record. On September 11, 2007, the reporter filed a status report that indicated A.G.N. had not requested preparation of the reporter's record. In a status report filed September 25, 2007, the reporter indicated on September 20, 2007, the mother of A.G.N. paid a deposit for preparation of the reporter's record.

A juvenile who may be found delinquent and subjected to loss of liberty has the right to appointed counsel. *See In re Gault*, 387 U.S. 1, 41, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *In re D.A.S.*, 973 S.W.2d 296, 298 (Tex. 1998). The Legislature has mandated that indigent juveniles receive the assistance of appointed counsel on appeal. *Sections 51.10(f)(2) and 56.01(d)(2),(3)*. Once a juvenile expresses the desire to appeal by filing a notice of appeal "[c]ounsel shall be appointed under the stan-

dards provided in *Section 51.10* of this code unless the right to appeal is waived in accordance with *Section 51.09* of this code." *Section 56.01(f)*. "A child may be represented by an attorney at every stage of proceedings under this title including . . . : (8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title." *Section 51.10(a)*.

This case potentially raises the issue of a juvenile's right to appellate counsel when his or her parents are capable of retaining an attorney but do not engage counsel for the child. Under such circumstances *Section 51.10* further provides:

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

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

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

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

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

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

*Section 51.10 (d)*.

The court may also appoint counsel in any case it deems representation necessary to protect the interests of the juvenile. *Section 51.10(g)*.

"The court may enforce orders under Subsection (d) by proceedings under *Section 54.07* or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under *Section 54.07*." *Section 51.10(e)*.

Conversely, if the court determines a juvenile's parents are "financially unable to employ an attorney" for the child, it shall appoint an attorney. *Section 51.10(f)*. Counsel appointed under *Section 51.10 (f)* or *(g)* may be compensated from the general fund of the county and the juvenile's parents ordered to reimburse the county for fees it pays appointed counsel. *Section 51.10 (k)*. For the purpose of determining indigency, the court shall consider the assets and income of the child, his or her parents, and any other person responsible for the support of the child. *Section 56.01(m)*.

**Held:** Abate and Remand

**Opinion:** While the Family Code's mechanism under Title 3 for ensuring counsel on appeal is relatively detailed, the same may not be said for the provision for payment of costs attending appeal in the absence of indigency. As noted above, this court has received the clerk's record; however, counsel for A.G.N. may desire supplementation. More problematic is the issue of payment for the reporter's record. According to the reporter's current status report, the transcript of A.G.N.'s modification hearing is approximately 120 pages covering four days of testimony. This court has received notification that the mother of A.G.N. recently tendered a deposit for preparation of the reporter's record, but this alone does not eradicate the possibility of future delay for non-payment of this cost. *Section 56.01(l)* authorizes the court, in the absence of indigency, to order the payment of costs on appeal by the child, his or her parent, or person responsible for support. Thus, should the court determine that a juvenile is not entitled to a free reporter's record under *Section 56.02*, it is empowered to make orders sufficient for payment of the clerk's record and reporter's record by the child, his or her parents, or other persons responsible for support.

In light of the foregoing, we abate the appeal and remand the case to the County Court at Law No. 1 of Potter County for further proceedings. Upon remand, the trial court shall use all necessary means, including a hearing if the court finds it necessary, to determine the following:

1. whether appellant desires to prosecute the appeal;
2. whether appellant is indigent, applying the standard of *Section 56.01(m)*;
3. whether appellant is entitled to appointed counsel due to indigence;
4. whether appointment of an attorney for appeal is necessary to protect the interests of appellant according to *Section 51.10(g)*;
5. after applying *Section 51.10(d)*, whether to order appellant's father and mother to retain an attorney for appellate representation of appellant;
6. whether appellant is entitled to a free reporter's record under *Section 56.02*;
7. in the absence of an indigency finding, whether to order appellant's parents to pay the costs for preparation of the clerk's record and reporter's record.

If the trial court determines that A.G.N. desires to prosecute the appeal, it shall make all orders necessary to ensure representation and a complete record on appeal.

This court finds no indication that the case comes within *Section 56.01(n)*; however, if it does, the trial court shall also certify that A.G.N. is entitled to appeal under *Section 56.01(n)(1)* or *(2)* or that he is not entitled to appeal and the reason.

**Conclusion:** The trial court shall cause any hearing held to be transcribed and shall conduct it in a manner designed to protect A.G.N.'s rights which may include presentation of testimony in any manner permitted by law. The trial court shall (1) execute findings of fact and conclusions of law addressing the foregoing issues, (2) cause to be developed a supplemental clerk's record containing the findings of fact and conclusions of law and all orders and certificates it may issue as a result of compliance with this order, and (3) cause to be developed a reporter's record transcribing the evidence and arguments presented at any hearing conducted.

Additionally, the trial court shall file the supplemental record with the clerk of this court on or before November 9, 2007. Should further time be required by the trial court to perform these tasks, it shall be so requested before November 9, 2007.

Finally, if the trial court determines A.G.N. is entitled to appointed counsel and appoints counsel, it shall inform this court of the name, address, and state bar number of the appointed counsel.

Per Curiam

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**ORDERS AND JUDGEMENTS—  
A JUVENILE REFEREE'S ORDER TAKES EFFECT WHEN HE OR SHE SIGNS IT.**

¶ 07-4-14. **In the Matter of S.G.**, No. 11-05-00360-CV, 2007 Tex.App.Lexis 7807 (Tex.App.—Eastland, 9/27/07).

**Facts:** In October 2004, the juvenile court found that S.G. had engaged in delinquent conduct. The court entered a judgment of delinquency and ordered that S.G. be placed on probation at Settlement Home in Austin. However, S.G. was unsuccessfully discharged from Settlement Home. Consequently, the court modified the terms of S.G.'s probation and placed her in the Rockdale Juvenile Facility. Pursuant to the court's order, S.G. was to remain at Rockdale until successfully discharged, and the period of probation was to expire "June 31, [sic] 2005." On June 9, 2005, S.G. successfully completed the treatment program at Rockdale and was discharged. On that same date, an agreed motion and order modifying the terms of S.G.'s probation—to the custody of her grandmother until June 30, 2005—was signed by S.G., her attorney, the assistant district attorney, and an associate judge/referee. The juvenile court judge signed the agreed motion and order on June 24, 2005. The terms and conditions of probation that were attached to the agreed motion and order required S.G. to be in her grandmother's residence between the hours of 8:00 p.m. and 6:00 a.m. This curfew requirement was new; the previous order placing S.G. at Rockdale did not contain such a provision. The State filed a motion to modify on June 28, 2005, alleging that S.G. had violated the terms of her

probation by breaking curfew on June 21, 2005. This allegation was found to be true, and the terms of S.G.'s probation were again modified—this time committing her to TYC. It is from this final modification order that S.G. appeals.

S.G. contends in her sole issue that the court erred in finding that she violated the terms of her probation because there was no valid court order in effect at the time of her June 21 violation. S.G. asserts that the order was not enforceable until June 24 when it was signed by the juvenile court judge. While we agree with S.G. that associate judges, referees, and masters are not vested with the authority to act as judges, *In re D.G.*, No. 05-01-00208-CV, 2002 Tex. App. LEXIS 1628, 2002 WL 338875 (Tex. App.—Dallas Mar. 5, 2002, *pet. denied*) (mem. op., not designated for publication), we cannot conclude that the order did not take effect until it was signed by the juvenile court judge.<sup>1</sup>

<sup>1</sup> We note that, in a suit affecting the parent-child relationship, an order signed only by an associate judge constitutes a final order of the referring court if the order is an agreed order, a default order, or a temporary order. *TEX. FAM. CODE ANN. §§ 201.007(a)(14), (c); 201.016(c)* (Vernon Supp. 2006). The Family Code, however, contains no such provision for an agreed order signed by a referee in a juvenile case.

**Held:** Affirmed.

**Opinion:** The Texas Family Code provides that a county juvenile board may appoint a referee to make detention determinations and conduct hearings under the Juvenile Justice Code. *TEX. FAM. CODE ANN. § 51.04(g)* (Vernon 2002). When a referee conducts a hearing<sup>2</sup> on a petition to modify the disposition in a juvenile case, the referee must, at the conclusion of the hearing, transmit written findings and recommendations to the juvenile court judge, who "shall adopt, modify, or reject the referee's recommendations not later than the next working day after the day that the judge receives the recommendations. Failure to act within that time results in release of the child by operation of law."<sup>3</sup> *TEX. FAM. CODE ANN. § 54.10(d)* (Vernon Supp. 2006); *see also TEX. FAM. CODE ANN. § 54.05* (Vernon Supp. 2006). *Section 54.10(d)* also provides that a referee's "recommendation that the child be released operates to secure the child's immediate release subject to the power of the juvenile court judge to modify or reject that recommendation." In this case, the agreed order operated to release S.G. into the custody of her grandmother. Therefore, we are of the opinion that it took effect immediately upon being signed by the referee.

<sup>2</sup> We note that it does not appear that a hearing was conducted with respect to the agreed order. The court's docket sheet shows that the agreed order was "submitted" to the court.

3 In this case, neither party contends that any failure to timely act occurred or that any such failure should have resulted in the release of S.G. from the terms and conditions of her probation, and there is nothing in the record indicating when the juvenile [\*5] court judge received the agreed order

Even if the agreed order did not operate as a "release," various provisions in the Family Code provide that orders of referees are enforceable when made. In addition to providing that a referee's recommendation of release "operates to secure the child's immediate release subject to the power of the juvenile court judge to modify or reject that recommendation," *Section 54.10(d)* also provides that other recommendations made by a referee remain in effect unless altered by the juvenile court judge or by operation of law. Similar to *Section 54.10(d)*, *TEX. FAM. CODE ANN. § 54.01(l)* (Vernon Supp. 2006) provides for a referee's order at a detention hearing to take immediate effect and states that the "effect of an order detaining a child shall be computed from the time of the hearing before the referee." If the agreed order had not taken effect at the time it was signed by the referee, S.G. would still have been subject to the disposition order previously entered by the juvenile court judge, which placed responsibility for S.G.'s care and placement with the Travis Juvenile Probation Department instead of the release of S.G. to her grandmother.

We hold that the order took effect when the referee signed it because the orders of referees are effective immediately if they recommend that the juvenile be released and because, even though they may not be final judgments, the orders of referees are otherwise enforceable until the juvenile court judge adopts, modifies, or rejects them or until they are altered by operation of law.

**Conclusion:** Since the order was in effect at the time that S.G. violated its terms, the trial court did not err in revoking S.G.'s probation and committing her to TYC. S.G.'s sole issue on appeal is overruled.

The order of the trial court is affirmed.

***DISPOSITION PROCEEDINGS—***  
**A TRIAL COURT IS NOT REQUIRED TO EXHAUST ALL POSSIBLE ALTERNATIVES BEFORE SENDING A JUVENILE TO THE TYC.**

¶ 07-4-15. **In the Matter of J.R.C.**, No. 06-07-00018-CV, 2007 Tex.App.Lexis 8059 (Tex.App.—Texarkana, 10/11/07).

**Facts:** J.R.C., a juvenile, had previously been found to have engaged in delinquent conduct—indecency with a child by contact—and had been placed on probation. Later, the trial court found that J.R.C. had violated the terms of his probation, but the court declined to revoke his probation, instead placing him in the custody of the

Brookhaven Youth Ranch with directions to successfully complete the residential placement. Approximately four months after being placed at Brookhaven, J.R.C. was discharged from that facility amid reports that he had not progressed in his anger and impulse control and had exhibited behavioral problems at the on-campus school there. Ultimately, on the State's motion to modify disposition, J.R.C. was sent to the Texas Youth Commission (TYC) for an indeterminate commitment.

Appealing that modification, J.R.C. contends only that the trial court abused its discretion by committing him to the TYC rather than Tarrant County's Specialized Treatment for Offenders Program (STOP).<sup>1</sup> We affirm the disposition by the trial court.

1 STOP provides a residential environment option for certain male juveniles who have been adjudicated for sexual conduct and have been ordered to participate in residential treatment before they return home.

J.R.C. asserts that STOP was an available option; that there was no showing that public safety was better served by sending him to the TYC instead; that there was no showing that the TYC could better rehabilitate him than STOP; and that there was a showing that his mother could more easily participate if he were sent to STOP. J.R.C. also cites evidence that his first counselor at Brookhaven discontinued her services, resulting in J.R.C.'s "discharge" because of scheduling problems,<sup>2</sup> and that, before J.R.C. was sent to Brookhaven, a second counselor, Parnell Ryan, had strongly recommended outpatient treatment for J.R.C. J.R.C. adds that there was evidence that his time at Brookhaven was marked by a number of assaults on him by fellow students and that fellow students urinated or vomited on items belonging to him. J.R.C.'s family members all testified that they wanted him to go to the local STOP program and that committing him to the TYC would make things only worse. J.R.C. argues that the trial court had inadequate evidence to justify sending him to the TYC rather than using one of the other options.

2 The document involved—as the witness explained—incorrectly stated that his counseling with Debra Moore had ended unsuccessfully, rather than simply noting that there was a change in counselor.

The State responds by suggesting that it had no duty to show that the TYC commitment was superior to STOP and that we should not in any fashion consider whether the trial court failed to exhaust other alternatives to a TYC placement. The State would have us focus solely on whether the court abused its discretion by removing J.R.C. from the home. In other words, the State takes the position that we cannot review the nature of the placement (after removal), but only whether the court had evidence to justify removing J.R.C. Under the State's

formulation, we would look at only whether the State met the three-pronged test used to determine whether a court is authorized to remove a juvenile from his or her home. *See TEX. FAM. CODE ANN. § 54.05(m)(1)(A), (B), and (C)* (Vernon Supp. 2006).<sup>3</sup> The ultimate conclusion of the State's position is that trial courts can, without considering any alternatives, automatically choose to place all juvenile defendants into the TYC, so long as they have been properly removed from their homes. We disagree.

3 As support for its argument, the State analogizes to the procedure followed in adult convictions. It argues that appellate courts would not review whether a defendant was sentenced to a particular type of imprisonment, or in a particular type of facility. Thus, the State posits, the particular disposition made in a juvenile case should not be reviewable.

**Held:** Affirmed.

**Opinion:** The State argues that *In re K.K.D., No. 03-03-00772-CV, 2004 Tex. App. LEXIS 7166 (Tex. App.—Austin Aug. 12, 2004, pet. ref'd)* (mem. op.), provides the proper standard of review. In that case, the Austin court of appeals recognized that the Texas Family Code does not require the State to investigate every possible alternative to TYC commitment. *See TEX. FAM. CODE ANN. § 54.04(i)(1)* (Vernon Supp. 2006). *K.K.D.* did not, however, hold that an argument about proper placement could not be raised or that evidence as to proper placement was irrelevant to the issues that were raised.

In fact, *K.K.D.* held that, once a juvenile court has properly made the findings required by *Section 54.04(i)(1)*, to place a juvenile on probation outside his or her home or to commit the juvenile to TYC, the court then has broad discretion to determine the suitable disposition of the juvenile. *See K.K.D., 2004 Tex. App. LEXIS 7166, at \*5* (citing *In re C.C., 13 S.W.3d 854, 859 (Tex. App.—Austin 2000, no pet.)*). The statutorily required findings are stated in the following way:

(i) If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court:

(1) shall include in its order its determination that:

(A) it is in the child's best interests to be placed outside the child's home;

(B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and

(C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that

the child needs to meet the conditions of probation . . . .

*TEX. FAM. CODE ANN. § 54.04 (i)(1)*.

In this case, those findings were explicitly made in the order of commitment and have not been challenged on appeal. Thus, the trial court had broad discretion in choosing the disposition for *J.R.C.* *See C.C., 13 S.W.3d at 859*.

The State also directs our attention to *In re G.L.C.P., No. 02-06-00293-CV, 2007 Tex. App. LEXIS 3621 (Tex. App.—Fort Worth May 10, 2007, no pet.)*, and *In re J.L.C., No. 2-06-00252-CV, 2007 Tex. App. LEXIS 3063, at \*9 (Tex. App.—Fort Worth Apr. 19, 2007, no pet.)*. In *G.L.C.P.*, the Fort Worth appellate court addressed a similar argument while determining whether commitment to the TYC was an available disposition. That court determined that the TYC was an available disposition and, after noting that the record showed that prior efforts to keep *G.L.C.P.* at home had failed, concluded that it was in his best interest to be placed outside the home and that the trial court had not abused its discretion by committing him to the TYC.

In *J.L.C.*, the Fort Worth court refused to conclude that the trial court abused its discretion by finding that commitment was a more appropriate disposition in the absence of any testimony to show why the "Family Preservation" aspect of Tarrant County Juvenile Services would be a viable option. *J.L.C., 2007 Tex. App. LEXIS 3063, at \*9*.

The San Antonio court of appeals was faced with a case having a different posture, in *In re S.G., No. 04-04-00475-CV, 2005 Tex. App. LEXIS 2560, at \*5 (Tex. App.—San Antonio Apr. 6, 2005, no pet.)*. In that modification case, the State's witness admitted (and the trial court found) that many local remedies had been exhausted and suggested it was time for the State, rather than the county, to begin paying for *S.G.*'s upkeep. The trial court modified the disposition from probation and committed her to the TYC. The appellate court found that the stated reason to send the juvenile to the TYC—making the State pay to care for *S.G.*—did not conform to the stated goals of the juvenile justice code and, thus, the trial court had no proper reason to commit *S.G.* to the TYC. *Id.*<sup>4</sup> The El Paso court of appeals also addressed a similar issue in a modification case in *In re E.R.L., 109 S.W.3d 123 (Tex. App.—El Paso 2003, no pet.)*. The court considered itself "informed" by the required findings set out in *Section 54.04(i)*, and then looked to see if there was evidence to support the decision of the trial court to place the juvenile in a program that was not the least restrictive available. The appellate court ultimately concluded that there was evidence supporting the trial court's decision to send *E.R.L.* to the TYC, even though other options were available.

4 *See In re L.D., No. 12-06-00193-CV, 2007 Tex. App. LEXIS 1714 (Tex. App.—Tyler Mar. 2, 2007, no pet.)*. In

that appeal, the monetary problem was also raised, but the trial court had made explicit findings that the child was a danger to the public, and it was apparent that the court had considered the progressive sanction guidelines found in *Sections 59.005-59.015 of the Texas Family Code*, and decided that deviating from those guidelines and committing L.D. to the TYC was appropriate. Thus, the appellate court concluded that the trial court did not abuse its discretion by so deciding.

Neither the State's premise nor its conclusion are supported by the cited cases. The State's comment that it did not have a duty to show that a TYC commitment was a superior result is correct. But that premise does not lead to the conclusion that evidence of the nature or existence of alternatives to TYC commitment is irrelevant, or that such a determination is effectively nonreviewable on appeal. None of the cases cited by the State explicitly takes the position argued by the State in this appeal, and we reject the proposition that the choice of disposition of a juvenile may never be reviewed by an appellate court—that only the decision to commit may be reviewed.

Modifying a juvenile's probation is a decision which is within the sound discretion of the trial court; such a decision can be reversed only on a finding that the trial court abused that discretion. *TEX. FAM. CODE ANN. § 54.05* (Vernon Supp. 2006); *In re J.P.*, 136 S.W.3d 629, 632 (Tex. 2004); *In re M.A.*, 198 S.W.3d 388, 390-91 (Tex. App.—Texarkana 2006, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably or without reference to guiding rules or principles. *M.A.*, 198 S.W.3d at 391. A trial court does not abuse its discretion if some evidence supports the decision. *J.L.C.*, 2007 Tex. App. LEXIS 3063, at \*9; see *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 379 (Tex. 2001); see also *Estrello v. Elboar*, 965 S.W.2d 754, 758 (Tex. App.—Fort Worth 1998, no pet.); *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied). In other words, whether there is factually sufficient evidence to support the trial court's findings is a relevant consideration in determining whether the trial court abused its discretion. *In re C.J.H.*, 79 S.W.3d 698, 702 (Tex. App.—Fort Worth 2002, no pet.); see *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *Tex. Dep't of Health v. Buckner*, 950 S.W.2d 216, 218 (Tex. App.—Fort Worth 1997, no writ).

We must review the sole appellate issue in light of the discretionary authority of the trial court. A trial court is not required to exhaust all possible alternatives before sending a juvenile to the TYC. *M.A.*, 198 S.W.3d at 391. The Texas Family Code permits a trial court to decline third and fourth chances to a juvenile who has abused a second chance. *J.P.*, 136 S.W.3d at 633.

**Conclusion:** This record contains some evidence about the nature of the STOP program, and some evidence about its potential usefulness in rehabilitating J.R.C.

There was also evidence, however, that J.R.C. had failed to complete one type of local program successfully, and the managers of that program indicated that he had not altered his behavior. There was evidence that J.R.C. was on the receiving end of the hostility of other students at Brookhaven because he provoked them. There is nothing shown by this record that would require the trial court to commit J.R.C. to STOP rather than to the TYC. The evidence was thus not such as to require us to conclude that the trial court abused its discretion by deciding to commit J.R.C. to the TYC.

We affirm the judgment.

**ATTORNEY GENERAL—**

**A SCHOOL DISTRICT MAY FILE A NEW FAILURE TO ATTEND SCHOOL COMPLAINT, LISTING SOME OF THE SAME ABSENCES AS WELL AS A SUBSEQUENT TENTH UNEXCUSED ABSENCE, AS LONG AS IT IS FILED WITHIN TEN SCHOOL DAYS OF THE TENTH ABSENCE LISTED IN THE COMPLAINT OR REFERRAL.**

¶ 07-4-16. **Texas Attorney General Opinion No. GA-0574**, 2007 Tex.AG Lexis 77 (10/02/07).

**Subject:** School district responsibilities under *section 25.0951(a) of the Texas Education Code* (RQ-0584-GA)

You ask two questions about a school district's responsibility to file a complaint for failure to attend school under *section 25.0951(a) of the Texas Education Code*.

A child between the ages of six and eighteen generally must attend school "each school day for the entire period the program of instruction is provided." *TEX. EDUC. CODE ANN. §25.085(a)-(b)* (Vernon 2006). A child who is required to attend school commits an offense if, without a legitimate excuse, he or she "fails to attend school on 10 or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period." *Id.* § 25.094(a); see also *id.* § 25.087 (establishing guidelines for excused absences). Under section 25.0951, a school district must initiate legal action against a child or the parent of a child who fails to comply with the statutory school-attendance requirements. See *id.* § 25.0951. In the following excerpt from section 25.0951, relevant legislative amendments to section 25.0951 adopted during the 2007 legislative session are indicated:

(a) If a student fails to attend school without excuse on 10 or more days or parts of days within a six-month period in the same school year, a school district shall within 10 [seven] school days of the student's 10th [last] absence:

(1) file a complaint against the student or the student's parent or both in a county, justice, or municipal court for an offense under

Section 25.093 ["Parent Contributing to Non-attendance"] or 25.094 ["Failure to Attend School"], as appropriate, or refer the student to a juvenile court in a county with a population of less than 100,000 for conduct that violates Section 25.094; or

(2) refer the student to a juvenile court for conduct indicating a need for supervision.

...

....

(d) A court shall dismiss a complaint or referral made by a school district under this section that is not made in compliance with this section.

In 2006 this office interpreted section 25.0951 as it was written at that time. *See generally* Tex. Att'y Gen. Op. No. GA-0417 (2006). In that opinion, GA-0417, this office determined that section 25.0951(a) requires a school district to file a complaint or referral<sup>2</sup> within seven days of the student's tenth unexcused absence. *See id.* at 5. Failure to do so, the opinion concluded, "inevitably leads to the complaint's or referral's dismissal." *Id.* Moreover, if a complaint is dismissed as untimely, subsection (a) prohibits a school district from refileing the exact same complaint based upon the same ten unexcused absences—but "[i]f the student has failed to attend school without excuse since the original complaint was filed," the school district must file a new complaint "that lists the latest absence as well as some or all of the absences listed in the original complaint" within seven school days of the latest absence. *Id.* at 6. Thus, each subsequent absence that occurs within a six-month period of the same school year renews the seven-day period within which the school district may file a timely complaint. *See id.*

2 Throughout the remainder of this opinion, we will use the term "complaint" to encompass both a complaint filed in a county, justice, or municipal court under section 25.0951(a)(1) and a referral to juvenile court made under section 25.0951(a)(2).

Question 1: You now ask whether "a school district's failure to file a truancy complaint . . . under § 25.0951(a) . . . within the seven[-]day period after the tenth unexcused absence affect[s] in any way its ability to file a complaint . . . against the same student based on a subsequent absence, assuming that the most recent ten absences are within a sixth-month period." Request Letter, *supra* note 1, at 1. Nothing in the statute forbids a school district from filing a new complaint listing some of the absences listed in the dismissed complaint in addition to a new, subsequent tenth unexcused absence, so long as all the absences have occurred within a six-month period of the same school year.

**Opinion:** A recent legislative amendment to section 25.0951(a) supersedes a portion of GA-0417's conclusion. Under the amendment, a school district must file the complaint within ten, not seven, school days.<sup>3</sup> *See* Act of May 23, 2007, 80th Leg., R.S., ch. 984, § 1, 2007 Tex. Sess. Law Serv. 3463, 3463 (Vernon) (to be codified at *TEX. EDUC. CODE ANN.* § 25.0951(a)). A second amendment, changing the word "last" to "10th," codifies that portion of GA-0417 concluding that a school district must file a complaint after the student's tenth absence. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 908, § 31, 2007 Tex. Sess. Law Serv. 2277, 2291 (Vernon) (to be codified at *TEX. EDUC. CODE ANN.* § 25.0951(a)); House Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. Comm. Substitute H.B. 2884, 80th Leg., R.S., § 24 (2007). As the second amendment makes clear, a student's tenth unexcused absence triggers the school district's responsibility to file a complaint. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 908, § 31, 2007 Tex. Sess. Law Serv. 2277, 2291 (Vernon) (to be codified at *TEX. EDUC. CODE ANN.* § 25.0951(a)). *See generally* *TEX. GOV'T CODE ANN.* § 311.025(b) (Vernon 2005) (directing that multiple amendments to the same statute enacted at the same legislative session should be harmonized if possible to effectuate each). Otherwise, GA-0417's construction of section 25.0951(a) is unaffected.

3 The bill amending section 25.0951(a) to increase the filing period from seven to ten school days became effective immediately. *See* Act of May 23, 2007, 80th Leg., R.S., ch. 984, § 2 [Tex. S.B.1161]; *see also* H.J. of Tex., 80th Leg., R.S. 5268-69 (2007) (recording a vote of 144-0 in favor of passage on the bill's third reading); S.J. of Tex., 80th Leg., R.S. 986-87 (2007) (recording a vote of 30-0 in favor of passage on the bill's third reading).

Question 2: You also ask whether a school district that fails to file a timely complaint under section 25.0951(a) suffers any penalty under the Education Code other than the dismissal of the complaint under section 25.0951(d). We find no other penalties in the Education Code.

**Conclusion:** Under *section 25.0951(a) of the Education Code*, a school district must file a complaint or referral against a student who has accumulated ten or more unexcused absences within a six-month period in the same school year within ten school days of the student's tenth absence. Failure to file within the requisite time will lead to dismissal of the complaint or referral, but the school district may file a new complaint, listing some of the same absences as well as a subsequent tenth unexcused absence, within ten school days of the tenth absence listed in the complaint or referral. To the extent Attorney General Opinion GA-0417 construes section 25.0951(a) to require filing a complaint or referral within seven

school days, it has been superseded by amendments to the statute.

Other than requiring a court to dismiss the complaint or referral, the Education Code imposes no penalties on a school district that fails to file a complaint or referral within ten school days of the student's tenth unexcused absence.

—————

**DETERMINATE SENTENCE ACT—  
TRIAL COURT LACKED JURISDICTION TO  
REDUCE DETERMINATE SENTENCE TERM  
AFTER COURT'S PLENARY POWER HAD EX-  
PIRED.**

¶ 07-4-17. **In the Matter of F.M.**, No. 08-06-00194-CV, 2007 Tex.App.Lexis 8497 (Tex.App.—El Paso, 10/11/07).

**Facts:** This is the State's appeal from the district court's order reducing F.M.'s twenty-year determinate sentence, being served in the Texas Department of Criminal Justice ("TDCJ"), to fourteen years.

On October 26, 1992, F.M., a juvenile, was charged with committing the offenses of aggravated kidnaping and aggravated sexual assault. The petition was filed pursuant to *Tex. Fam. Code Ann. § 54.04(d)(3)*, the determinate sentencing statute. A trial was held in which the jury found that F.M. had committed aggravated kidnaping and aggravated sexual assault and adjudicated him delinquent. F.M. elected to be sentenced by the court. Judge Philip R. Martinez of the 327th District Court, a designated Juvenile Court, signed a Judgment and Disposition Order of Commitment to the Texas Youth Commission on December 8, 1992, sentencing F.M. to a determinate sentence of twenty years. On December 21, 1992, Judge Martinez signed a Judgment Nunc Pro Tunc, correcting the Penal Code sections of the two adjudicated offenses.

F.M. was to turn eighteen years of age on October 18, 1993, which subjected him to transfer to the Institutional Division of the TDCJ. Pursuant to *Tex. Fam. Code Ann. § 54.11*, the Texas Youth Commission requested that a release and transfer hearing be set before Judge Martinez. On October 1, 1993, following a hearing held on September 10, 1993, Judge Martinez ordered F.M. to be committed to the TDCJ to finish the remainder of his twenty-year determinate sentence. No appeal was ever filed from this determination.

On February 14, 2006, F.M. filed a Motion for Review Hearing which also requested that Appellant be brought to El Paso County to consult with counsel and to attend a hearing. On July 5, 2006, a hearing was held in the 65th District Court, a designated Juvenile Court, before Judge Alfredo Chavez, on a number of motions filed by F.M. All of the motions were denied, except for a Motion for Forensic DNA Testing, and a Motion To Suspend Further Execution of the Sentence/Motion To

Have Sentence Reduced. The court ordered the sentence reduced to fourteen years. It is from this order that the State appeals.

In Issue Nos. One and Two, Appellant (the State) asserts that the court lacked jurisdiction to reduce F.M.'s sentence and that the plenary power of the court had expired, thereby causing the court's reduction of the sentence to be void, because no law or rule of procedure authorized the reduction.

**Held:** District Court order set aside.

**Opinion:** Subject-matter jurisdiction is an essential part of the authority of a court to decide a case, and it is never to be presumed and cannot be waived. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993). The reviewing court determines whether subject-matter jurisdiction exists as a question of law, subject to *de novo* review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

With regard to Issue No. One, following the release hearing required by *Section 54.11 of the Family Code*, the trial court had the authority to: (1) recommit the juvenile to TYC without a determinate sentence; (2) transfer the juvenile to TDCJ; or (3) discharge the juvenile. *Tex. Fam. Code Ann. § 54.11 (i) and (j)*. If the juvenile is transferred to the Texas Department of Criminal Justice, as occurred in this case, he comes under the authority of the Board of Pardons and Paroles. *See In the Matter of J.G.*, 905 S.W.2d 676, 682 (Tex. App.—Texarkana 1995, writ denied). The Parole Board does have the constitutional authority to provide an inmate with the opportunity for parole, pursuant to Section 498.053 of the Texas Government Code. *In the Matter of S.C.*, 790 S.W.2d 766, 770 (Tex. App.—Austin 1990, writ denied). However, we are unaware of, and have been unable to find, any indication that the juvenile court remains vested with the ability to reduce the determinate sentence of an inmate incarcerated at the TDCJ.

Furthermore, with regard to Issue No. Two, an appeal may be taken from an order, entered under *Family Code Section 54.11(i)(2)*, transferring the person to the custody of the Institutional Division of the TDCJ. *Tex. Fam. Code Ann. § 56.01(c)(2)*. *Section 56.01(b) of the Family Code* states that the requirements governing an appeal are as in civil cases generally. *See Tex. Fam. Code Ann. § 56.01(b)*. As noted above, the record indicates that no appeal was taken after F.M. was transferred to the TDCJ.

Judicial action taken after a trial court's plenary power has expired is a nullity. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam). Absent the filing of a motion for new trial, 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) & (e)*. No motion for new trial was filed in this case. An order en-

tered after the trial court's plenary power has expired is outside the jurisdiction of the trial court and is void. *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998).

F.M. cites *In the Matter of C.L., Jr.*, 874 S.W.2d 880, 884 (Tex. App.—Austin 1994, no writ), and *In the Matter of H.V.R.*, 974 S.W.2d 213, 217 (Tex. App.—San Antonio 1998, no pet.) as authority for the proposition that the court retained jurisdiction to modify the determinate sentence. Both cases stand for the proposition that, even though *Family Code Section 54.11(h)* provides that the transfer hearing must begin more than thirty days before the juvenile's eighteenth birthday, it is not required that it be completed in that time frame, as long as it occurs before that juvenile's eighteenth birthday. *Matter of H.V.R.*, 974 S.W.2d at 217; *Matter of C.L., Jr.*, 874 S.W.2d at 884. F.M. reasons that those holdings allow for the court to have continuing jurisdiction to modify the sentence, by reducing it to fourteen years. However, nothing in either of these cases leads to that conclusion. Both cases restrict the extended time limit prior to the juvenile's eighteenth birthday, and we find neither case to be applicable to the present situation. As the court was without jurisdiction to reduce F.M.'s determinate sentence, we sustain Issue Nos. One and Two.

**Conclusion:** We set aside the order reducing F.M.'s determinate sentence.

#### **DISPOSITION PROCEEDINGS—**

#### **ALIEN RESIDENCE STATUS DOES NOT EFFECT A TYC COMMITMENT IF THE CHILD'S HOME DOES NOT PROVIDE THE QUALITY OF CARE AND LEVEL OF SUPPORT AND SUPERVISION THAT IS NEEDED TO MEET THE CONDITIONS OF PROBATION.**

¶ 07-4-18. **In the Matter of J.M.L.**, No. 08-06-00015-CV, 2007 Tex.App.Lexis 8433 (Tex.App.—El Paso, 10/25/07).

**Facts:** On November 8, 2005, sixteen-year-old Appellant waived his right to a jury trial and entered a plea of true to an allegation that he possessed less than fifty pounds but more than five pounds of marihuana. The juvenile court set the disposition hearing for December 8, 2005 and ordered the juvenile probation department to complete a pre-disposition report. A juvenile probation officer, Kim Schumate, conducted an investigation and prepared the pre-disposition report. Schumate recommended that Appellant be removed from the home and committed to TYC because Appellant was not a U.S. citizen, his mother had not established his resident status in the United States, and INS had placed a detainer on him. Schumate testified at the disposition hearing that Appellant's mother is a U.S. citizen but Appellant was born in Mexico. INS advised Schumate that Appellant

has a potential claim of derivative U.S. citizenship but it required that his mother initiate the documentation process. If Appellant were a U.S. citizen, Schumate would have considered recommending supervised juvenile probation. The juvenile court questioned Appellant's mother during the disposition hearing regarding her failure to file the appropriate documents with INS to establish derivative citizenship. She claimed that she had filed an application in 1994 but it was lost and she had not re-filed it. She went to INS before the disposition hearing but she had not returned the form they had given her. The juvenile court found that placement outside of the home was in Appellant's best interests, that Appellant's home did not provide the quality of care and level of support and supervision needed to meet the conditions of probation, and that no efforts could be made to prevent or eliminate removal because Appellant is a foreign national and there are no programs or alternatives to prevent removal. Based on these findings, the juvenile court committed Appellant to TYC.

In his sole issue for review, Appellant contends the juvenile court abused its discretion by committing him to TYC based solely on his citizenship status. He argues that there is an issue of fact regarding his citizenship status and the juvenile court should have resolved the issue before committing Appellant to TYC, even if it required continuing the disposition hearing to a later date.

**Held:** Affirmed

**Opinion:** The Family Code provides that if the juvenile court commits the child to the Texas Youth Commission, the court:

- (1) shall include in its order its determination that:
  - (A) it is in the child's best interests to be placed outside the child's home;
  - (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
  - (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

*Tex.Fam.Code Ann. § 54.04(i)(1)*(Vernon Supp. 2006).

In a juvenile case, the trial court possesses broad discretion to determine a suitable disposition of a child who has been adjudicated to have engaged in delinquent conduct. *In the Matter of A.S.*, 954 S.W.2d 855, 861 (Tex.App.—El Paso 1997, no pet.). The juvenile court's findings of fact made pursuant to *Section 54.04(i)* are reviewable for legal and factual sufficiency of the evidence using the same standards we apply in reviewing the legal or factual sufficiency of the evidence supporting a jury's findings. *Id.* We do not disturb the juvenile

court's disposition order in the absence of an abuse of discretion. *Id.* In conducting this review, we engage in a two-pronged analysis: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? *In the Matter of M.A.C.*, 999 S.W.2d 442, 446 (Tex.App.—El Paso 1999, no pet.). The traditional sufficiency of the evidence standards of review come into play when considering the first question. *Id.* We then proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision or whether it is arbitrary and unreasonable. *Id.* The question is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but whether the court acted without reference to any guiding rules and principles. *Id.*, citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Id.*

The findings in the disposition order need not be supported by proof beyond a reasonable doubt. Consequently, we apply the traditional legal and factual sufficiency standards of review applicable in civil cases. *See A.S.*, 954 S.W.2d at 858. In considering a "no evidence" legal sufficiency issue, we consider only the evidence and inferences that tend to support the challenged finding and disregard all evidence and inferences to the contrary. *See Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992). If any probative evidence supports the finding, it must be upheld. *Sotelo v. Gonzales*, 170 S.W.3d 783, 787 (Tex.App.—El Paso 2005, no pet.).

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. *Sotelo*, 170 S.W.3d at 787. In reviewing an issue asserting that a finding is factually insufficient or against the great weight and preponderance of the evidence, we must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact, as well as evidence which tends to disprove its existence. *Id.* It is for the fact finder to determine the weight to be given to the testimony and to resolve any conflicts in the evidence. *Id.* The trial court's finding must be so against the great weight and preponderance of the evidence as to be manifestly wrong. *Id.*

Appellant does not challenge the juvenile court's finding that it is in Appellant's best interest that he be removed from his home. Likewise, his brief does not address whether the evidence supports the juvenile court's finding that Appellant, in his home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation. Appellant restricts his argument to the juvenile court's determination that no efforts could be made

to prevent or eliminate removal from the home because Appellant is a foreign national.

The evidence at the disposition hearing established that Appellant's mother is a United States citizen. No specific evidence was offered regarding the citizenship of Appellant's father. He presently lives in Mexico and Appellant has not seen him since 1994. Appellant was born in Mexico but he has resided with his mother in the United States since 1994. Appellant elicited testimony from Schumate that Appellant is not a United States citizen and he is undocumented. Schumate testified, based on her conversations with INS, that Appellant has a potential claim for derivative citizenship but it requires that his mother initiate the process and offer proof related to residence. It is undisputed that Appellant's mother has not taken steps to establish Appellant's residency or his dual citizenship. When the trial court informed Appellant that he was committing him to TYC and suggested that his mother should in the meantime establish his status in the United States so that he would not be deported when released, Appellant responded that his mother could not do that because she was not living in the United States prior to his birth.

The pertinent portions of the Immigration and Nationality Act, 8 U.S.C.A. § 1401, provide that the following persons shall be nationals and citizens of the United States at birth:

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

...

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided*, That any periods of

honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

*8 U.S.C.A. § 1401(c), (d), (e) and (g)(West 2005).*

Given the absence of evidence regarding the nationality and citizenship status of Appellant's father, it is unclear which of these subsections apply to Appellant. However, each of them requires that a parent who is a United States citizen must have resided in the United States prior the birth of the child. There is no evidence that either of Appellant's parents resided in the United States prior to his birth. Although Appellant was not sworn, he stated in open court that his mother had not resided in the United States prior to his birth. We therefore conclude that the evidence is legally sufficient to support the juvenile court's conclusion that Appellant is an undocumented foreign national, and therefore, no steps could be taken to prevent his removal from the home.

Schumate testified that INS advised her that Appellant has a claim for derivative U.S. citizenship and she agreed with Appellant's counsel that Appellant has a "very good claim." But she acknowledged that his claim required his mother to file an application and provide evidence to support it. Appellant's mother had not taken these steps even though Appellant had been living in the United States for more than ten years at the time of the disposition hearing. She had picked up an application some time prior to the disposition hearing but she had not returned it. We find that the evidence is factually sufficient to support the juvenile court's finding that no steps could be taken to prevent removal from the home because Appellant is an undocumented foreign national.

We next consider whether the juvenile court abused its discretion in committing Appellant to TYC. Appellant contends that there is an abuse of discretion because the juvenile court committed him to TYC without giving him an opportunity to pursue his derivative citizenship claim. Appellant did not move for a continuance. Nevertheless, he complains that the juvenile court should have continued the disposition hearing on its own motion because the citizenship issue was unresolved. Appellant cites no authority for the proposition that the

juvenile court had a duty to continue the disposition hearing on its own motion and we are aware of none.

**Conclusion:** Even assuming the juvenile court had such a duty and Appellant has a valid claim for derivative citizenship, the juvenile court found that it was in Appellant's best interest that he be removed from the home and that his home did not provide him the quality of care and level of support and supervision that he needed to meet the conditions of probation. Appellant has not challenged these findings on appeal. Consequently, juvenile probation was not an available alternative disposition. We overrule the sole point and affirm the disposition order.

#### CONCURRING OPINION

I agree with the analysis and result. But I write separately to make two points.

First, the acquisition of American citizenship at birth abroad has always been dependent upon the satisfaction of preliminary residence or physical presence in the United States by the transmitting United States citizen parent or parents. While it was the Appellant's burden here to establish those necessary conditions precedent, I want to highlight that U.S. citizenship, if it is acquired, is acquired at birth, and not when the Department of Homeland Security or the Department of State approve the issuance of an official document that says he is a U.S. citizen.

Secondly, I want to note that Appellant might also have acquired U.S. citizenship as a child born abroad and out of wedlock, and the condition precedent is that the U.S. citizen mother was physically present in the United States for a continuous period of one year. *8 U.S.C.A. § 1409(c).*

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#### SEARCH & SEIZURE—

**A PARENT MAY GIVE VICARIOUS-CONSENT TO RECORD A CHILD'S TELEPHONE CONVERSATIONS (WITHOUT THE CHILD'S KNOWLEDGE) IF THE PARENT HAS A GOOD-FAITH BASIS FOR BELIEVING THAT THE RECORDING IS IN THE BEST INTEREST OF THE CHILD.**

¶ 07-4-19. **Alameda v. State**, No. PD-0231-06, 2007 Tex.Crim.App. Lexis 868, (Tex.Crim.App., 6/27/07).

**Background:** Appellant was convicted of two counts of aggravated sexual assault of a child under fourteen. The jury assessed punishment at thirty years' confinement for each count, and the trial judge ordered that the sentences be served consecutively. Appellant appealed the stacking order, as well as the trial court's decision to admit an audio tape of his conversations with the victim and a transcription of the audio tape. The court of appeals held that the trial court did not err in stacking Appellant's sen-

tences or in admitting the audio tape and the transcript. *Alameda v. State*, 181 S.W.3d 772 (Tex. App.—Ft. Worth 2005).

**Facts:** While Appellant was going through a divorce, he moved in with the 12-year-old victim, J.H., and her mother, Deborah, whom Appellant had known for eight or nine years. He lived in an extra bedroom in Deborah's home for close to a year. After Appellant moved out, Deborah became suspicious<sup>1</sup> that Appellant and J.H. were communicating without her knowledge, so she attached to the phone jack in her garage a recording device that would record all incoming and outgoing calls on her home telephone. Over two weeks, Deborah recorded almost twenty hours of conversation between Appellant and J.H., neither of whom knew that they were being recorded. Deborah did not suspect that Appellant and J.H. were having a sexual relationship until she heard the recording of their conversations. Deborah took the audiotape to the police, and Appellant was charged with aggravated sexual assault of a child.

1 Members of Appellant's family made statements to Deborah which led her to believe that Appellant and J.H. were in frequent contact with each other. Deborah was also aware that Appellant had allowed J.H. to do things that she did not approve of, such as driving even though she was not old enough, and lying about her age in order to join a gym.

Prior to his trial, Appellant filed a motion to suppress the audiotapes. He claimed that it was an offense under Penal Code section<sup>2</sup> 16.02 to intentionally intercept a wire communication without consent, so the audiotape was inadmissible under Code of Criminal Procedure article<sup>3</sup> 38.23. The trial judge found that Deborah could vicariously consent to the recording of J.H.'s phone conversations, so the audiotape was admissible.

2 All future references to sections refer to Texas Penal Code, unless otherwise specified.

3 All future references to articles refer to Texas Code of Criminal Procedure unless otherwise specified.

After Appellant was convicted, he appealed the trial court's decision to admit the audiotape and a transcript of the recording. He also appealed the trial court's cumulation of the two 30-year sentences imposed by the jury, arguing that the jury should decide whether the sentences were cumulated rather than the trial judge. Because there are no Texas cases on this issue, the court of appeals looked at other state courts, as well as at how federal courts have interpreted the federal wiretap law, which is similar to the Texas law. The court of appeals considered the factors outlined in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), which held that a parent may give vicarious-consent to record a child's telephone conversations if the parent has a good-faith basis for believ-

ing that recording is in the best interest of the child. Although vicarious-consent is not listed as an exception to the Texas wiretap law, the court of appeals held that, in order to protect a child, a parent may record her child's telephone conversations if the recording meets the standards in *Pollock v. Pollock*, 181 S.W.3d at 778. The court of appeals agreed with the trial court's determination that Deborah had a good-faith, objectively reasonable belief that recording the phone conversations was in the best interest of J.H. and therefore upheld the trial court's denial of Appellant's motion to suppress. *Id.* at 780. Because the court held that the audiotape was properly admitted, and Appellant conceded that the transcript was admissible if the audiotape was admissible, the court of appeals did not address the admissibility of the transcript. *Id.* The court of appeals also rejected Appellant's claim regarding the cumulation of his sentences, stating that it was not improper for the trial judge, rather than the jury, to determine whether the sentences would be cumulated. *Id.* at 781. Because the cumulating of the sentences does not exceed the statutory maximum for the offense, the court held that the cumulated sentence does not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Alameda*, 181 S.W.3d at 781.

Appellant filed a petition for discretionary review, asking us to consider whether the court of appeals erred in grafting an exception into the relevant statute in order to conclude that the audiotape was properly admitted. Appellant argues that because the court of appeals improperly held that the audiotape was admissible, the court erred in failing to address the merits of his claim that the transcript of the audiotape was improperly admitted. Finally, Appellant asks us to consider whether the court of appeals erred in holding that the trial court's cumulation of his sentences does not violate *Apprendi*.

**Held:** The court affirmed the appellate court's decision.

**Opinion:** Article 38.23(a) of the Texas Code of Criminal Procedure states, "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Therefore, because section 16.02(b)<sup>4</sup> states that a person commits an offense if he intentionally intercepts a wire communication, the audiotapes are inadmissible unless the vicarious-consent given by Deborah meets the consent exception to this statute<sup>5</sup> or the interception was legal for some other reason. Appellant argues that the vicarious-consent exception does not apply to the wiretap laws. He bases this argument on *Duffy v. State*, 33 S.W.3d 17, 25 (Tex. App.—El Paso 2000, no pet.), and *Kent v. State*, 809 S.W.2d 664, 668 (Tex. App.—Amarillo 1991, pet. ref'd), in which both courts stated that section 16.02 must be applied in all circumstances that are not specifically excepted. However, as the court of appeals noted, *Duffy* and *Kent* are distin-

guishable from Appellant's case because those cases addressed whether one spouse can vicariously consent to the recording of the other spouse's conversation, rather than the issue of whether a parent can vicariously consent to the recording of her child's conversations. *Alameda*, 181 S.W.3d at 775 n. 1. The fact that there is no interspousal consent exception to the wiretap statute does not preclude us from recognizing a parent-child vicarious-consent exception.

Texas Penal Code Section 16.02(b) states that a person commits an offense if the person:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;

(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(3) intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if the person knows or is reckless about whether the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

Under section 16.02(c), it is an affirmative defense to prosecution under Subsection (b) that:

(4) a person not acting under color of law intercepts a wire, oral, or electronic communication, if:

(A) the person is a party to the communication; or

(B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

Appellant also cites cases related to a minor child's right to seek an abortion or to purchase contraceptives without parental consent for the proposition that a child has the right to privacy, and this general right to privacy should not be taken from the child unless there is a significant state interest. Appellant further argues that, because the Texas Family Code<sup>6</sup> lists the circumstances under which a parent has the right to consent on behalf of a child and does not mention the right to consent to the recording of a child's conversations, we should assume that the legislature intended that no such right exist.

Texas Family Code section 151.001 lists the rights and duties of a parent:

(a) A parent of a child has the following rights and duties: (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment; (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

We disagree. We dealt with both the right to privacy and a mother's ability to consent for her child in *Sorensen v. State*, 478 S.W.2d 532 (Tex. Crim. App. 1972). Even though the child in *Sorensen* was not a minor, we held that a child has no reasonable expectation of privacy in his room when the parent routinely enters the room, and that a parent can vicariously consent to a search of her child's room. *Id.* at 534. Therefore, we reject Appellant's contentions that the vicarious-consent exception unlawfully violates a minor's right to privacy and that a parent has the right to consent only in the circumstances listed in the family code.

Because no Texas cases have addressed a parent's ability to vicariously consent to the recording of a child's telephone conversations, and the federal wiretap statute is substantively the same as the Texas statute, we look to the Sixth Circuit's decision in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), which is the leading case regarding the vicarious-consent doctrine in the context of the federal wiretap statute.<sup>7</sup> In *Pollock*, the plaintiff was the child's stepmother and the defendant was the child's mother. The stepmother appealed the trial court's determination that the mother had not violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511 when she recorded conversations between her daughter and the plaintiff. In upholding the trial court's decision, the court of appeals looked to federal and state case law in which the vicarious-consent doctrine had been applied to both federal and state wiretap statutes.<sup>8</sup> *Pollock*, 154 F.3d at 608-610. The court adopted the rule set out in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993), and held that:

as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. *Pollock* 154 F.3d at 608-610.

Unlike adults, minors do not have the legal ability to consent in most situations. As the *Thompson* court noted, the vicarious-consent doctrine was necessary because children lack both "the capacity to consent and the ability to give actual consent." 838 F. Supp. at 1543.

18 U.S.C. § 2511(1)(a) states in relevant part that any person who intentionally intercepts any wire communication shall be punished. The federal analog to the

consent exception is in 18 U.S.C. § 2511(2)(d) and states that it is not unlawful for a person not acting under color of law to intercept a wire communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act.

The court referenced *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998), where the vicarious-consent doctrine was applied to Title III; *Silas v. Silas*, 680 So. 2d 368 (Ala. Civ. App. 1996) and *State v. Diaz*, 308 N.J. Super. 504, 706 A.2d 264 (N.J. Super. Ct. App. 1998), which applied the vicarious-consent doctrine to the respective state's wiretap statutes; and *Williams v. Williams*, 229 Mich. App. 318, 581 N.W.2d 777, 1998 WL 180849 (Mich. Ct. App. 1998) and *West Virginia Dep't of Health & Human Resources v. David L.*, 192 W. Va. 663, 453 S.E.2d 646 (W. Va. 1994), which addressed the vicarious-consent doctrine under both federal and state wiretap statutes.

Appellant argues that, in this case, J.H. did have the ability to consent because she was thirteen years old at the time the conversations were recorded, whereas the children in *Thompson* were only three and five years old. However, the vicarious-consent doctrine has also been applied to older children, including a fourteen-year-old in *Pollock*. A minor's actual ability to consent does not preclude her mother's ability to vicariously consent on her behalf. Thus the standard set out in *Pollock* is that vicarious-consent is acceptable if the parent had an objectively reasonable, good-faith belief that consenting for the child was in the child's best interest.

We agree with the court of appeals that Deborah had an objectively reasonable, good-faith basis for believing that recording the conversations was in J.H.'s best interest. Because the recording of the conversations meets the standards set out in *Pollock*, the vicarious-consent given by Deborah satisfies the exception to the Texas wiretap statute. And, since it is not a violation of Penal Code section 16.02 to intentionally intercept an oral communication if one party consented, no law was broken, and article 38.23 does not render the evidence inadmissible.

Appellant states that this case may illustrate why a vicarious-consent exception should be added to the statute, but he argues that it should be added by the legislature and not the courts. However, by holding that a parent can give vicarious-consent for a child, we are not adding a new exception to the wiretap statute. Rather, we are saying that vicarious-consent, which is a type of consent is recognized in many contexts in the law regarding the parent-child relationship, also applies to the existing consent exception to the wiretap statute.

#### *Admissibility of the Transcript*

Appellant concedes that if the audiotape were admissible, his complaint regarding the admissibility of the transcript of the recorded conversations would be moot.

Therefore, because the audiotape was properly admitted, the transcript was also admissible, and we do not need to address Appellant's second ground for review. The court of appeals did not err in failing to consider the merits of this claim.

**Conclusion:** We hold that the doctrine of vicarious-consent applies to the consent exception of the wiretapping statute. Because the victim's mother provided the consent necessary for the affirmative defense to the statute prohibiting wire tapping, it was not a violation of Penal Code section 16.02 to record the conversations. Therefore, the audiotape was legally obtained and was not rendered inadmissible by article 38.23. Since the audiotape was properly admitted, the admissibility of the transcript of the recorded conversations is not at issue, and the court of appeals did not err in failing to consider the merits of this claim. Although the jury imposed the two 30-year sentences, it was within the trial judge's discretion to decide whether to order that the sentences be served consecutively. The court of appeals properly rejected Appellant's arguments regarding the cumulation of his sentences and upheld the trial court's cumulation order. The decision of the court of appeals is affirmed.

CONCUR BY: KELLER

CONCUR

KELLER, P.J., filed a concurring opinion in which KEASLER, and HERVEY, JJ., joined.

Three salient facts bear on the admissibility of the tape recording in this case: (1) one of the parties to the recorded conversations was the minor child of a parent conducting the recording, (2) the recording was conducted by the parent as part of caring for the child's welfare, and (3) the recording occurred through a telephone jack located in the parent's home. Because of these three facts, I would hold that the recording did not constitute "interception" under the Texas wiretap statute.

For a crime to occur under the wiretap statute, there must be an *interception* or an intended interception of a wire, oral or electronic communication.<sup>1</sup> The statute provides that "intercept" has the same meaning as defined under Article 18.20 of the Code of Criminal Procedure, governing law-enforcement-related wiretaps.<sup>2</sup> Under Article 18.20, "intercept" means "the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device."<sup>3</sup> This definition in turn relies upon the definition of "electronic, mechanical, or other device," which explicitly excludes certain types of instruments or equipment.<sup>4</sup> Among other things, the wiretap statute excludes from its reach "a telephone or telegraph instrument, [or] equipment . . . used for the transmission of electronic communications, . . . if the . . . instrument [or] equipment . . . is . . . furnished to the subscriber or user by a provider of wire or electronic com-

munications service in the ordinary course of the provider's business and *being used by the subscriber or user in the ordinary course of its business.*"<sup>5</sup>

1 TEX. PEN. CODE § 16.02(b).

2 § 16.02(a).

3 TEX. CODE CRIM. PROC. Art. 18.20, § 1(3).

4 Art. 18.20, § 1(4).

5 Art. 18.20, § 1(4)(A) (emphasis added).

All of this language is virtually identical to language in the federal wiretap statute. In reviewing the legislative history of the federal counterpart to this provision (what has become known as the "extension phone" exception), the Second Circuit explained that the exception originally contained no "ordinary course of business" limitation.<sup>6</sup> This limitation was added after Professor Herman Schwartz, testifying on behalf of the A.C.L.U., complained that the unqualified language would allow policemen and private intruders to enter others' homes and listen in on extension phones without penalty.<sup>7</sup> But, declining to recommend that the entire exception be deleted, Professor Schwartz commented, "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem."<sup>8</sup>

6 *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2nd Cir. 1977).

7 *Id.*

8 *Id.* (quoting Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. 901 (1967)).

Several federal appeals courts have applied the extension phone exception to in-home recording by a parent of a minor child's conversations because the recording was done within the ordinary course of the parent's business of caring for the child.<sup>9</sup> The Supreme Court of New Hampshire followed suit in interpreting the same language in its own wiretap statute.<sup>10</sup> I would follow these cases and hold that a parent's recording of a minor child's conversations from a telephone jack within the home for the purpose of caring for the child constitutes a use that is exempt from the wiretap statute.

9 *Scheib v. Grant*, 22 F.3d 149, 153-55 (7th Cir. 1994); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991); *Janecka v. Franklin*, 843 F.2d 110, 111 (2nd Cir. 1988), *affirming and approving district court opinion at* 684 F. Supp. 24 (S.D.N.Y. 1987); *Anonymous*, 558 F.2d at 679. *But see Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998)(declining to follow these cases but citing them as some support for its holding exempting parental recording of a minor child's conversations under the "consent" exception to the wiretap statute).

10 *State v. Telles* 139 N.H. 344, 346-47, 653 A.2d 554, 556-57 (1995).

With these comments, I join the opinion of the Court.