JUVENILE CASELAW UPDATE

2018 JUVENILE DELINQUENCY CONFERENCE
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EDUCATION

2001: Juvenile Law: Board Certified – by the Texas Board of Legal Specialization
1980: Admitted to the Texas Bar.
1980: Jurist Doctor, South Texas College of Law, Houston, Texas.
1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

Life Fellow of the Texas Bar Foundation
2018 – Present: Texas Board of Legal Specialization Juvenile Law Exam Commission Chair
2005 – Present: Editor, State Bar of Texas Juvenile Law Section Newsletter.
2009 – 2015: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
2007: Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004: Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
2001 – 2006: Texas Board of Legal Specialization Juvenile Law Advisory Commissioner
1999 – Present: Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 – 1999: Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 – 1997: Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997: Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

In his 29 years as an Associate Judge and Referee, Judge Garza has presided over 59,000 juvenile hearings and has been published 27 times. Judge Garza is a regular speaker on juvenile law issues, having delivered over 100 juvenile law presentations.

SPEECHES AND PRESENTATIONS
(last two years only)

- Caselaw Updates; 31st Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Horseshoe Bay, Texas, February, 2018.
- Juvenile Law: Caselaw Update; Fifth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, December, 2017.
- Caselaw Updates; 30th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Horseshoe Bay, Texas, February, 2017.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 30th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Horseshoe Bay, Texas, February, 2017.
- Juvenile Law: Caselaw Update; Fifth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, December, 2016.
- Caselaw Update; Juvenile Delinquency Advanced Topics Seminar, Presented by the DBA Juvenile Justice Committee, Dallas, Texas, October 6, 2016.
- Caselaw Update; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Arrest, Confessions, and Search and Seizure; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Juvenile Law; 2016 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2016.

- Caselaw Updates; 29th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 29th Annual Juvenile Law Conference , Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.

PUBLICATIONS

- Caselaw Update. Sixth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2015.
- Privacy Policy, Riley v. California and Cell Phone Searches in Schools. Texas Bar Journal, Volume 78, Number 2, February, 2015. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- Riley v. California and Cell Phone Searches in School. Texas Juvenile Law Reporter, Volume 28, Number 3, September, 2014. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- "Any Detectable Amount of Alcohol": Taking a Breath or Blood Specimen of a Juvenile. Texas Bar Journal, Volume 75, Number 2, February, 2012. A legal article analyzing the taking of a Breath or Blood Specimen of a Juvenile.
- Police Interactions with Juveniles. 20th Annual Juvenile Law Conference Article, February, 2007. This article won the Franklin Jones Best Continuing Legal Education Article for 2007, as voted on by the State Bar College Board of Directors, February 2, 2008.
- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation. State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think. State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.

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CASELAW UPDATE

by Pat Garza

APPEALS—

In the Matter of D.W., MEMORANDUM, No. 02-16-00468-CV, 2017 WL 4819399, Tex.Juv.Rep. Vol. 32 No. 1 ¶18-1-1 (Tex.App.—Ft. Worth, 10/26/2017).

APPOINTED COUNSEL CONTINUES TO REPRESENT THE CHILD "UNTIL THE CASE IS TERMINATED, THE FAMILY RETAINS AN ATTORNEY, OR A NEW ATTORNEY IS APPOINTED BY THE JUVENILE COURT.

Facts: The trial court adjudicated Appellant D.W. delinquent for the felony offense of aggravated assault with a deadly weapon and, after a disposition hearing, ordered her committed to the Texas Juvenile Justice Department for an indeterminate sentence.

D.W.'s court-appointed appellate attorney has filed a motion to withdraw as counsel and a brief in support of that motion, averring that after diligently reviewing the record, he believes that this appeal is frivolous. See Anders v. California, 386 U.S. 738, 744–45, 87 S. Ct. 1396, 1400 (1967). The brief meets the requirements of Anders by presenting a professional evaluation of the record and demonstrating why there are no arguable grounds to be advanced on appeal. Although given the opportunity, D.W. did not file a response, and the State did not submit a brief.

Held: Affirmed. Motion to Withdraw Denied

MEMORANDUM OPINION: Having carefully reviewed the record and the Anders brief, we agree that this appeal is frivolous. We find nothing in the record that might arguably support D.W.'s appeal. See Bledsoe v. State, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005). Therefore, we affirm the trial court's judgment.

Ordinarily, upon finding that the appeal is frivolous, we would grant counsel's motion to withdraw. But in In re P.M., a termination of parental rights appeal, the supreme court held—in reliance on family code section 107.013, which provides that appointed counsel continues to serve in that capacity until the date all appeals are exhausted or waived—that the mere filing of an Anders brief in the court of appeals does not warrant the withdrawal of that counsel for purposes of proceeding in the supreme court. 520 S.W.3d 24, 26–27 (Tex. 2016). The Juvenile Justice Code contains a similar provision: when, as in this case, the trial court finds a child's family indigent and appoints counsel, that counsel must continue to represent the child "until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court." Tex. Fam. Code Ann. § 51.101(a) (West Supp. 2016).

Conclusion: The record does not show that either of the latter two events have occurred here, and under the reasoning in P.M., this case has not "terminated" because not all appeals have been exhausted. See 520 S.W.3d at 26–27. Accordingly, even though we have affirmed the trial court's judgment, we deny counsel's motion to withdraw. See In re A.H., No. 02-16-00320-CV, 2017 WL 1573735, at *1 (Tex. App.—Fort Worth Apr. 27, 2017, no pet.) (holding similarly).

COLLATERAL ATTACK—

In re J.A., MEMORNADUM, No. 01-17-00645-CV, 2017 WL 6327356, Tex.Juv.Rep. Vol. 32 No 1 ¶ 18-1-2 [Tex. App.—Houston (1st Dist.), 12/12/2017].

TRIAL JUDGE ABUSED HIS DISCRETION IN SIGNING THE "NUNC PRO TUNC ORDER TO CORRECT JUDGMENT" AND THE "ORDER ON MOTION TO DISMISS FOR LACK OF JURISDICTION AND MOTION FOR ENTRY NUNC PRO TUNC."

Facts: J.A. was born on November 29, 1998 and was to turn nineteen on November 29, 2017. Real party in interest, The State of Texas, alleged in a grand-jury approved, determinate sentence petition that J.A. had committed delinquent conduct, namely first-degree aggravated robbery with a pellet gun, on September 27, 2015. On July 19, 2016, J.A., with counsel, signed a stipulation of evidence judicially confessing to aggravated robbery and entered a plea without an agreed recommendation, roughly four months shy of J.A.'s 18th birthday. When discussing possible sentences, J.A.'s counsel reminded the respondent, the Honorable Michael Schneider, that a determinate probation could continue in the juvenile court until J.A. reached the age of 19, and the court agreed, stating that it may have incorrectly stated 18 earlier at the hearing.

At the end of the July 19, 2016 hearing, the respondent orally ruled that the "[d]isposition will be an 8-year determinate probation, ... and we're going to return every four to six months while this court has jurisdiction of [J.A.] to see if you know how to follow the rules or not." The court's oral ruling did not mention whether it would have jurisdiction of J.A. until J.A.'s 18th or 19th birthday. However, the sentence-portion of the judgment actually stated that J.A. "now comes under the jurisdiction of said Court and shall continue its care, guidance, and control from 7/19/2016 or until said Respondent becomes eighteen (18) years of age unless discharged prior to and subject to subsequent and additional proceedings. ..."

On December 1, 2016, two days after J.A.'s 18th birthday on November 29, 2016, the State filed a petition to modify disposition alleging that J.A. had committed a terroristic threat on November 11, 2016, before J.A. turned 18. On June 13, 2017, J.A. filed a motion to dismiss the modification for want of jurisdiction, claiming that the probation terminated on J.A.'s 18th birthday. The juvenile court held a hearing on J.A.'s motion to dismiss on June 15, 2017. The parties made legal arguments over whether the court retained jurisdiction, and the State argued that the judgment contains clerical errors that can be corrected via a nunc pro tunc order. The court took the motion under consideration.

On June 16, 2017, the State filed a motion for nunc pro tunc claiming that clerical errors in the original judgment did not comport with the oral pronouncement of the disposition. On June 29, 2017, the juvenile court held an evidentiary hearing on J.A.'s motion to dismiss and the State's motion for nunc pro tunc. The State noted that J.A. had continued to appear throughout the probationary period including after J.A.'s 18th birthday, indicating that J.A. understood that the court would continue supervision until J.A.'s 19th birthday.

The State called Claudia Marquez, a district court clerk, as the only witness. Marquez testified that she had not read the reporter's record of the sentence, the judge had not told her to put the probation ends at "18 years" on the judgment, that their office used an outdated form judgment database, which had a 2013 revision date, and that the individual clerk has no power to change the judgment beyond adding certain information. Marquez also testified that their software had recently been updated due to this case, and that determinate judgments now show that the court has jurisdiction until a juvenile's 19th birthday.

At the end of the hearing, the respondent stated his personal recollections of his rendition that he understood he would supervise J.A. until J.A.'s 19th birthday, and the inclusion of "18 years" on the judgment was merely a clerical error because the judgment was generated by the individual clerk, not the judge. On June 23, 2017, the respondent signed a "Nunc Pro Tunc Order to Correct Judgment" that replaced the relevant references in the judgment from "18th birthday" with "19th birthday." On July 28, 2017, the respondent denied J.A.'s motion to dismiss and granted the State's motion for nunc pro tunc judgment by signing an "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc."

On August 16, 2017, J.A. filed this mandamus petition contending, among other things, that the juvenile court's nunc pro tunc orders in a modification proceeding brought after J.A.'s probation period expired, when J.A. turned 18,

should be vacated as void. J.A. further claims that, if this Court denies this petition, J.A. will have an inadequate remedy on appeal because the juvenile court may proceed on the State's petition to modify for the alleged violation of J.A.'s probationary terms, incarcerate J.A., and then the continuation of the modification action will be in the adult district court while the void orders would be from the juvenile court that no longer has jurisdiction.

With his petition, J.A. also filed a motion to stay all proceedings pending this Court's disposition of this petition because J.A. could have been subject to additional void orders or incarceration. This Court's August 22, 2017 Order granted J.A.'s motion to stay and requested a response from the State.

On September 11, 2017, the State filed its response, primarily contending that J.A. had an adequate appellate remedy for the nunc pro tunc judgment. The State also alleged that there was no abuse of discretion because the respondent's personal recollections supported the finding of clerical error.

On September 21, 2017, David R. Dow, of the Juvenile and Capital Advocacy Project of the University of Houston Law Center, filed an amicus brief. The amicus contends that, because the juvenile court lost jurisdiction over J.A. when the probation ended, it was without jurisdiction to modify the judgment because that was judicial error.

On November 10, 2017, the State filed a motion to reconsider this Court's grant of temporary relief, contending that the juvenile court will lose jurisdiction on November 28, 2017, because J.A. turns 19 the next day. This Court's November 20, 2017 Order granted the State's motion and lifted the stay to allow the juvenile court to conduct all proceedings, if any.

Held: Writ of Mandamus conditionally granted

Memorandum Opinion:

A. The Respondent Clearly Abused His Discretion

The respondent clearly abused his discretion by signing the June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment" and the July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc." These nunc pro tunc orders were void because they corrected a substantive error that required judicial interpretation, which was a judicial error, not a clerical one.

A trial court generally retains jurisdiction over a case for thirty days after it signs a final judgment, during which time the trial court has plenary power to change its judgment. In re Patchen, No. 01-16-00947-CV, 2017 WL 976077, at *2 (Tex. App.—Houston [1st Dist.] Mar. 14, 2017, orig. proceeding) (per curiam) (mem. op.) (citing, inter alia, TEX. R. CIV. P. 329b(f)). "Nevertheless, a trial court may always correct clerical errors by using a judgment nunc pro tunc." In the Interest of A.M.R., 528 S.W.3d 119, 122 (Tex. App.—El Paso 2017, no pet.) (citing TEX. R. CIV. P. 316; 329b(f)). "A judgment nunc pro tunc allows a trial court to correct a clerical error, but not a judicial error, in the judgment after the court's plenary power has expired." Id. (citing, inter alia, Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986) and TEX. R. CIV. P. 316).

This Court has summarized the distinction between judicial and clerical errors:

A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. Barton [v. Gillespie, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.)]. Rendition occurs when the trial court's decision is officially announced either by a signed memorandum filed with the clerk of the court or orally in open court. Id.

Unlike with clerical errors, the trial court cannot correct a judicial error after the expiration of plenary power by entering a judgment nunc pro tunc. Escobar, 711 S.W.2d at 231. A judicial error is one that arises from a mistake of law or fact that requires judicial reasoning to correct and it occurs in the rendering, rather than the entering of the

judgment. Barton, 178 S.W.3d at 126. “Thus, even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition.” Escobar, 711 S.W.2d at 232. Stated another way, if the judgment entered is the same as the judgment rendered, regardless of whether the rendition was incorrect, a trial court has no nunc pro tunc power to correct or modify the entered judgment after its plenary [power] expires. Hernandez v. Lopez, 288 S.W.3d 180, 187 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (op. on rehearing) [(emphasis in original)]. A judgment rendered to correct a judicial error after plenary power has expired is void. Id. at 185 (citing Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973)).
In re D & KW Family, L.P., No. 01-11-00276-CV, 2012 WL 3252683, at *5 (Tex. App.—Houston [1st Dist.] Aug. 9, 2012, orig. proceeding) (mem. op.) (internal quotation marks omitted).

The party claiming clerical error must show, by clear and convincing evidence, that “the trial judge intended the requested result at the time the original judgment was entered.” A.M.R., 528 S.W.3d at 122 (citation omitted). “This high burden insures that trial judges can correct their clerical mistakes” and prevents using a judgment nunc pro tunc as “a vehicle to circumvent the general rules regarding the trial court’s plenary power if the court changes its mind about its judgment.” Id. “The determination as to whether an error is clerical is a question of law, and the trial court’s finding in this regard is not binding on an appellate court.” In the Matter of M.A.V., No. 04-01-00533-CV, 2002 WL 662246, at *1 (Tex. App.—San Antonio Apr. 4, 2002, pet. denied) (citation omitted). When deciding whether an error in a judgment is clerical or judicial, the court must look to the judgment actually rendered and not the judgment that should have been rendered. A.M.R., 528 S.W.3d at 123 (citing, inter alia, Escobar, 711 S.W.2d at 232). “Evidence may be in the form of oral testimony of witnesses, written documents, previous judgments, docket entries, or the judge’s personal recollection.” Hernandez, 288 S.W.3d at 185 (citation omitted).

Here, because the respondent’s June 23, 2017 “Nunc Pro Tunc Order to Correct Judgment” and corresponding July 28, 2017 “Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc” were both signed beyond the juvenile court’s plenary power, which ended thirty days after the determinate sentencing judgment/order was signed on July 19, 2016, they were void unless they corrected clerical, not judicial, error. See Escobar, 711 S.W.2d at 231; Dikeman, 490 S.W.2d at 186 (judgment rendered to correct judicial error after plenary power has expired is void); see also In the Matter of R.G., 388 S.W.3d 820, 826 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (granting habeas relief because “juvenile court abused its discretion and exceeded its plenary power when it vacated its order granting relator habeas corpus relief more than six months after granting the relief”).

At the nunc pro tunc hearing, the court heard testimony from Marquez, the individual district clerk that had generated the judgment, that the judge had not told her to put the probation ends at 18 on the judgment, that their office used an outdated form judgment database, that their software had recently been updated due to this case, and that determinate judgments now show the court’s jurisdiction until the juvenile’s 19th birthday. The respondent also stated his personal recollections of his rendition that he understood he would supervise J.A. until J.A.’s 19th birthday, and the inclusion of age 18 on the judgment was merely a clerical error because the judgment was generated by the individual clerk, not the judge. However, we are not bound by the trial court’s clerical-error finding. See M.A.V., 2002 WL 662246, at *1.

As noted above, a “judicial error is one that arises from a mistake of law or fact that requires judicial reasoning to correct and it occurs in the rendering, rather than the entering of the judgment.” Barton, 178 S.W.3d at 126. “Thus, even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition.” Escobar, 711 S.W.2d at 232. Here, the judgment changed the length of the court’s supervisory term of J.A.’s probation, which is a substantive rather than a clerical change. See, e.g., Hernandez, 288 S.W.3d at 185, 188 (finding judgment nunc pro tunc’s change of year of child support arrearage was substantive change, and thus judicial error, because it resulted in extra year of interest). A disposition with a probated sentence can extend supervision to any date within the range of the juvenile court’s jurisdiction. Thus, a discussion that a juvenile court’s

jurisdiction to supervise probation can extend to age 19 is not a determination that jurisdiction to supervise that probation would extend to that duration.

Here, the trial court did not orally pronounce that the supervisory term of probation would conclude on J.A.'s 19th birthday during its rendering of the ruling, but if it had, then the judgment stating 18th birthday would have been a clerical error. See Barton, 178 S.W.3d at 126 (stating that clerical error is discrepancy between entry of judgment in record and judgment that was actually rendered). Instead, the juvenile court stated that the: "disposition will be an 8-year determinate probation, ... and we're going to return every four to six months while this court has jurisdiction of [J.A.] to see if you know how to follow the rules or not." That statement requires interpretation in light of the original judgment—the court was to exercise its jurisdiction to the juvenile's 18th birthday. The State argues that the trial court meant "jurisdiction" in its most complete sense—that the juvenile court meant to impose a supervisory term coextensive with all the time it could have to exercise it. But neither the judgment nor the oral ruling clarify this meaning. The correction in the nunc pro tunc order changed the length of the term of supervision of probation rather than conforming it to any earlier oral pronouncement of sentence. To make that change in the length of the supervisory term of probation required judicial interpretation about what the judge meant by "jurisdiction"—an interpretation not found in the oral ruling of the disposition. See Barton, 178 S.W.3d at 126 (stating that judicial error is one that arises from mistake of law or fact that requires judicial reasoning to correct and it occurs in rendering, rather than entering, of judgment). Thus, the error was judicial and not clerical. Cf. A.M.R., 428 S.W.3d at 123 (finding trial court properly corrected clerical error in judgment nunc pro tunc because "trial judge did not, in its oral rendition of the judgment, stipulate the restriction would only remain in place if [parent] remained in El Paso County, Texas").

Consequently, because the two nunc pro tunc orders improperly corrected judicial errors in the July 19, 2016 determinate sentencing judgment/order, by changing the 18th-birthday-references to 19th-birthday-ones, they were void. Thus, the respondent clearly abused his discretion in signing these void orders.

B. Relator Lacks an Adequate Appellate Remedy

As discussed above, mandamus relief is proper when the trial court issues a void order, and the relator need not demonstrate the lack of an adequate remedy by appeal. See In re Sw. Bell Tel., 35 S.W.3d at 605; In re Flores, 111 S.W.3d at 818. In any event, a party can seek mandamus relief from a void judgment even if there is an adequate remedy by appeal. See Dikeman, 490 S.W.2d at 186 ("In view of our policy for at least a decade of accepting and exercising our mandamus jurisdiction in cases involving void or invalid judgments of district courts, Relator had every reason to expect relief from the void judgment in this case without first attempting an appeal."). Thus, even after J.A. turned nineteen on November 29, 2017, the juvenile court will continue to have jurisdiction to vacate any void orders that it may have signed. Here, because the respondent's June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment" and July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc" were void, J.A. need not demonstrate the lack of an adequate appellate remedy. See In re Sw. Bell Tel., 35 S.W.3d at 605; Dikeman, 490 S.W.2d at 186; In re Flores, 111 S.W.3d at 818.

Conclusion: We hold that the respondent abused his discretion in signing the "Nunc Pro Tunc Order to Correct Judgment" and the "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc," and J.A. need not demonstrate an inadequate remedy by appeal because they were void. Accordingly, we conditionally grant the petition for writ of mandamus and order the respondent to vacate the June 23, 2017 "Nunc Pro Tunc Order to Correct Judgment," and the July 28, 2017 "Order on Motion to Dismiss for Lack of Jurisdiction and Motion for Entry Nunc Pro Tunc". We are confident the trial court will promptly comply, and our writ will issue only if it does not comply within 20 days of the date of this opinion.

In re D.G., MEMORANDUM, No. 13-17-00300-CV, 2017 WL 6047554, Tex.Juv.Rep. Vol. 32 No 1 ¶ 18-1-3 (Tex. App.—Corpus Christi-Edinburg, 12/7/2017).

APPLICATION FOR WRIT OF HABEAS CORPUS FROM DETERMINATE SENTENCE DISPOSITION MAY NOT BE FILED IN THE TEXAS COURT OF APPEALS.

Facts: Relator D.G., proceeding pro se, filed a petition for writ of habeas corpus in the above cause through which he contends that he has been wrongfully imprisoned. Relator asserts that he was adjudicated delinquent in 1997 and ordered committed to the Texas Youth Commission. Relator contends that he was transferred to the Texas Department of Criminal Justice without the benefit of a court-ordered transfer hearing and has been incarcerated since that time.2 This Court requested and received a response to the petition from the State of Texas, acting by and through the County and District Attorney for Cameron County, Texas. The State asserted that relator was found delinquent, committed to the Texas Youth Commission for a period of twenty years, discharged from the Texas Youth Commission upon "aging out," and was released to adult parole on September 26, 2000. The State further stated that an application for writ of habeas corpus arising from a juvenile proceeding should be presented in the first instance to the trial court, and accordingly requested that we abate and remand this matter to the trial court for a determination on the merits after due consideration. We abated and remanded this matter to the trial court, who has now appointed the Honorable Traci L. Evans as counsel to represent relator in the pursuit of habeas relief.

Held: Writ Dismissed

Memorandum Opinion: Except when in conflict with a provision of the Texas Family Code, the Texas Rules of Civil Procedure govern juvenile proceedings. See TEX. FAM. CODE ANN. § 51.17(a) (West, Westlaw through 2017 1st C.S.); In re Dorsey, 465 S.W.3d 656, 657 (Tex. Crim. App. 2015) (orig. proceeding) (Richardson, J. concurring); In re M.R., 858 S.W.2d 365, 366 (Tex. 1993) (per curiam). A person confined pursuant to an adjudication and disposition in juvenile court may seek habeas corpus relief. See TEX. FAM. CODE ANN. § 56.01(o) (West, Westlaw through 2017 1st C.S.). Juveniles may file applications for writs of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution, which gives "[d]istrict [c]ourt judges ... the power to issue writs necessary to enforce their jurisdiction." TEX. CONST. art. V, § 8; see Ex parte Valle, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003). Thus, to the extent that relator seeks relief from confinement resulting from his juvenile adjudication, relator may file an application for writ of habeas corpus pursuant to Article V, Section 8 of the Texas Constitution with the district court where he was adjudicated. We lack jurisdiction over such a proceeding. See TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.221 (West, Westlaw through 2017 1st C.S.). And, because proceedings in juvenile court are considered civil cases, the Texas Supreme Court, rather than the Texas Court of Criminal Appeals, is the court of last resort for such matters. In re Dorsey, 465 S.W.3d at 656; In re Hall, 286 S.W.3d 925, 927 (Tex. 2009) (orig. proceeding).

Conclusion: The Court, having examined and fully considered the petition for writ of habeas corpus, the State's response, and the trial court's findings and orders on abatement, is of the opinion that we are without jurisdiction to consider this matter. Therefore, we reinstate this matter. We dismiss this petition for writ of habeas for lack of jurisdiction without reference to the merits and without prejudice to any other habeas corpus relief that may be pursued by relator, and we dismiss all pending motions and outstanding orders as moot.

CRIMINAL PROCEEDINGS—

In the Matter of the Expunction of V.H.B., --- S.W.3d ----, 2018 WL 4660101, 2018 WL 4660101, Tex.Juv.Rep. Vol. 32 No 4 ¶ 18-4-6 (Tex.App.—El Paso, 9/28/2018).

JUVENILE MISTAKENLY INDICTED BY GRAND JURY WAS NOT ENTITLED TO HAVE HIS RECORD EXPUNGED BECAUSE MISTAKE OF AGE DOES NOT CALL INTO QUESTION THE EXISTENCE OF PROBABLE CAUSE BUT INSTEAD RELATES TO THE STATE'S ABILITY TO MEET ITS EVIDENTIARY BURDEN OF PROVING THE ELEMENTS OF THE OFFENSE, INCLUDING AGE.

Facts: V.H.B. was charged by indictment for the offense of continuous sexual assault of a child. TEX.PEN.CODE ANN. § 21.02 (West Supp. 2017). At the time of indictment, Section 21.02(b) provided that a person commits the offense of continuous sexual assault of a child if: (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age. TEX.PEN.CODE ANN. § 21.02 (West Supp. 2017).

The indictment in this case alleged that V.H.B. committed the offense of continuous sexual abuse of a child by four manner and means occurring during a period that was more than 30 days in duration, specifically on or about the dates of February 1, 2008, and December 30, 2010, when V.H.B. was 17 years of age or older. After the jury was empaneled, the State's prosecutor moved to dismiss the indictment against V.H.B. for the reason that the "Detective made an error on defendant's birthday." The trial court ordered the case dismissed for this reason. The State sought to have V.H.B. adjudicated a delinquent child in a juvenile court or, alternatively, certified for trial as an adult and to have his case transferred to a criminal court. Finding that the State's petition to waive juvenile court jurisdiction and to transfer the case to criminal court was filed when V.H.B. was 21 years old, the trial judge presiding over the juvenile case dismissed the case for want of jurisdiction. See TEX.FAM.CODE ANN. §§ 51.0412, 54.02(j)(4)(A), (B)(West 2014).

Thereafter, V.H.B. filed in the trial court a petition for expunction. At the expunction hearing, V.H.B. testified that he was born on January 29, 1992.3 Consequently, V.H.B. was only 16 years old on February 1, 2008, the first date of the period alleged in the indictment. After considering the evidence and testimony and hearing arguments of counsel, the trial court denied the petition for expunction.

At V.H.B.'s request, the trial court issued findings of fact and conclusions of law. Although we need not recite all of the trial court's findings of fact, we note that regarding V.H.B.'s age, the trial court found that V.H.B. was born on January 29, 1992, was sixteen years of age, a juvenile, during a portion of the alleged time of commission of the predicate acts alleged in the indictment (February 1, 2008 to December 30, 2010),4 and was 17 years old on January 29, 2009, for purposes of prosecution as an adult under Texas law. The trial court also found, "[t]he indictment was not void" and "was not 'dismissed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of dismissal to believe the person committed the offense or because the indictment was void[,]' " that V.H.B.'s "age or error thereof has no bearing on whether there was probable cause to believe that an offense or offenses were committed during the said duration of time as alleged in the indictment, and that the error regarding V.H.B.'s age "is no evidence of mistake, false information, or other similar reason indicating absence of probable cause to believe that [V.H.B.] committed the offense." Regarding V.H.B.'s burden of proof, the trial court found that V.H.B. had failed to satisfy his burdens of proving that "he was a juvenile during the entire duration of time of commission of the alleged criminal acts set out in the indictment thereby divesting the District Court of jurisdiction (without proper adult certification) and rendering the indictment void," and "was unlawfully arrested or indicted for the said offense(s) and hence entitled to expunction of the said criminal records." Also finding that no applicable statute of limitations exists for the indicted or predicate acts alleged, and that V.H.B. remains subject to prosecution as an adult, the trial court then concluded as a matter of law that V.H.B. had failed to meet his burden of proving he was "entitled to expunction of criminal records under Tex. Code. Crim. Proc. Ann. Art. 55.01(a)(2)(2016)."

Held: Affirmed

Opinion: V.H.B. specifically sought expunction under Article 55.01(a)(2)(A)(ii). See TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(ii)(West 2018). Article 55.01(a)(2)(A)(ii)(c) provides in part that a person who has been placed under a custodial or non-custodial arrest for commission of a felony is entitled to have all records and files relating to the arrest expunged if the indictment was dismissed and the trial court finds that the indictment was dismissed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the

offense. TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(ii)(c).

To be entitled to expunction under the pleadings and facts of this case, V.H.B was required to establish that: (1) he had been released and the charge, if any, had not resulted in a final conviction and was no longer pending; (2) there was no court-ordered community supervision under Article 42.12 for the offense; (3) an indictment or information charging him with the commission of any felony offense arising out the same transaction for which he was arrested, if presented, was dismissed or quashed; and (4) the trial court found that the indictment or information was dismissed or quashed because of mistake, false information, or some other reason indicating absence of probable cause at the time of the dismissal to believe he committed the offense.5 [Emphasis added]. See TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(ii). In his sole issue, V.H.B. challenges the trial court's findings related to the fourth element and its denial of the petition for expunction.

The issue we address is whether V.H.B. presented legally sufficient evidence to prove that the indictment was dismissed because presentment of the indictment had been made because of mistake, false information, or some other reason indicating absence of probable cause at the time of the dismissal to believe V.H.B. could be found guilty of the offense. See TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(ii). To prove this statutory element, V.H.B. relied on his own testimony as well as the State's express reason for seeking dismissal of the indictment as set forth in its motion to dismiss the indictment.

To be entitled to an expunction under Article 55.01(a)(2)(A)(ii), the petitioner is required to prove that the indictment was dismissed because a mistake, false information, or other similar reason caused the presentment of the indictment. See TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(ii). The statute requires proof that the original presentment of the indictment was made because of mistake, false information, or other reason that would, at the time of the dismissal, indicate a lack of probable cause to believe the person committed the offense. T.L.B., Jr. v. Texas Dep't of Pub. Safety, 03-10-00196-CV, 2011 WL 182889, at *3 (Tex.App.--Austin Jan. 20, 2011, no pet.). The statute requires both that mistake, false information, or similar reason cause the presentment and that the fact of wrongful or mistaken presentment cause the dismissal. State v. Sink, 685 S.W.2d 403, 405 (Tex.App.--Dallas 1985, no writ); see also In Matter of Expunction of A.M., 511 S.W.3d at 596; Kendall v. State, 997 S.W.2d 630, 632 (Tex.App.--Dallas 1998, pet. denied)(finding that presentment had been made because of false information or mistake requires proof that grand jury based its decision to indict on erroneous facts.). Restated, it must be shown that but for the reason for dismissal, the indictment would not have been presented. Sink, 685 S.W.2d at 405.

The dismissal of an indictment due to insufficient evidence to obtain a conviction cannot be the basis of an expunction because it is not evidence that presentment of the indictment was made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe that the defendant committed the offense. See In re C.V., 214 S.W.3d 43, 45 (Tex.App.--El Paso 2006, no pet.); Barker v. State, 84 S.W.3d 409, 413 (Tex.App.--Fort Worth 2002, no pet.). When examining the reason for the dismissal, the expunction court may look beyond the reasons given by the prosecutor. See Harris County District Attorney's Office v. Hopson, 880 S.W.2d 1, 4 (Tex.App.--Houston [14th Dist.] 1994, no pet.).

V.H.B. contends the trial court abused its discretion when it denied his petition for expunction because he was not 17 years of age or older "during all of the times alleged in the indictment." He asserts that the State dismissed the indictment because the prosecutor realized that the presentment to the grand jury had been made on the basis of a mistake or false information about V.H.B.'s age, and he could not be guilty of the offense alleged in the indictment. V.H.B. argues that the grand jury would not have indicted him had it known his true age, since it would have lacked probable cause to believe that he was at or above the age of 17 during the alleged period as required by Section 21.02 of the Penal Code. TEX.PEN.CODE ANN. § 21.02. We disagree.

It is undisputed that the State's motion to dismiss is founded on the detective's mistake regarding V.H.B.'s birthdate. Unlike some, that mistake does not call into question whether V.H.B. was the person who committed the offense. See In re C.V., 214 S.W.3d at 45. Nonetheless, the grand jurors did not have the benefit of V.H.B.'s actual age when they made their decision to indict him. We are mindful, however, of no less than two matters. We first observe that V.H.B. was age 17 and older during almost two years portion of the approximately three-year period alleged in the indictment and as represented to the grand jury. Second, we acknowledge that while the State must provide the defendant with notice of the time period in which the continuous sexual abuse is alleged to have occurred, it is not necessary for the State to allege the exact dates on which the predicate acts of sexual abuse

occurred, as those dates are not essential to the State's case and are considered to be evidentiary facts only. See Holton v. State, 487 S.W.3d 600, 609-10 (Tex.App.--El Paso 2015, no pet.). That the prosecutor dismisses a case simply because she believes she has insufficient evidence to convict is not mistake or false information. See Texas Dept. of Pub. Safety v. Collmorgen, 14-06-00478-CV, 2007 WL 853812, at *2 (Tex.App.--Houston [14th Dist.] Mar. 22, 2007, no pet.)(mem. op., not designated for publication), citing Thomas v. State, 578 S.W.2d 691, 699 (Tex. Crim. App. 1979). Consequently, in this case, the significance of the detective's mistake of age does not call into question the existence of probable cause for the grand jury to indict but instead relates to the State's ability to meet its evidentiary burden of proving, at a minimum, that V.H.B. was 17 years or older at the time he committed two or more of the alleged predicate acts during a period of 30 or more days in duration. TEX.PEN.CODE ANN. § 21.02.

Insufficient evidence to convict does not equate to a lack of probable cause to indict. See Texas Dept. of Pub. Safety v. Williams, 76 S.W.3d 647, 651 (Tex.App.--Corpus Christi 2002, no pet.), citing Ex parte Thomas, 956 S.W.2d 782, 786 (Tex.App.--Waco 1997, no writ). Insufficient evidence to convict beyond a reasonable doubt neither invalidates an indictment nor calls for its dismissal. See Harris County Dist. Attorney's Office v. M.G.G., 866 S.W.2d 796, 799 (Tex.App.--Houston [14th Dist.] 1993, no writ), citing Givens v. State, 438 S.W.2d 810, 810 (Tex. Crim. App. 1969). That the State chose to dismiss the indictment in this case does not change the outcome.

Conclusion: Nothing in the record indicates the trial court found the indictment or information was dismissed or quashed because of mistake, false information, or some other reason indicating absence of probable cause at the time of dismissal to believe V.H.B. was the person who committed the offense. See TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(ii); In re I.V., 415 S.W.3d 926, 930 (Tex.App.--El Paso 2013, no pet.). The record shows that V.H.B. was 17 years of age or older during the period alleged in in the indictment, and this evidence supports the trial court's ruling. For the foregoing reasons, the trial court had sufficient evidence by which it could have determined that the grand jury did not base its decision to indict on a mistake indicating an absence of probable cause at the time of dismissal that V.H.B. was the person who committed the offense. V.H.B.'s sole issue on appeal is overruled. The trial court's judgment is affirmed.

Ex Parte McIntyre, No. 02-18-00163-CR, No. 02-18-00164-CR, --- S.W.3d ----, 2018 WL 3968786, Tex.Juv.Rep. Vol. 32 No 4 ¶ 18-4-1 (Tex.App.—Fort Worth, 8/16/2018).

IN INTERPRETING ARTICLE I, SECTION 11B OF THE TEXAS CONSTITUTION, "RELEASED ON BAIL PENDING TRIAL" IS THE SAME AS A "JUVENILE PREDELINQUENCY ADJUDICATION HEARING RELEASE," AND HAVING HIS "BAIL" REVOKED IS THE SAME AS "CUTTING OFF HIS ANKLE MONITOR AND FLEEING."

Facts: Appellant was sixteen years old when he allegedly committed these offenses. The capital murder case stems from a July 26, 2016 incident in which multiple suspects entered a house in Mansfield at 10:45 p.m., displayed their pistols, and demanded the occupants' cell phones and illegal drugs. During the robbery, the suspects fired their pistols, killing one of the occupants and wounding another. Appellant was identified as one of the suspects.

An arrest warrant issued for Appellant, and he was arrested and placed in the juvenile detention facility. After detention hearings, the juvenile court released Appellant pretrial to "home arrest" subject to conditions that included electronic monitoring via an ankle monitor. Despite signing the conditions of release and being informed that violations could result in the issuance of a directive to apprehend him and his subsequent arrest and detention, on March 27, 2017, Appellant cut off his monitor and fled.

Within a month of fleeing, Appellant became a suspect in—and has now been indicted for—a second capital murder in Bexar County. According to a Bexar County arrest warrant affidavit admitted into evidence at the writ hearing, Appellant and three others picked up a photographer for a photo shoot at a mall on April 23, 2017. The affidavit alleges that Appellant and one of the others pulled out guns and took the photographer's backpack containing his camera equipment. The other gun-bearing individual pistol-whipped the photographer and forced him from the car. The photographer attempted to get back into the car and eventually jumped on the hood. According to the affidavit, Appellant then leaned out of the window and shot the photographer, who died as a result of the gunshot.

A month after that incident, Appellant became a suspect in—and has now been indicted in—the May 25, 2017

Arlington aggravated robbery case. The details of that offense are not in the record before us.

Thus, Appellant has been indicted for two felony offenses—the Bexar County capital murder and the Arlington aggravated robbery—that were committed within two months of the date Appellant cut off his ankle monitor and fled. Approximately three months after Appellant cut off his ankle monitor and fled, on June 30, 2017, he was apprehended by the United States Marshals Service in Union County, New Jersey. He was returned to Tarrant County where he was incarcerated in the Tarrant County Jail on July 20, 2017. The juvenile court waived its jurisdiction and transferred Appellant's cases to the district court.

The State filed criminal complaints against Appellant in the capital murder case (noting bail was set in the amount of $500,000) and in the Arlington aggravated robbery case (noting "$0 bond"), and a Tarrant County grand jury returned indictments against Appellant in both cases on September 29, 2017. On February 7, 2018, the trial court sua sponte held the $500,000 bond previously set in the capital murder case to be insufficient and ordered that Appellant be held without bail in that case.

Appellant filed an application for a pretrial writ of habeas corpus in both cases1 arguing that he is being illegally restrained because he has been incarcerated since July 20, 2017, without the setting of reasonable bail. Appellant requested in his application that the trial court set reasonable bail in both the capital murder case and the Arlington aggravated robbery case. The trial court conducted a hearing.

At the hearing on Appellant's application for a pretrial writ of habeas corpus, evidence presented to the trial court established that after Appellant cut off his ankle monitor and fled, he wrote a song detailing his escapades. A New York lawyer represented Appellant in recording contract negotiations, and Appellant ultimately signed a three-year recording contract with 88 Classic for $600,000 or $700,000. Appellant also made a music video in which the trial court described Appellant as "pretty much bragging about the fact that he not only cut off his monitor ... but he's standing around holding a .9 mm pistol ... standing next to a poster of himself," which the trial court believed "came from the directive to apprehend."

Appellant's father and Appellant's uncle testified at the writ hearing. Appellant's father, Kevin Beverly, said that although he lived in McKinney, he had made arrangements to lease a home in Fort Worth so Appellant could live there with him if Appellant were released on bond. Beverly explained that Appellant's uncle had agreed to live with them if Appellant was released so that together they could provide continuous supervision of Appellant and make sure Appellant complied with all of the conditions of any bonds that are set. Beverly said that Appellant's recording contract was paying for his lawyers in Tarrant County and Bexar County and that as Appellant's legal guardian, he had transferred Appellant's assets to a trust.

Appellant's uncle testified that he lived in Florida and that he had retired from the Army after suffering injuries during combat. Since retiring from the Army, Appellant's uncle had worked in security contracting (protecting embassies and consulates) and executive protection (providing security for mayors, senators, artists, and other similar professionals). Appellant's uncle testified that he was willing to move to Texas and live with Beverly. Appellant's uncle agreed that either he or Beverly would be in direct supervision of Appellant at all times and promised to make sure that Appellant observed every condition of any bonds that are set.

Defense counsel asked to provide additional information about the assets in Appellant's trust fund at a later date. The trial court agreed, and defense counsel provided that information at a subsequent, brief, on-the-record conclusion to the writ hearing. Defense counsel also requested that the trial court take judicial notice of Bexar County's placement of a juvenile hold on Appellant for the alleged capital murder of the photographer. According to defense counsel, even if the trial court set bail in Appellant's capital murder case and in his Arlington aggravated robbery case and even if Appellant posted bail, Appellant would not be released from custody but instead would be transported to Bexar County for a detention hearing in the juvenile court and possibly a hearing seeking a waiver of jurisdiction by the juvenile court and transfer of Appellant's case to a Bexar County district court for criminal prosecution. Only at that point, defense counsel argued, could Appellant seek bail in his Bexar County case and potentially be released.

The State offered, and the trial court admitted the arrest warrant for Appellant in the capital murder case and the Bexar County capital murder arrest warrant for Appellant. The State's sole witness was Luis Montoya. Montoya

testified that the juvenile system does not have bonds and that Appellant has never been placed on a bond or bail. Montoya explained that Appellant's act of cutting off his monitor was a violation of his conditions of release and that the remedy for that violation was to issue a directive to apprehend.

The trial court made the following findings of fact and conclusions of law:
1. Applicant's date of birth is [redacted].
2. Applicant has been a runaway since July 4, 2014.
3. In Cause No. 1511547D, Applicant is accused in a four-count indictment alleging one count of capital murder and three counts of aggravated robbery.
4. In Cause No. 151157[4]D, Applicant is accused of one count of aggravated robbery and one count of aggravated assault.
5. Applicant previously removed his ankle monitor and fled while under house arrest as ordered by the juvenile court.
6. Applicant is alleged to have committed an additional capital murder and other felonious conduct after a directive to apprehend was issued following his absconding from house arrest by removing his ankle monitor.
7. According to the Noble Static Risk Assessment that was administered to Applicant, the classification reported for Applicant is "High Violent."
8. The nature of the alleged offenses and safety of the victim and community should be and has been considered on the issue of bond.

For all the reasons stated above and by the Court on the record during the hearing on March 8, 2018, the relief requested by Applicant should be denied[,] and no bail amount should be set. The trial court denied Appellant's application for a pretrial writ of habeas corpus ruling that "Applicant's requests for relief are DENIED[,] and no bail amount shall be set."

Held: Trial court's order denying bail in the capital murder case affirmed. Trial court's order denying bail in the Arlington aggravated robbery case reversed.

Opinion (per curiam): In the capital murder case, Appellant is charged with one count of capital murder and three counts of aggravated robbery for the events that occurred in Mansfield in July 2016. Appellant was placed in juvenile detention as a result of these offenses, was subsequently released on "house arrest," and was subject to conditions of release that included electronic monitoring via an ankle monitor. The State argues that Appellant's release from juvenile detention on the condition that he be electronically monitored twenty-four hours a day is equivalent to being "released on bail pending trial" for purposes of Texas constitution article I, section 11b's authorization of the denial of bail.

In support of this argument, the State's brief includes a helpful chart comparing juvenile predelinquency adjudication hearing release to adult pretrial bond release, which we have reformatted as follows:

Chart omitted.

The above comparison shows that juvenile predelinquency adjudication hearing release and adult pretrial bond release differ only in that (a) adult pretrial bond release typically includes security or money and (b) juvenile predelinquency adjudication hearing release may require an adult to agree to produce the child at later proceedings under penalty of an order of contempt. Compare Tex. Code Crim. Proc. Ann. art. 17.01, with Tex. Fam. Code Ann. § 53.02(d).

The State points out that the same major underlying purpose—assuring appearance at trial—is served by juvenile predelinquency adjudication hearing release and its conditions and adult pretrial bond release and its conditions. See, e.g., Tex. Fam. Code Ann. §§ 53.02(a), 54.01(f); Ex parte Rodriguez, 595 S.W.2d 549, 550 (Tex. Crim. App. [Panel Op.] 1980) (stating that "[t]he primary purpose or object of an appearance bond is to secure the presence of a defendant in court for the trial of the offense charged"). Conditions of juvenile predelinquency adjudication hearing release serve the same purpose, apply similar requirements, and use similar punishments for violations as adult bail conditions. The State argues that the above-charted procedural consistencies and the identical purposes underlying juvenile predelinquency adjudication hearing release and adult pretrial bond release render violations of conditions of juvenile predelinquency adjudication hearing release congruent with and interchangeable with violations of adult pretrial bond release for purposes of triggering possible denial of bail under section 11b of

the Texas constitution. We agree. No distinction exists between juvenile predelinquency adjudication hearing release and adult pretrial bond release for purposes of article I, section 11b of the Texas constitution; indeed, the Texas Court of Criminal Appeals has declined to draw such a distinction between adults and juveniles certified to stand trial as adults in a similar situation. See, e.g., Ex parte Green, 688 S.W.2d 555, 556–57 (Tex. Crim. App. 1985) (rejecting applying section 42.03 of the code of criminal procedure's credit-for-time-served provision differently to juvenile subsequently certified as an adult who had served time pretrial—even though juvenile was detained in juvenile detention facility, not jail—when juvenile was confined as a result of behavior which, if committed by an adult, would constitute a penal offense).4

A trial court may deny bail under Texas constitution article I, section 11b if a person (1) who is accused in Texas of a felony, (2) is released on bail pending trial, (3) has his bail subsequently revoked for a violation of a condition of release, and (4) is found to have violated conditions that relate to the safety of a victim or the safety of the community. Tex. Const. art. I, § 11b. In the capital murder case, Appellant is a person (1) who was accused in Tarrant County, Texas, of the felonies of capital murder and aggravated robbery; (2) was "released on bail pending trial" via his juvenile predelinquency adjudication hearing release; (3) had his "bail"/juvenile predelinquency adjudication hearing release subsequently revoked, as reflected by Appellant's continuous confinement since July 20, 2017, for violating a condition of his release—including cutting off his ankle monitor and fleeing; and (4) was specifically found by the trial court in finding of fact to have violated a condition that relates to the safety of the victims and of the community. For purposes of article I, section 11b of the Texas constitution, Appellant has effectively been "released on bail pending trial" in the capital murder case; Appellant violated the conditions of his release, fled, and allegedly committed multiple additional felonies demonstrating his danger to the community. We hold that the trial court did not abuse its discretion by denying Appellant's application for a pretrial writ of habeas corpus and by denying bail under article I, section 11b in the capital murder case. See id. See generally Ex parte Shires, 508 S.W.3d 856, 865 (Tex. App.—Fort Worth 2016, no pet.) (looking at the legislative history of section 11b and stating that "the legislature recognized that when an accused has demonstrated a reluctance to abide by reasonable conditions of bond, considerations of the safety of victims ... and the safety of the community as a whole should be considered before releasing the defendant into the community again").

We overrule the portion of Appellant's sole issue challenging the denial of his application for a pretrial writ of habeas corpus seeking bail in the capital murder case.

The Arlington Aggravated Robbery Case

Because Appellant's juvenile predelinquency adjudication hearing release was based on the capital murder case, not the Arlington aggravated robbery case, Texas constitution article I, section 11b does not support the trial court's decision to deny bail in the Arlington aggravated robbery case. That is, Appellant was never granted juvenile predelinquency adjudication hearing release in the Arlington aggravated robbery case, so he cannot be denied bail based on a violation of conditions of release that were never imposed.

The State argues that "extraordinary circumstances" exist authorizing the trial court to deny bail in the Arlington aggravated robbery case. The State candidly acknowledges, however, that this bail exception has been very rarely utilized—only in one case. We decline to apply the "extraordinary circumstances" exception here, if in fact such an exception still exists. We hold that the trial court abused its discretion by denying Appellant's application for a pretrial writ of habeas corpus seeking reasonable bail in the Arlington aggravated robbery case. See, e.g., Tex. Const. art. I, § 11 ("All prisoners shall be bailable ...."); Tex. Code Crim. Proc. Ann. art. 1.07 (using similar language); Ex parte Davis, 574 S.W.2d 166, 168 (Tex. Crim. App. [Panel Op.] 1978) ("The general rule favors the allowance of bail."); Gutierrez v. State, 927 S.W.2d 783, 784 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (holding that appellant was entitled to pretrial bail under the Texas constitution because none of the constitutional exceptions to bail applied).

We sustain the portion of Appellant's sole issue challenging the denial of his application for a pretrial writ of habeas corpus seeking reasonable bail in the Arlington aggravated robbery case.

Conclusion: Having overruled the portion of Appellant's sole issue challenging the trial court's denial of bail in the capital murder case, we affirm the trial court's order denying Appellant's application for a pretrial writ of habeas corpus in that case. Having sustained the portion of Appellant's sole issue challenging the trial court's denial of bail in the Arlington aggravated robbery case, we reverse the trial court denial of Appellant's application for a pretrial

writ of habeas corpus in that case and remand that case to the trial court for further proceedings consistent with this opinion. See Tex. R. App. P. 43.2(d); Gutierrez, 927 S.W.2d at 784 (remanding case to trial court to set bail when appellant court held appellant was entitled to have bail set).

Agers v. State, MEMORANDUM, No. 05-16-01419-CR, No. 05-16-01420-CR, No. 05-16-01421-CR, No. 05-16-01422-CR, No. 05-16-01423-CR, 2018 WL 494800, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-8 (Tex. App.—Dallas, 1/22/2018).

AGGRAVATED SEXUAL ASSAULT COMMITTED BY A JUVENILE DOES NOT QUALIFY AS SEXUALLY VIOLENT OFFENSE FOR AFFIRMATIVE FINDINGS PURPOSES IN ADULT COURT.

Facts: Appellant was convicted of four aggravated assault of a child offenses (the KG offenses)1 and one indecency with a child offense (the LM offense), and was sentenced to seven years imprisonment for each offense.

In ten issues, appellant argues that all judgments should be reformed to: (i) reflect that he pled no contest and (ii) provide credit for the 167 days he served in juvenile custody. In eight additional issues, he argues that the judgments for the KG offenses should be modified to delete the affirmative finding concerning the victim's age and that the evidence is insufficient to support the finding that KG was ten years old when appellant committed the offense. The State agrees with all of appellant's modification arguments.

Held: Judgment modified, Affirmed as modified.

Memorandum Opinion: The judgments for the KG offenses include an affirmative finding that "The age of the victim at the time of the offense was 10 years."

The code of criminal procedure requires an affirmative finding that the victim of a sexually violent offense was younger than fourteen years of age. See TEX. CODE CRIM. PROC. ANN. art. 42.015(b). A "sexually violent offense" includes aggravated sexual assault "committed by a person 17 years of age or older." Id. art. 62.001(6); see also Munday v. State, Nos. 09-15-00277-78-CR, 2017 WL 3082136, at * 6 n.5 (Tex. App.—Beaumont Apr. 24, 2017, no pet.) (mem. op., not designated for publication) (for affirmative finding to apply, state must prove defendant was seventeen or older when he committed the qualifying offense).

Appellant was born on September 25, 1996, and was sixteen when the KG offenses were reported to the police. Although he was over the age of seventeen when he was convicted, nothing in the record shows that he was seventeen or older when he committed the offenses. Thus, the KG offenses did not qualify as sexually violent offenses and no affirmative age finding was required. Therefore, we sustain issues eleven through fourteen and modify the KG judgments to omit the finding providing "The age of the victim at the time of the offense was ten years." Our resolution of these issues obviates the need to consider appellant's remaining issues. See TEX. R. APP. P. 47.1.

Conclusion: We sustain issues one through fourteen and modify all judgments to reflect appellant's no contest plea and to include credit for juvenile custody time served from November 22-May 8, 2014. We modify the KG judgments (trial court cause numbers F14-15514-Y, F14-15515-Y, F14-15516-Y, and F14-1557-Y) to omit the affirmative finding providing "The age of the victim at the time of the offense was 10 years." As modified, all judgments are affirmed.

DETERMINATE SENTENCE ACT—

In the Matter of D.L., MEMORANDUM, No. 03-17-00491-CV, 2018 WL 4016933, Tex.Juv.Rep. Vol. 32 No. 4 ¶ 18-4-3 (Tex.App.—Austin, 8/23/2018).

A PETITION THAT INCLUDES BOTH ELIGIBLE AND INELIGIBLE OFFENSES MAY BE REFERRED TO THE GRAND JURY, BUT A DETERMINATE SENTENCE MAY BE IMPOSED AS TO THE

ELIGIBLE OFFENSE ONLY.

Facts: In August 2012, when appellant D.L. was thirteen years old, the State filed a petition alleging that he had committed aggravated sexual assault against a child and indecency with a child by contact; the victim was about a year younger than D.L. On October 5, 2012, the State filed a Notice of Intent to Seek Grand Jury Certification, and on October 17, the grand jury found probable cause that D.L. had engaged in the alleged conduct and "approved" the State's petition seeking determinate sentencing. See Tex. Fam. Code § 53.045(a). About a week later, D.L. and his attorney signed a Waiver of Grand Jury Approval, stating that he understood that "such waiver is an acceptance of the determinate sentencing petition as though approved by the said grand jury, as authorized by Sections 53.045 and 51.09 of the Texas Family Code." The State abandoned the allegation of aggravated sexual assault, and on October 31, D.L. entered a plea of true to the allegation of indecency with a child by conduct. D.L. was adjudicated delinquent and received a determinate ten-year sentence, probated for ten years. In January 2015, D.L.'s probation was revoked and he was ordered committed to TJJD for ten years. In May 2017, the State filed a motion asking that D.L. be transferred from TJJD to TDCJ to serve the remainder of his determinate sentence. A hearing was held before the trial court, and the court signed an order finding that D.L. was still in need of rehabilitation; that he was at a high risk to re-offend; that TJJD lacked programs to benefit D.L.; that D.L. had "over 200 documented incidents of misconduct while at TJJD"; that D.L. had "failed sex offender treatment program on three occasions"; that he posed "a danger to staff and youth"; and that it was in D.L.'s and the public's best interest that D.L. be transferred to TDCJ to serve the remainder of his ten-year sentence.

"A juvenile court may not impose a determinate sentence unless (1) the prosecuting attorney refers the petition to the grand jury; (2) the grand jury approves the petition and certifies its approval; and (3) the grand jury's certification is entered in the record."1 In re J.G., 195 S.W.3d 161, 180 (Tex. App.—San Antonio 2006, no pet.) (citing Tex. Fam. Code § 53.045). Section 53.045 of the family code specifies the offenses for which a juvenile may be given a determinate sentence, including, as relevant to this case, aggravated sexual assault or indecency with a child by contact. Tex. Fam. Code § 53.045(a)(5), (12); see Tex. Penal Code §§ 21.11(a) (indecency with child by contact); 22.021 (aggravated sexual assault). However, the State "may not refer a petition that alleges the child engaged in conduct that violated Section 22.011(a)(2) [sexual assault of a child], or Sections 22.021(a)(1)(B) and (2)(B) [aggravated sexual assault of a child], unless the child is more than three years older than the victim of the conduct." Tex. Fam. Code § 53.045(e).

The State alleged that D.L. committed aggravated sexual assault and indecency by contact against the same victim, who was about one year younger than D.L. D.L. contends that because he was not more than three years older than the victim, as required by section 53.045(e), the determinate sentence and all subsequent orders are void.

Held: Affirmed

Memorandum Opinion: Initially, we note that the record does not reflect that D.L. raised this issue before the trial court. Although juvenile cases are civil proceedings, they are also quasi-criminal. In re C.O.S., 988 S.W.2d 760, 765-66 (Tex. 1999); In re A.I., 82 S.W.3d 377, 379 (Tex. App.—Austin 2002, pet. denied) ("Although juvenile matters are civil proceedings, they are quasi-criminal in nature and thus bear different consideration with regard to issue preservation."); see also In re R.L.H., 771 S.W.2d 697, 702 (Tex. App.—Austin 1989, writ denied) (fundamental error may be raised at any point in proceedings; "error is fundamental when it directly and adversely affects the public interest as that interest is defined in the statutes and constitution"). In considering error preservation in juvenile cases, the supreme court held that we should apply the same preservation rules to juvenile cases as we do in adult criminal proceedings, explaining that "there are essentially three categories of rights and requirements." C.O.S., 988 S.W.2d at 765. There are rights considered "so fundamental to the proper functioning of our adjudicatory process that they cannot be forfeited" by a defendant's inaction—called "absolute rights or prohibitions and systemic requirements"; "forfeitable" rights, which are rights the trial court has a duty to enforce when requested but that can be waived by a failure to call the trial court's attention to the error; and a third category that are " 'not forfeitable,' meaning that they cannot be lost by inaction but that they are 'waivable' if the waiver is affirmatively, plainly, freely, and intelligently made." Id. at 765-66 (cleaned up).

D.L. does not address whether he preserved this issue and attempts to avoid the problem by arguing that the determinate sentence is void. See Ex parte Seidel, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001) (void judgment is nullity and may be attacked by direct or collateral attack); Harris v. State, No. 01-04-01174-CR, 2006 WL 488677, at

*2 (Tex. App.—Houston [1st Dist.] Mar. 2, 2006, no pet.) (mem. op., not designated for publication) ("Error need not be preserved to attack a void judgment by direct appeal."). However, "[n]early every case that has held a sentence not 'authorized by law' or void (such that the alleged defect could be raised for the first time on appeal) involved the trial court's assessment of a punishment that was not applicable to the offense under the controlling statutes. That is, the punishment assessed was not within the universe of punishments applicable to the offense." Speth v. State, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999) (cleaned up). Here, the determinate sentence was imposed due to D.L.'s commission of indecency with a child by contact, and a determinate sentence is authorized for such an offense. See Tex. Fam. Code. § 53.045(a)(12). Thus, D.L.'s punishment is not outside "the universe of punishments applicable to the offense." See Speth, 6 S.W.3d at 532; see also A.I., 82 S.W.3d at 381 (sentence was void because statute did not allow for commitment to TYC).

Instead, we believe this issue is more akin to an alleged defect in an indictment or information. A petition under which the State seeks a determinate sentence against a juvenile operates as an equivalent of an indictment or information. See In re J.G., 905 S.W.2d 676, 680 (Tex. App.—Texarkana 1995), writ denied, 916 S.W.2d 949 (Tex. 1995) (per curiam) (for purposes of transferring juvenile to TDCJ, petition approved by grand jury functions as indictment); R.L.H., 771 S.W.2d at 699-700 (disagreeing with juvenile's argument that "petition cannot function as an indictment"). In an adult criminal prosecution, any defect in an indictment or information must be raised before trial or is waived. Ramirez v. State, 105 S.W.3d 628, 630 (Tex. Crim. App. 2003); Aguilar v. State, 846 S.W.2d 318, 320 (Tex. Crim. App. 1993). The issue D.L. complains of does not implicate a fundamental, systemic, or absolute right, and D.L. thus has not shown that the asserted error rises to the level of constitutional error. See R.L.H., 771 S.W.2d at 702 (fundamental error is "extremely rare"). We hold that error, if any can be said to exist, in the petition's inclusion of an offense for which a determinate sentence could not be imposed was waived by D.L.'s failure to object. See In re J.O.E., No. 07-15-00215-CV, 2016 WL 5929600, at *3 (Tex. App.—Amarillo Oct. 11, 2016, no pet.) (defects in charging instrument's fundamental, constitutional requirements cannot be waived, but defects, errors, or irregularities in instrument's form or substance "are considered to be of a non-jurisdictional nature and can be waived"); In re A.D.J., No. 03-96-00210-CV, 1996 WL 591140, at *3 (Tex. App.—Austin Oct. 16, 1996, writ denied) (per curiam) (not designated for publication) (juvenile waived defect in determinate-sentence petition by failing to object in trial court to lack of signatures by nine grand jurors).

However, even if D.L. had preserved the issue, we would hold that it was not reversible error for the petition to include the abandoned allegation. In In re J.G., our sister court addressed a similar contention—that because "the petition included an offense not eligible for determinate sentencing, the grand jury certification is void, and as such, the trial court had no jurisdiction over the case." 195 S.W.3d at 180. In that case, the petition certified by the grand jury alleged aggravated sexual assault and indecency by exposure, but the State abandoned the indecency charge. Id. The court held that because the sexual-assault charge supported a determinate sentence, the grand jury had the authority to certify the petition "with respect to" that charge. Id. The court disagreed with the juvenile's contention that the grand jury's certification was a nullity because the petition included the abandoned indecency allegation, noting that although one of the alleged crimes would not have supported a determinate sentence, the other offense, on which the State proceeded, did, and holding that the requirements of section 53.045 were met. Id.

Similarly, although this specific question was not directly at issue, we believe our decision in In re J.H. is useful to our analysis. 150 S.W.3d 477 (Tex. App.—Austin 2004, pet. denied). In that case, J.H. was accused of nine counts of delinquent behavior—aggravated sexual assault, indecency with a child by contact, and indecency with a child by exposure. Id. at 479. The trial court found six of the allegations to be true, and because it found that J.H. had "engaged in a violation of the offense of aggravated sexual assault," assessed a determinate sentence of twenty-five years. Id. at 479-80. J.H. appealed, arguing in part "that the trial court erred in assessing a determinate sentence after finding that he engaged in two counts of indecency with a child by exposure because that offense is not among the listed offenses for which a determinate sentence can be ordered." Id. at 480. We held:

Based on a plain reading of the statute, we conclude that even one violation of one penal law listed in section 53.045(a) of the family code is sufficient for the imposition of a determinate sentence. Here, J.H. was found to have engaged in both aggravated sexual assault and indecency with a child by contact, both of which are listed in section 53.045(a). That he also engaged in another offense—one not listed in section 53.045(a)—does not prohibit the assessment of a determinate sentence.
Id. at 481.

D.L. urges us to disregard J.H. because that case did not "dispose of the antecedent question of whether a determinate sentence was authorized in the first place." He attempts to distinguish J.G. by arguing that our sister court "apparently was not asked to consider, nor did it consider, whether, since the Legislature chose the word 'petition' in 53.045(e), this means that a petition covered by that subsection may not be referred to the grand jury for approval if it also contains an eligible determinate sentence offense allegation." He emphasizes the use of the word "petition" in section 53.045, as opposed to "offense," which he argues the legislature would have used had it intended to allow for ineligible offenses to be included with eligible offenses.

Reading section 53.045 carefully, as D.L. urges us to do, that statute provides that a petition may be referred to the grand jury and subsequently support a determinate sentence "if the petition alleges that the child engaged in delinquent conduct ... that included the violation of any of the following provisions," and then goes on to list the offenses eligible for determinate sentence. Tex. Fam. Code § 53.045(a) (emphasis added). Section 53.045 does not state that a petition referred to the grand jury can only allege eligible offenses. Considering all of the language chosen by the legislature, it follows that the petition must include at least one eligible offense but is not limited to alleging only eligible offenses. Instead, logic requires the conclusion that a petition that includes both eligible and ineligible offenses may be referred to the grand jury, and a determinate sentence may be imposed as to the eligible offense.

Finally, even if there was preserved error in the petition's listing a non-eligible offense, D.L. has not shown that his substantial rights were harmed by that inclusion, since he was given a determinate sentence based on the indecency allegation, which does not require the juvenile to be more than three years older than the victim of his conduct. See id. § 53.045(a), (e). The allegation of aggravated sexual assault was abandoned before D.L. entered his plea. See In re J.H., 150 S.W.3d at 485-86 (courts should apply criminal harm analysis to determinate sentences, meaning judgment must be reversed unless court determines beyond reasonable doubt that constitutional error did not contribute to adjudication or punishment, but other non-constitutional errors will be disregarded unless they affect substantial rights). We overrule D.L.'s sole issue on appeal.

Conclusion: We have overruled D.L.'s issue on appeal. We therefore affirm the trial court's order of adjudication with a determinate sentence and all subsequent orders, including the order transferring him to TDCJ for the remainder of his sentence.

R.L. v. State, MEMORNADUM, No. 01-17-00023-CV, 2018 WL 650250, Tex.Juv.Rep. Vol. 32 No. 2 ¶ 18-2-2 [Tex.App.—Houston (1st Dist.) 2/1/18].

IN DETERMINATE SENTENCE "NO CONTEST" PLEA, TRIAL COURT WAS UNDER NO DUTY TO SUA SPONTE WITHDRAW APPELLANT'S PLEA WHERE HE TESTIFIED TO OFFENSE BEING A "TRAGIC ACCIDENT."

Facts: R.L., a juvenile, was charged with aggravated assault with a deadly weapon.1 Appellant stipulated that "if the witnesses were called to testify under oath they would testify" that he "did then and there unlawfully, recklessly cause serious bodily injury to [the complainant] by shooting the complainant with a weapon, namely a firearm." The trial court admonished appellant in accordance with Section 54.03(b) of the Family Code, accepted the stipulated evidence and appellant's "no contest" plea, and adjudicated appellant delinquent.

After accepting the stipulation of evidence and appellant's no contest plea, the trial court held a non-jury, determinate sentencing hearing. During the hearing, the complainant testified that appellant approached her while she was talking with friends, put a gun to her face, and asked her, "Bitch, do you want to see how my gun and bullets feel?" The complainant was about to say, "Get the gun out of my face" and push it aside, when it went off, shooting her in the cheek. As a result of her injury, she was in the hospital for three months before being transferred to a rehabilitation facility for another three months. The bullet tip was lodged in her spine and she had to relearn how to walk, talk, and eat.

Appellant testified on his own behalf at the hearing. He denied putting the gun to the complainant's face and called the shooting "just a tragic accident." He testified as follows:
There was no gun to no one's face. It was a group of people and the gun fell and shot off and then everything was white. It was in the gazebo. And it was, like, shocking and I couldn't see anything. And then when I finally saw,

everyone was running. I did not point the gun at her cheek and shoot her.

The trial court disbelieved appellant's version of the shooting, noting that "although admonished, [that he] did not have to testify, [he] did, and apparently lied to the Court suggesting that he just simply does not get it." Thereafter, the trial court assessed appellant's punishment at 10 years' confinement in the Texas Juvenile Justice Department, with a possible of transfer to the Texas Department of Criminal Justice.

On appeal, appellant contends that the trial court erred by:
[F]ailing to withdraw appellant's plea of true to the offense of aggravated assault because it was not voluntarily, knowingly or intelligently entered as shown at the disposition hearing where he denied committing the offense and failed to understand the culpable mental state of recklessness.

Essentially, appellant claims that when he testified at the determinate sentencing hearing that he did not point a gun at the complainant, and that his shooting of her was a "tragic accident," his testimony evidenced that he did not understand what "reckless" meant and the trial court should have withdrawn his plea.

Held: Affirmed

Memorandum Opinion: Appellant concedes that he stipulated that the witnesses would testify that he "recklessly" caused bodily injury to the complainant but argues that his subsequent testimony about the shooting being a "tragic accident" shows that he did not understand the legal definition of "reckless." As a result, appellant contends that his plea should have been withdrawn because it was not knowingly, intelligently, and voluntarily made.

This Court considered a similar claim in In re J.B., No. 01-13-00844-CV, 2014 WL 6998068 (Tex. App.—Houston [1st Dist.] Dec. 11, 2014, no pet.) (mem. op.). In that case, the juvenile defendant stipulated to the evidence of his guilt and pleaded "true" to the State's charge alleging aggravated robbery with a deadly weapon. Id. at *1. The trial court properly admonished the juvenile, accepted the stipulated evidence, and adjudicated the juvenile delinquent. Id. At the disposition hearing, the juvenile testified that he used a toy gun when committing the offense. Id. On appeal, the juvenile contended that his plea was not voluntary, knowing, or intelligent because it was based on his erroneous belief that aggravated robbery could be committed with a toy gun. Id. This Court noted that the evidence the juvenile relied on was presented during the disposition hearing, after he was adjudicated delinquent. Id. at *2. Thus, the question presented was whether the trial court had a duty to sua sponte withdraw the juvenile's plea. Id. Because the juvenile had not requested that he be allowed to withdraw his plea, the trial court was not required to sua sponte withdraw the plea, even if there was evidence at the disposition hearing that reasonably and fairly raised an issue as to his guilt. Id. at *3 (citing Rivera, 123 S.W.3d at 32–33).

The same is true in this case. The record shows that the trial court admonished appellant, who was represented by counsel, regarding the allegations against him, the consequences of the proceeding, including the admissibility of his juvenile record in criminal proceedings, his right to remain silent, his right to a trial or a trial by jury, and his right to confront witnesses. See TEX. FAM. CODE ANN. § 54.03(b). Thus, appellant bears the burden to show that he entered his plea without understanding its consequences and was harmed as a result. Martinez, 981 S.W.2d at 197; J.B., 2014 WL 6998068, at *2.

The trial court accepted appellant's stipulation and adjudicated him delinquent before appellant presented evidence that he claims evidences his misunderstanding of the culpable mental state required to prove the charged offense. Appellant did not file a timely motion for new trial asking the court to withdraw his plea. Therefore, the trial court was under no duty to sua sponte withdraw appellant's plea. See Rivera, 123 S.W.3d at 32–33; J.B., 2014 WL 6998068, at *3.

Nevertheless, appellant argues that J.B. is distinguishable, claiming that he did, in fact, ask the trial court to withdraw his guilty plea in his First Supplemental Motion for New Trial or, Alternatively, to Modify Judgment. However, at a post-trial hearing, appellant's counsel admitted that this amended motion for new trial was filed on February 10, 2017, more than 30 days after the disposition order was signed on December 2, 2016. The Juvenile Justice Code provides that "[a] motion for new trial seeking to vacate an adjudication is ... timely if the motion is filed not later than the 30th day after the date which the disposition order is signed; and ... governed by Rule 21, Texas Rules of Appellate Procedure." TEX. FAM. CODE. ANN. § 56.01(b-1)(1) (West Supp. 2017). Rule 21 of the

Texas Rule of Appellate Procedure provides that:
Within 30 days after the date when the court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amended motions for new trial. TEX. R. APP. P. 21.4(b).

A motion for new trial must be filed within thirty days after sentence is imposed or suspended in open court. State v. Arizmendi, 519 S.W.3d 143, 150 (Tex. Crim. App. 2017) (citing TEX. R. APP. 21). The motion can be amended at any time during that thirty-day period, but the trial court is barred from considering a ground raised outside the thirty-day period if the State properly objects. Id.

Conclusion: Because appellant's First Supplemental Motion for New Trial, in which he claims to have asked the trial court to withdraw his plea, was filed more than 30 days after the December 2, 2016 disposition order, it was untimely. And, indeed, appellant's original motion for new trial was overruled by operation of law on February 15, 2017.

Because appellant did not timely request that his plea be withdrawn, the holding in J.B. applies, and the trial court was under no duty to sua sponte withdraw appellant's plea. See Rivera, 123 S.W.3d at 32–33; J.B., 2014 WL 6998068, at *3. We overrule appellant's sole issue.

DETERMINATE SENTENCE TRANSFER—

In the Matter of D.M., MEMORANDUM, No. 01-17-00950-CV, No. 01-17-00951-CV, No. 01-17-00952-CV, No. 01-17-00953-CV, 2018 WL 3059738, Tex.Juv.Rep. Vol. 32 No. 3 ¶ 18-3-2 [Tex.App.—Houston (1st Dist.), 6/21/2018].

A JUVENILE COURT'S ORDER TRANSFERRING DETERMINATE SENTENCE PROBATION TO A CRIMINAL DISTRICT COURT IS NOT AN APPEALABLE ORDER.

Facts: In each juvenile court proceeding, the State filed a petition alleging delinquent conduct against appellant, charging her with delinquent conduct by committing the offense of aggravated robbery with a deadly weapon. And, in each proceeding, the juvenile court found that appellant engaged in delinquent conduct and assessed a determinate sentence of probation for a period of ten years. On April 19, 2017, the juvenile court held a hearing on the State's "motion to transfer these probations" and signed orders transferring appellant's determinate sentence probations from juvenile court to criminal district court. See TEX. FAM. CODE ANN. § 54.051(d) (West Supp. 2017). Appellant filed a notice of appeal of each trial court order.

Held: Appeal dismissed

Memorandum Opinion: Section 56.01 of the Texas Family Code sets out a juvenile's right to appeal a juvenile court's orders and specifically lists those orders. See TEX. FAM. CODE ANN. § 56.01(a), (c) (West Supp. 2017); In re J.H., 176 S.W.3d 677, 679 (Tex. App.—Dallas 2005, no pet.). A juvenile may appeal an order under:
(A) Section 54.02 respecting transfer of the child for prosecution as an adult;
(B) Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;
(C) Section 54.04 disposing of the case;
(D) Section 54.05 respecting modification of a previous juvenile court disposition; or
(E) Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or intellectually disabled. TEX. FAM. CODE ANN. § 56.01(c)(1).

Further, an appeal may be taken "by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice." Id. § 56.01(c)(2). An order under section 54.051 to transfer a determinate sentence probation to a criminal district court is not an order enumerated in section 56.01. See id. § 56.01(c)(1), (2); In re J.H., 176 S.W.3d at 679. Thus, the trial court's orders transferring appellant's determinate sentence probation to criminal district court are not appealable orders. See In re V.T., 479 S.W.3d 517, 518 (Tex. App.—Amarillo 2015, no pet.); In re T.D.S., No. 14-11-00005-CV, 2011 WL 2474056, at *1 (Tex. App.—Houston [14th Dist.] June 23, 2011, pet. denied) (mem. op.); In re J.H., 176 S.W.3d at 679.

After we notified her of our intent to dismiss the appeals unless she demonstrated that we have jurisdiction, appellant responded with a motion to retain the appeals. In her motion, she asserts that the list of appealable orders set out in section 56.01 is not exclusive and "the transfer of a determinate sentence probation from juvenile court to adult district court is akin to modification of a previous juvenile court disposition," which is an appealable order under section 56.01(c)(1)(D) of the Family Code. Appellant further asserts that the proceedings here are distinguishable from those in In re V.T. and In re T.D.S. because "they both involved technical complaints prior to the transfer hearing, and not a complete loss of jurisdiction to even hold a transfer hearing," as in appellant's proceedings.

Appellant has not demonstrated that we have jurisdiction over her appeals. "The right of appeal in juvenile proceedings is specifically controlled by Section 56.01 of the Texas Family Code." C. L. B. v. State, 567 S.W.2d 795, 796 (Tex. 1978). Section 56.01 enumerates which orders are appealable, and "there is no right to appeal orders not so included." In re J.H., 176 S.W.3d at 679. Under "the plain language of the statute," a juvenile court's order transferring determinate sentence probation to a criminal district court is not an appealable order. In re J.M., No. 03-14-00027-CV, 2015 WL 3393819 at *3 (Tex. App.—Austin May 21, 2015, no pet.) (mem. op.). And, we do not have jurisdiction over appellant's appeals even though she contends that the juvenile court lost jurisdiction to hold a transfer hearing. A claim of lack of jurisdiction "must be brought to a court through an appropriate vehicle and ... an order transferring determinate sentence probation to district court is not appealable." In re V.T., 479 S.W.3d at 518–19; see In re J.M., 2015 WL 3393819 at *3 (dismissing attempted appeal of order transferring determinate sentence probation to criminal district court when appellant contended trial court erred because it did not hold hearing before appellant's eighteenth birthday).

Conclusion: Accordingly, we dismiss the appeals for want of jurisdiction. We dismiss all pending motions as moot.

DISPOSITION PROCEEDINGS—

McCardle v. State, --- S.W.3d ----, 2018 WL 2012394, 2018 WL 2012394, Tex.Juv.Rep. Vol. 32 No. 2 ¶ 18-2-6 [Tex.App.—Houston (14th Dist.), 5/1/18].

A CAPITAL MURDER SENTENCE OF MANDATORY LIFE WITHOUT PAROLE FOR JUVENILE CERTIFIED TO ADULT COURT REFORMED TO, LIFE IN PRISON WITH PAROLE ELIGIBILITY IN FORTY YEARS, RATHER THAN THIRTY YEARS, AS WAS THE PUNISHMENT AT THE TIME FOR A FIRST-DEGREE OFFENSE, WAS NOT UNCONSTITUTIONAL AS AN EX POST FACTO VIOLATION.

Facts: In 2006, appellant Michael McCardle was convicted of capital murder and sentenced to life in prison without the possibility of parole. Appellant was seventeen years old at the time of the offense. In 2016, in light of the United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), appellant's sentence was vacated, and his case was remanded for resentencing. In 2017, the trial court sentenced appellant to life in prison with the possibility of parole in forty years. Appellant asserts that his sentence violated the United States Constitution's prohibitions on (1) cruel and unusual punishment, and (2) ex post facto punishment. He also contends that (3) the trial court's refusal to hold a full sentencing hearing violated his federal right to due process.

Held: Affirmed.

Opinion: In his second issue, appellant argues his sentence under the current version of section 12.31 violates "his right to be free from ex post facto."

Article I, section 9, of the United States Constitution states that "[n]o ... ex post facto Law shall be passed," while article I, section 10, prohibits the states from passing any ex post facto law. U.S. Const. art. I, §§ 9, 10. Similarly, article I, section 16, of the Texas Constitution states that "[n]o ... ex post facto law ... shall be made." Tex. Const. art. 1, § 16. Only the legislature can violate the federal or state ex post facto clause. Ex parte Heilman, 456 S.W.3d 159, 163–65 (Tex. Crim. App. 2015). However, "in assessing a claim based on the Ex Post Facto Clause, we look beyond the actor that is directly committing the alleged violation for some legislative origin of the alleged

violation." Id. at 165. We evaluate claims under the ex post facto clause of the United States and Texas Constitutions using the same legal standard. See Rodriguez v. State, 93 S.W.3d 60, 65 n.1 (Tex. Crim. App. 2002).4

An ex post facto law: (1) punishes as a crime an act previously committed which was innocent when done; (2) aggravates a crime, or makes it greater than it was, when committed; (3) changes the punishment and inflicts greater punishment than the law attached to the criminal offense when committed; or (4) deprives a person charged with a crime of any defense available at the time the act was committed. See Peugh v. United States, 569 U.S. 530, 538–39, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013); Collins v. Youngblood, 497 U.S. 37, 41–44, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); Rodriguez, 93 S.W.3d at 66. The ex post facto clause prohibits applying a new or amended statute's higher penalties to pre-statute conduct, but it does not prohibit applying lower penalties. See Dorsey v. United States, 567 U.S. 260, 275, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012); Ex Parte Moussazadeh, 361 S.W.3d 684, 690 n.3 (Tex. Crim. App. 2012) ("A law that changes the punishment for a crime after the crime has been committed is an unconstitutional ex post facto law only if it inflicts a greater punishment than did the previous law.... A statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as ex post facto with reference to that crime." (citations omitted)).

Before 2005, section 12.31 of the Texas Penal Code, entitled "Capital Felony," provided: "An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life." Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3602 (amended 2005, 2009 & 2013) (current version at Tex. Penal Code § 12.31(a)) (emphasis in orig.); Ex Parte Maxwell, 424 S.W.3d at 68 n.3.

Also, before 2005, an inmate serving a life sentence for a capital felony was not eligible for release on parole until the actual calendar time served without consideration of good-conduct time equaled forty years. See Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.01, 1997 Tex. Gen. Laws 327, 425 (amended 2005 & 2009) (current version at Tex. Gov't Code § 508.145(b)). That is, an individual adjudged guilty of a capital felony, in which the State did not seek the death penalty, was punished with imprisonment for life with the possibility of parole after forty years.

In 2005, the legislature amended section 12.31: "An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life without parole." Act of May 28, 2005, 79th Leg., R.S., ch. 787, § 1, 2005 Tex. Gen. Laws at 2705 (emphasis in orig.). This amendment was effective September 1, 2005. Id. § 18, 2005 Tex. Gen. Laws at 2709. Appellant committed his offense on September 15, 2005. Since this amendment removed life imprisonment with the possibility of parole as a punishment for individuals found guilty of capital felonies where the State did not seek the death penalty, the legislature repealed section 508.154(b) of the Government Code which had provided for eligibility for parole after forty years. Id. § 12, 2005 Tex. Gen. Laws at 2708. This was the law in effect at the time of appellant's conviction and original sentence.

In 2009, section 12.31 was amended again, this time to provide for life in prison in capital-felony cases transferred to criminal court from juvenile court pursuant to section 54.02 of the Texas Family Code. See Ex parte Maxwell, 424 S.W.3d at 68 n.3. The sentence for a capital felony where the State did not seek the death penalty was either life, if the case was a juvenile transfer, or life without parole. Act of May 29, 2009, 81st Leg., R.S., ch. 765, § 1, 2009 Tex. Gen. Laws 1930, 1930 (amended 2013) (current version at Tex. Penal Code § 12.31(a)). The legislature returned subsection (b) to section 508.145 of the Government Code, again setting minimum parole eligibility at forty years for capital felons serving life in prison. Id. § 2, 2009 Tex. Gen. Laws at 1930.

In 2012, the United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme for juvenile offenders under the age of eighteen in which life without the possibility of parole is mandatory, rather than based on an individualized sentencing assessment. Miller, 567 U.S. at 470, 479, 132 S.Ct. 2455; Turner, 443 S.W.3d at 128; Lewis, 428 S.W.3d at 861. However, the Supreme Court did not announce a categorical ban on assessing life without parole on minors. See Lewis, 428 S.W.3d at 863; Carmon v. State, 456 S.W.3d 594, 599 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (contrasting Miller with categorical ban on death penalty for minors in Roper, 543 U.S. at 578, 125 S.Ct. 1183, and categorical ban on life without parole for non-homicide offenses in Graham v. Florida, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)).

"In response to the Supreme Court's opinion in Miller, the Texas Legislature amended the capital sentencing statute to provide that life imprisonment, with the possibility of parole, is the mandatory sentence for defendants convicted of a capital offense which was committed when the defendant was younger than eighteen." Turner, 443 S.W.3d at 129 n.2 (citing Tex. Penal Code § 12.31(a)(1)). Section 12.31 of the Texas Penal Code was amended to state:

An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for:

(1) life, if the individual committed the offense when younger than 18 years of age; or

(2) life without parole, if the individual committed the offense when 18 years of age or older.

Act of July 11, 2013, 83rd Leg., 2d C.S., ch. 2, § 1, 2013 Tex. Gen. Laws at 5020 (emphases in orig.); see Tex. Penal Code § 12.31(a) (West 2017). This amendment became effective on July 22, 2013, and was made applicable to cases pending and on appeal as of that date. Act of July 11, 2013, 83rd Leg., 2d C.S., ch. 2, § 3, 2013 Tex. Gen. Laws at 5021; Lewis, 428 S.W.3d at 863 n.6. Section 508.145(b) continued to require a minimum of forty years before capital felons serving life in prison became parole eligible. Tex. Gov't Code Ann. § 508.145(b) (West 2012 & Supp. 2017).

The judgment entered September 1, 2006, states that the jury found appellant guilty of the offense of capital murder, a capital felony, and that the trial court sentenced him to life, which at the time meant life without parole. See Tex. Penal Code § 19.03(b) (West 2017) (capital murder is capital felony); Act of May 28, 2005, 79th Leg., R.S., ch. 787, § 1, 2005 Tex. Gen. Laws at 2705. On September 16, 2016, the Court of Criminal Appeals vacated this sentence. Ex parte McCardle, 2016 WL 5404522, at *1. On March 22, 2017, the trial court assessed appellant's punishment at "life in prison with the possibility of parole to be in accordance with the Texas Penal Code, Section 12.31." Appellant was to "serve [his] sentence of life in prison with the possibility of parole in forty years."

According to appellant, because the former version of section 12.31(a) was declared unconstitutional in Miller, and the amended section 12.31(a) went into effect on July 22, 2013, after his conviction was final, "the only penalty available to one convicted of capital murder[ ] was that of a first-degree felony." Because "[a] sentence of life for a first-degree felony allows for the possibility of parole after 30 years," appellant therefore contends that his "harsher punishment, providing the possibility of parole after 40 years, violates the prohibition against ex post facto under Article I[,] § 10 [,] o[f] the United States Constitution."[*emphasis added*]

Appellant's conviction for capital murder under section 19.03 of the Texas Penal Code was not affected by Miller; only his sentence was rendered unconstitutional. This is why the Court of Criminal Appeals granted appellant habeas relief with regard to his sentence of life without parole and remanded his case for the trial court to resentence him. Appellant looks to nonbinding authority from another state in arguing that the trial court on remand should have considered and applied the lower punishment range available for a first-degree felony. See Jackson v. Norris, 426 S.W.3d 906, 907, 911 (Ark. 2013) (on remand from Supreme Court in Miller granting habeas relief and instructing trial court to hold sentencing hearing with Miller "consideration evidence" and impose sentence within range for Arkansas Class Y felony). Here, however, the trial court was bound to follow the dictates of the Court of Criminal Appeals on remand. See Perez v. State, 495 S.W.3d 374, 392 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (describing vertical stare decisis). In appellant's habeas grant, the Court specifically remanded "for further sentencing proceedings to permit the factfinder to assess [appellant's] sentence at (1) life with the possibility of parole or (2) life without parole after consideration of [appellant's] individual conduct, circumstances, and character." Ex parte McCardle, 2016 WL 5404522, at *1.

Appellant contends the harsher portion of his punishment is not that he was subjected to life imprisonment, but rather that he has to remain in prison for ten additional years (forty instead of thirty) before becoming eligible for parole. Contrary to appellant's suggestion, the trial court could not have applied section 508.145(d) to provide him with for parole eligibility after thirty years on his sentence of life in prison with the possibility of parole for the offense of capital murder. See Ex Parte Moussazadeh, 361 S.W.3d at 690 ("[A]n applicant's parole eligibility is determined by the law in effect on the date of the offense."). At the time of his offense, section 508.145(d) provided:

An inmate serving a sentence for an offense described by Section 3g(a)(1)(A), (C), (D), (E), (F), (G), or (H), Article 42.12, Code of Criminal Procedure, or for an offense for which the judgment contains an affirmative finding under Section 3g(a)(2) of that article, is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence <u>or 30</u>

calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years.
Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.01, 1997 Tex. Gen. Laws at 425–26 (amended 2007, 2009, 2011, 2013 & 2015) (current version at Tex. Gov't Code § 508.145(d)). [*emphasis added*]

The list of offenses for which thirty-year parole eligibility was available included murder, indecency with a child, aggravated kidnapping, aggravated sexual assault, aggravated robbery, certain offenses under chapter 481 of the Health and Safety Code involving increased punishment, and sexual assault. See Act of May 21, 2001, 77th Leg., R.S., ch. 786, § 2, 2001 Tex. Gen. Laws 1528, 1529 (amended 2007, 2009, 2011 & 2013), repealed by Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 3.01, 2015 Tex. Gen. Laws 2321, 2395. **The list did not include capital murder.** The list has never included and does not currently include capital murder under section 19.03. E.g., Tex. Gov't Code Ann. § 508.145(d)(1)(A) (West Supp. 2017) (applying to inmate serving sentence for offense described by article 42A.054(a) of Code of Criminal Procedure, but expressly excluding "an offense under Section 19.03, Penal Code"); Tex. Code Crim. Proc. art. 42A.054(a) (West 2017); Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 1.01, 2.51, 2015 Tex. Gen. Laws at 2326, 2385; Act of May 25, 2013, 83rd Leg., R.S., ch. 1325, § 2, 2013 Tex. Gen. Laws 3515, 3516; Act of May 23, 2013, 83rd Leg., R.S., ch. 1252, § 13, 2013 Tex. Gen. Laws 3167, 3169–70; Act of May 9, 2013, 83rd Leg., R.S., ch. 126, §§ 1–2, 2013 Tex. Gen. Laws 522, 522; Act of May 26, 2011, 82nd Leg., R.S., ch. 1119, § 2, 2011 Tex. Gen. Laws 2880, 2881; Act of May 13, 2011, 82nd Leg., ch. 122, § 10, 2011 Tex. Gen Laws 613, 618; Act of April 7, 2011, 82nd Leg., R.S., ch. 1, § 2.09, 2011 Tex. Gen. Laws 1, 6; Act of May 11, 2009, 81st Leg., R.S., ch. 87, §§ 6.003, 11.008, Tex. Gen. Laws 208, 228–29, 241; Act of May 17, 2007, 80th Leg., R.S., ch. 405, §§ 1–2, 2007 Tex. Gen. Laws 723, 723–24; Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.03, 1997 Tex. Gen. Laws at 438–39. As an individual adjudged guilty of capital murder under section 19.03, the thirty-year parole eligibility in section 508.145(d) did not and does not apply to appellant. [*emphasis added*]

The change in appellant's punishment, regardless of whether pursuant to the amended section 12.31 or to the Court of Criminal Appeals' mandate on his habeas grant, did not inflict greater punishment than the law attached to capital murder when appellant committed the offense. Compare Act of May 28, 2005, 79th Leg., R.S., ch. 787, § 1, 2005 Tex. Gen. Laws at 2705 (requiring mandatory sentence of life without parole), with Act of July 11, 2013, 83rd Leg., 2d C.S., ch. 2, § 1, 2013 Tex. Gen. Laws at 5020 (requiring mandatory sentence of life), and Ex parte McCardle, 2016 WL 5404522, at *1 (first available punishment option was life with possibility of parole). Initially, appellant was sentenced to mandatory life without the possibility of parole. See Act of May 28, 2005, 79th Leg., R.S., ch. 787, § 1, 2005 Tex. Gen. Laws at 2705. This is the law's harshest term of imprisonment and, in Texas, the second most severe penalty permitted. Miller, 567 U.S. at 474–75, 479, 489, 132 S.Ct. 2455; Meadoux v. State, 325 S.W.3d 189, 195 (Tex. Crim. App. 2010).

On remand, appellant was sentenced to life with the possibility of parole, a less severe punishment. See Act of July 11, 2013, 83rd Leg., 2d C.S., ch. 2, § 1, 2013 Tex. Gen. Laws at 5020; Montgomery, —— U.S. ——, 136 S.Ct. at 736 ("A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."); Miller, 567 U.S. at 474–75, 132 S.Ct. 2455; Carmon, 456 S.W.3d at 599. Application of a new lower penalty does not present an ex post facto issue. See Dorsey, 567 U.S. at 275, 132 S.Ct. 2321; Ex Parte Moussazadeh, 361 S.W.3d at 690 n.3.

Further, regardless of whether the law in effect before appellant committed his offense or post Miller and the 2013 amendment applied, appellant's punishment for capital murder would have been the same, i.e., life with the possibility of parole after forty years. Compare Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws at 3602 (requiring mandatory sentence of life), and Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.01, 1997 Tex. Gen. Laws at 425 (forty-year parole eligibility for capital felon serving life), with Act of July 11, 2013, 83rd Leg., 2d C.S., ch. 2, § 1, 2013 Tex. Gen. Laws at 5020 (requiring mandatory sentence of life), and Act of May 29, 2009, 81st Leg., ch. 765, § 2, 2009 Tex. Gen. Laws at 1930 (forty-year parole eligibility for capital felon serving life); see also Ex parte Maxwell, 424 S.W.3d at 76 ("life with the possibility of parole" for seventeen-year-old capital felon permitted by "both pre-2005 and post-2013 Texas law"). Appellant therefore has not suffered harm.

Conclusion: We conclude the trial court's imposition of a sentence of life in prison with parole eligibility in forty years, to the extent that it was based on the 2013 amendment to section 12.31, was not unconstitutional as an ex post facto violation. We overrule appellant's second issue.

In the Matter of J.C.C., No. 08-16-00306-CV, --- S.W.3d ----, 2018 WL 300243, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-5 (Tex. App.—El Paso, 1/5/2018).

THE MANDATORY LANGUAGE OF SECTION 51.20(C), STANDING ALONE, MAY NOT PRECLUDE A COMMITMENT TO THE TEXAS JUVENILE JUSTICE DEPARTMENT.

Facts: The State alleged in its petition that Appellant possessed more than four but less than 200 grams of heroin. See TEX.HEALTH & SAFETY CODE ANN. §§ 481.102(2), 481.115(a)(West 2017 and West Supp. 2017). Appellant waived his right to a jury trial and entered a plea of true to this allegation. Appellant's plea is supported by a judicial confession and stipulation. The trial court accepted the plea and found that Appellant had engaged in delinquent conduct, and it entered an adjudication order.

At the disposition hearing, the State presented the testimony of Renee Mora, a juvenile probation officer familiar with the facts of the case and Appellant's probation history. Further, the State introduced into evidence the pre-disposition report which sets forth Appellant's juvenile record. The record shows that Appellant was first referred to the El Paso County Juvenile Probation Department in 2013 for four burglary of a vehicle offenses. The juvenile court adjudicated Appellant for two of those offenses and placed him on supervised probation without a curfew. Appellant committed technical violations of the probation order in 2014 and 2015, and these violations resulted in an increase in the level of probation. He was placed on supervised probation with an electronic monitor in January 2014. Following another technical violation, the trial court placed him outside of the home in APECS Challenge Academy. He was successfully discharged from APECS in July 2014 and placed on intensive supervised probation (ISP) under the Drug Court program. In January 2015, the trial court sustained a motion to modify based on a technical violation and placed Appellant on SHOCAP1 Probation. In April 2015, the trial court adjudicated Appellant for two new offenses, evading arrest and failure to identify, and Appellant was placed in the Challenge Academy. After Appellant was successfully discharged from the Challenge Academy, the court placed him back on SHOCAP. Appellant committed a new technical violation in January 2016 and he was "recycled" back into the Challenge program. Appellant did not successfully complete the Challenge aftercare program. In September 2016, Appellant was referred to the Department again based on the offense involved in this case, possession of more than four but less than 200 grams of heroin.

The State also introduced evidence regarding Appellant's substance abuse and mental health history. Appellant began using marihuana daily when he was twelve years of age. He has also used alcohol, spice, cocaine, and heroin. He was referred to substance abuse counseling in 2013 and 2014, but did not complete it. The Probation Department referred Appellant to Aliviane from September 2013 to March 2014 and he received substance abuse counseling as well as individual and family therapy. He underwent two weeks of partial hospitalization at University Behavioral Health (UBH) from March 17, 2014 through April 14, 2014.

On May 1, 2014, Appellant underwent a psychological evaluation from Amanecer. Amanecer diagnosed Appellant with conduct disorder, moderate cannabis use disorder, parent/child relational problems, child physical abuse, academic or educational problems, and problems related to the legal system, and it recommended a physically-oriented behavior modification program. Appellant was referred to the Challenge program based on this recommendation. On June 2, 2014, Appellant was referred to Texas Tech University for a psychiatric evaluation, and he was diagnosed with ADHD, anxiety, and Post-Traumatic Stress Disorder (PTSD). There is evidence that both Appellant and his mother were physically abused by Appellant's father. Appellant was also evaluated by Dr. Shiva Mansourkhani and diagnosed, with ADHD, PTSD, anxiety disorder, depressive disorder, cannabis use disorder, and conduct disorder. Dr. Mansourkhani recommended that Appellant receive trauma-focused therapy in a structural therapeutic environment and emphasized that Appellant might benefit from long-term placement in a facility that provided trauma focused-cognitive behavior therapy (TF-CBT). Based on this report, the Juvenile Probation Department recommended to the trial court that Appellant be committed to TJJD. According to Ms. Mora, TJJD could provide trauma-focused therapy in a structural therapeutic environment.

In the disposition order committing Appellant to TJJD, the trial court expressly found that it is in Appellant's best interests to be placed outside of his home, reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home, and Appellant, in his home, cannot be provided the quality of care and level of support and supervision that he needs to meet the conditions of probation.

In his sole issue, Appellant contends that the trial court abused its discretion by committing him to the Texas Juvenile Justice Department because the trial court failed to provide him with any treatment for Post-Traumatic Stress Disorder in violation of Section 51.20 of the Texas Family Code.

Held: Affirmed

Opinion: A juvenile court possesses broad discretion to determine a suitable disposition for a child who has been adjudicated as having engaged in delinquent behavior. See TEX.FAM.CODE ANN. § 54.04 (West Supp. 2017); In re E.F.Z.R., 250 S.W.3d 173, 177 (Tex.App.—El Paso 2008, no pet.). Absent an abuse of discretion, we will not disturb the juvenile court's disposition or modification of a disposition. See In re E.F.Z.R., 250 S.W.3d at 176. The juvenile court's exercise of discretion regarding disposition is guided by Section 54.04 of the Texas Family Code. See TEX.FAM.CODE ANN. § 54.04; In re E.F.Z.R., 250 S.W.3d at 177.

Under Section 54.04(i), a court must make the following statutory findings before it commits a juvenile to TJJD: (A) it is in the child's best interests to be placed outside his home; (B) reasonable efforts were made to prevent or eliminate the need for his removal from the home and to make it possible for the child to return to his home; and (C) the child cannot be provided the quality of care and level of support and supervision in his home that he needs to meet the conditions of probation. See TEX.FAM.CODE ANN. § 54.04(i)(1)(A)-(C)(West Supp. 2017). The trial court made each of the required findings and included them in the disposition order. Appellant's brief challenges only the second of the required findings. See TEX.FAM.CODE ANN. § 54.04(i)(1)(B).

In conducting our 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 re E.F.Z.R., 250 S.W.3d at 176. We employ the traditional sufficiency of the evidence standards of review when considering the first question. Id. We then proceed to determine whether, based on the evidence, the trial court made a reasonable decision or whether it was arbitrary and unreasonable. Id. In evaluating the legal sufficiency of the evidence to support the trial court's findings, we consider evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not. See City of Keller v. Wilson, 168 S.W.3d 802, 807, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the challenged finding. In re C.J.H., 79 S.W.3d 698, 703 (Tex.App.—Fort Worth 2002, no pet.). When reviewing the factual sufficiency of the evidence to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to the finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); see In re E.F.Z.R., 250 S.W.3d at 176.

Reasonable Efforts Made to Prevent Removal

Appellant argues that the trial court's affirmative finding under Section 54.04(i)(1)(B) is precluded by the evidence showing that Appellant was not provided with treatment for PTSD as required by Section 51.20 of the Texas Family Code. As part of this argument, Appellant asserts that the Probation Department made "[n]o efforts of any kind" to provide treatment for PTSD based on Dr. Mansourkhani's recommendations. Appellant also contends that the trial court's finding is contrary to Section 51.01 of the Texas Family Code. Appellant does not expressly state his arguments in terms of a sufficiency challenge, but we have construed his brief as challenging the legal and factual sufficiency of the evidence supporting the trial court's finding that reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home and to make it possible for Appellant to return to his home. See TEX.FAM.CODE ANN. § 54.04(i)(1)(B).

Citing Section 51.01(5) of the Family Code, Appellant first argues that the trial court abused its discretion by committing him to TJJD because his removal from the home was not necessary. Section 51.01 requires that the Juvenile Justice Code (Title 3) be construed to effectuate a list of public purposes, including but not limited to the following: to provide for the protection of the public and public safety; to provide for the care, protection, and wholesome moral, mental, and physical development of children coming within the provisions of Title 3; and to protect the welfare of the community. See TEX.FAM.CODE ANN. § 51.01 (West 2014). Subsection (5) further provides that these purposes should be achieved in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety. See TEX.FAM.CODE ANN. § 51.01(5). This statute guides the construction of Title 3, but it does not provide Appellant

with an independent mechanism or ground for establishing that the trial court abused its discretion by removing him from his home.

Appellant bases his second argument on Section 51.20 of the Family Code. This statute authorizes a juvenile court to order a child who is alleged by a petition to have engaged in delinquent conduct to be examined by a disinterested expert to determine whether the child has a mental illness, is a person with mental retardation, or suffers from chemical dependency. See TEX.FAM.CODE ANN. § 51.20(a)(West 2014). If the examination reveals that the child has a mental illness or mental retardation, or suffers from chemical dependency, the probation department shall refer the child to the local mental health or mental retardation authority or to another appropriate agency or provider for evaluation and services. See TEX.FAM.CODE ANN. § 51.20(b). The statute also requires the probation department to refer the child for evaluation and services if a qualified professional determines that the child has a mental illness, mental retardation, or suffers from chemical dependency while the child is under court-ordered probation and is not currently receiving treatment for the mental illness, mental retardation, or chemical dependency. See TEX.FAM.CODE ANN. § 51.20(c).

We have found no cases holding that a probation department's failure to comply with Section 51.20(c), standing alone, precludes a finding that reasonable efforts were made to prevent or eliminate the need for the juvenile's removal from the home and to make it possible for the juvenile to return to his home. Further, we are unable to find that the record shows a complete failure to provide Appellant with treatment for PTSD. The record before us reflects that the Juvenile Probation Department attempted to address the constellation of mental health and chemical dependency issues likely arising from Appellant's physical abuse as a child by referring him for evaluation and services with various providers. In May 2014, Amanecer diagnosed Appellant with conduct disorder, moderate cannabis use disorder, parent/child relational problems, and child physical abuse. Based on Amanecer's recommendation for a physically-oriented behavior modification program, the Probation Department referred Appellant to the Challenge program. In June 2014, Appellant underwent a psychiatric evaluation, and he was diagnosed with ADHD, anxiety, and Post-Traumatic Stress Disorder (PTSD). The provider recommended that Appellant continue with the prescribed medications for PTSD-related depression and anxiety, and he further recommended that Appellant be referred for individual psychotherapy and counseling to address trauma-related issues as well as depression. Ms. Mora testified that the probation records did not indicate whether Appellant was referred to individual psychotherapy and counseling for PTSD. There is also evidence in the record that Appellant has been provided with individual and family counseling while on probation. Further, Ms. Mora testified that TJJD offers therapy for PTSD and the records indicated that Appellant generally responded better when he was in a restrictive environment rather than in the local community. Thus, there is evidence in the record that Appellant has been provided with some treatment for his mental health issues and additional services are available in TJJD. There is also evidence that Appellant has been provided with treatment for chemical dependency while on juvenile probation. Further, he received substance abuse counseling as well as individual therapy and family therapy. Appellant's mother admitted that she did not take Appellant to some mental health appointments as directed by the Probation Department.

In determining whether reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home and to make it possible for Appellant to return to his home, we must also consider the evidence that Appellant has multiple referrals to the Juvenile Probation Department and he has been subjected to increasing levels of probationary supervision over a three-year period. When Appellant was first referred to the Probation Department in 2013 for four burglary offenses, he was placed on supervised probation without a curfew, but the court incrementally increased the level of supervision in 2014 and 2015 in response to technical violations committed by Appellant. During this time, Appellant was on supervised probation with an electronic monitor, intensive supervised probation (ISP) under the Drug Court program, and SHOCAP probation. In 2014, the trial court also placed Appellant outside of the home in the APECS Challenge Academy. Despite this level of supervision, Appellant committed two new offenses, evading arrest and failure to identify, and the trial court placed Appellant in the Challenge Academy. After Appellant was successfully discharged from the Challenge Academy, the court placed him back on SHOCAP. Appellant committed a new technical violation in January 2016 and he was "recycled" back into the Challenge program. Appellant did not successfully complete the Challenge aftercare program. In September 2016, Appellant was referred to the Department again based on his commission of a new offense, possession of more than four but less than 200 grams of heroin. In summary, the evidence in favor of the challenged finding shows that the trial court placed Appellant on juvenile probation and the court steadily increased the level of supervision in response to Appellant's technical violations and commission of new offenses. Further, the Probation Department

provided Appellant with services designed to address his mental health, family dynamic, and chemical dependency issues. Despite this supervision and the services provided, Appellant continued to violate the conditions of probation and to commit new offenses, including the possession of heroin offense. The trial court could have determined from the evidence that reasonable efforts had been made to prevent Appellant's removal from the home, but these efforts were unsuccessful. See In re J.D, Nos. 04-01-00748-CV, 04-01-00749-CV, 2002 WL 31174477, at *2 (Tex.App.—San Antonio Oct. 2, 2002, no pet.)(reasonable efforts had been made to prevent the need for removal because the juvenile had been allowed to remain in his home on electronic monitoring; however, those efforts were unsuccessful because he committed an assault while on the electronic monitoring). We conclude that the evidence is legally sufficient to support the trial court's finding that reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home and to make it possible for Appellant to return to his home.

We have also considered whether this finding is supported by factually sufficient evidence. The facts related above show that Appellant did not succeed on probation despite being closely supervised and provided with treatment and counseling services for his mental health and chemical dependency issues. There is evidence that Appellant was not provided with the specific TF-CBT treatment recommended by Dr. Mansourkhani for PTSD, but there is no evidence that if this specific treatment had been provided there is even a reasonable possibility that it would have prevented or eliminated the need to remove Appellant from his home. We conclude that the evidence is factually sufficient to establish that reasonable efforts were made to prevent or eliminate the need for Appellant's removal from the home.

Conclusion: Having found that the evidence is legally and factually sufficient to support the challenged finding, we conclude that the trial court had sufficient information on which to base its decision. Further, we find that the trial court's decision to commit Appellant to TJJD does not constitute an abuse of discretion. Accordingly, we overrule Appellant's sole issue and affirm the judgment of the trial court.

EVIDENCE—

In the Matter of P.M., No. 08-15-00038-CV, --- S.W.3d ----, 2018 WL 388006, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-7 (Tex. App.—El Paso, 1/12/2018).

JUVENILE'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT WERE VIOLATED WHEN JUVENILE WAS REQUIRED TO CALL THE CHILD/COMPLAINANT TO TESTIFY BECAUSE THE STATE DID NOT CALL HIM AFTER CALLING THE OUT-CRY WITNESS TO TESTIFY.

Facts: P.M. (the juvenile) and F.H. (the child) are half-brothers through their biological mother, T.H. M.H. is the father of the child, who was six-years old at the time of the adjudication hearing in October 2014, and five-years old at the time the alleged offenses occurred in October 2013. The juvenile was fifteen at the time of the alleged offense, and sixteen at the time of trial. M.H. considered himself a father to the juvenile. In October 2013, T.H., M.H., the child, and the juvenile lived together in a two-bedroom apartment. The boys slept together in a single bed, and showered together on Sundays.

During the adjudication hearing, M.H. testified that on October 29, 2013, while returning home from buying cupcakes for school, the child informed his father, M.H., that he liked grapes. M.H. informed the child that he should have told him that he liked grapes, and he could have bought some. M.H. then asked his son whether he liked oranges, and M.H., replied, "No, because they taste like sex." When M.H. asked the child who discusses sex with him, the child replied, "[P.M.]" The child informed his father that the discussions occurred in the shower, then mentioned "wee-wee," and said that while in the shower "his wee-wees would go in [my] mouth[.]" The boys had last showered together on October 27, 2013.

After arriving home, and in T.H.'s presence, M.H. picked up the child, and asked, "[W]ho does pee-pees in your face?" to which the child answered, "[P.M.]" When M.H. asked where and how often this had occurred, the child responded, "A lot," and "In my hair, in my face and in my body." M.H. informed the juvenile that he should sleep with his mother that evening. After futile attempts to discuss the matter with T.H., M.H. called police out of concern for his son's safety.

Under cross-examination, M.H. acknowledged that he had informed police that evening that he and his wife had not spoken in several days due to marital difficulties. He agreed that pee-pee and wee-wee were different terms, and when asked whether F.M. said that the juvenile had "put his wee-wee in the mouth or was it pee-pee[,]" H.M. acknowledged that F.M. had stated that the juvenile had put his pee-pee in F.M.'s mouth, on his face, and all over his body while the boys showered together. M.H. did not discuss these matters with the child after October 29, 2013, nor did the child inform M.H. between that date and the adjudication hearing that these events did not happen. M.H. recalled informing a domestic relations social worker, Gwendolyn McClure, that he was concerned because of the time that had passed since the incident and noted that F.M. was changing his story, but M.H. testified that the child had not stated that the events did not occur. When asked on cross-examination whether the child had changed his story, H.M. replied, "No, I changed the story, he didn't." H.M. denied that he had ever told the child to make allegations of sexual abuse.

Under re-direct examination, and in relation to his comments to Gwendolyn McClure, M.H. was asked whether the child was saying the alleged acts had not occurred or was just saying he did not remember. M.H. clarified that the child had stated that he did not want to remember. When asked what the child had said since the allegations had been reported to police, M.H., replied, "The similar story, sir, to myself and to our counselor, Mary Beaver[.]"

Detective Patrick Barett of the El Paso County Sheriff's Office investigated the child's allegations and identified the juvenile as the suspect. He explained that although DNA or trace evidence is sometimes procured, when the exact date of incident is unknown, such evidence is not always obtained because the examinations for securing the evidence are very intrusive and traumatic for the victim, and because force may be used to conduct the exam, a parent's release of liability must be obtained. A forensic sexual assault examination for the purpose of attempting to recover biological evidence such as sperm and saliva may be conducted within four days of an occurrence. In this case, no photographs, DNA, or medical evidence was obtained because the date of the last incident was unclear. The juvenile informed Detective Barett that nothing had happened, and stated that he and his brother had not showered in a long time.

As part of the investigation, Detective Barett observed and heard Joe Zimmerly conduct a forensic interview with the child at the advocacy center. Detective Barett's purpose in witnessing forensic interviews is to determine whether a child provides information sufficient to constitute probable cause or acts that meet the elements of an offense based on what the child says and describes. He noted that children sometimes use language that is not age-appropriate, which may indicate their comments have been directed or coached. M.H. and T.H. were present at the advocacy center during the interview, and as the interview was concluding, Detective Barett heard a commotion and a female voice screaming. As Detective Barett exited, T.H. approached and began yelling at him, and informed him that she knew her rights and could take her child out of the interview. He spoke with T.H. in another room. When he asked T.H. whether she would like to give a statement, T.H. declined. Upon conclusion of the child's forensic interview, Detective Barett determined that the child had knowledge of events and that sufficient probable cause existed to proceed with the case.

Joe Max Zimmerly is a neutral fact finder at the advocacy center, and is unaffiliated with law enforcement or child protective services. As a forensic interviewer, Zimmerly's function is to attempt to have the child explain what has occurred through the use of non-leading and non-threatening questions, with no expected result. A few minutes prior to an interview, Zimmerly receives basic facts about the child and the case, such as how the outcry occurred, family relationships, and any special needs the child may have. A rainbow on a wall is used as a color reference.

Over objection, Zimmerly testified that during his interview of the child, the child had stated that while in the shower, the juvenile would pee on his face a lot of times, that the pee would get in his mouth and tasted oily and that he would make the "pee" come out. Using an anatomical doll, the child demonstrated to Zimmerly how the juvenile would hit his penis in a spanking or slapping manner and in a thrusting motion, and described the "pee" that would come out on the wall as sticky. The child stated his own pee was like green water, but showed how the juvenile would breathe differently, and although initially describing the color of the sticky "pee" as dark green, the child later pointed to a beige-colored lamp shade in the interview room as reflective of the color of the juvenile's pee. The child also said that the juvenile put the juvenile's "wee-wee" or penis in the child's mouth "a lot of times," and after Zimmerly clarified that "wee-wee" was the child's description of the penis, and the "pee" is what comes out of the "wee-wee," the child stated that the juvenile would put his wee-wee on the child's forehead, his eye, on his nose, the belly button, and in his mouth. Zimmerly described how the child put the doll on his forehead and on his mouth.

When Zimmerly asked, “Did it go on your mouth or in your mouth?” the child replied, “In my mouth.” When asked on several occasions whether he had seen the juvenile’s pee-pee or somebody’s “wee-wee,” the child said, “No.” The child described the juvenile’s wee-wee as being “a little straight” when he peed on him. Zimmerly then asked the child whether each of the incidents had occurred “[o]ne time, two times, [or] a lot of times.” Zimmerly believed the child had responded one or two times regarding his forehead and eyes, “but a lot of times in the mouth.”

Zimmerly agreed that during the interview, the child answered a qualifying question incorrectly, but noted that the child had not lied when he was asked a question about a “kitty cat” and a fish and pointed to the wrong animal, and answered the next qualification question correctly. He also agreed that the child originally stated that his brother had not touched him, and when the child used the anatomical dolls, Zimmerly did not recall whether the child actually articulated that his brother “put his wee-wee in my mouth.” Zimmerly sought clarification from the child by following up on statements the child made by asking about the frequency of the events. While the child was drawing, Zimmerly left the room to speak with agency personnel situated behind a glass to determine whether anything needed to be clarified, and although uncertain, initially stated that he believed comments regarding oral penetration had occurred after this time, but then stated that he believed that the child had used the word “wee-wee” prior to being asked to draw and in advance of Zimmerly’s break. Zimmerly asked the child to describe his drawing, and Zimmerly wrote his notes on the drawing. In addition to labeling the top and bottom of the drawing, Zimmerly also noted the child’s comments, “Water comes out,” and “He always pees in my face.”

The child had initially demonstrated his brother flicking him, but also described or demonstrated the juvenile striking the juvenile’s penis. When asked if someone had ever touched him, the child stated, “boys and girls are touching me.” Zimmerly testified that he had no information regarding whether the child had recanted before trial.

When the State sought to introduce the video recording of the child’s interview, the trial court heard arguments in the jury’s absence, and although defense counsel objected on the basis that the recording should not be admitted under Code of Criminal Procedure article 38.071 because the child was available to testify in the jury’s presence, the State argued that during opening statements, the defense opened the door to permit the video recording to be admitted under the optional completeness exception to the hearsay rule. See TEX. R. EVID. 107; TEX. CODE CRIM. PROC. ANN. art. 38.071, § 1(5), (8), § 2(a)(West Supp. 2017). Noting that the child was available to testify, the trial court sustained the objection. After the State rested its case, the trial court denied the juvenile’s motion for directed verdict.

The child testified as a defense witness. During his testimony, the child verbally answered some questions posed to him, however many of his answers were non-verbal. During examination, defense counsel, and sometimes the State’s attorney would often follow the child’s non-verbal response by stating “Yes” or “No.” Because of the nature of the questions and the form of answers presented in the record, we find it necessary to set out the relevant testimony in the context of the colloquy that occurred between the child and counsel:

[DEFENSE]: Okay. I’m going to ask you a couple of questions. Okay? It’s real simple. Do you remember talking to Greg last week?1
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. And what day was that? Do you remember what day it was?
[F.H.]: (No verbal response.)
[DEFENSE]: No. Okay. Do you remember telling Greg that you had taken showers before in the past with your brother?
[F.H.]: (No verbal response.)
[DEFENSE]: With [P.M.]?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. Okay. And that he never did pee on you. Right? That’s what you told Greg last week. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Okay. But rather that your brother peed in between you. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Is that what you told Greg?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. And that was last Thursday. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes. Okay. You and your brother used to take showers together. Is that correct?

[F.H.]: (No verbal response.)
[DEFENSE]: Okay. And when you took showers together, he would clean you first and then you would get out of the shower, wouldn't you?
[F.H.]: (No verbal response.)
[DEFENSE]: Yes?
[F.H.]: (No verbal response.)
[DEFENSE]: And when you would get out of the shower, would you stay in the bathroom?
[F.H.]: (No verbal response.)
[DEFENSE]: No. You would leave?
[F.H.]: (No verbal response.)
*4 [DEFENSE]: Okay. And who would take you out of the bathroom usually, was it mommy, daddy or both?
[F.H.]: Mommy.
[DEFENSE]: Okay. Did your brother ever put his pee-pee in your mouth?
[F.H.]: (No verbal response.)
[DEFENSE]: No.

Under cross-examination, the State was able to elicit more verbal responses from F.H:

[STATE]: All right. Now, [F.H.], whenever I see you do this—
[F.H.]: Uh-huh.
[STATE]: —that means yes. Right?
[F.H.]: (No verbal response.)
[STATE]: And I think these people back here, I don't know if they can quite see you so could you just say yes or no on some of those?
[F.H.]: Uh-huh.
...
[STATE]: Let me ask you a question. You see all these people in the courtroom here?
[F.H.]: (No verbal response.)
[STATE]: Do you know them?
[F.H.]: (No verbal response.)
[STATE]: Do you know some of them?
[F.H.]: (No verbal response.)
[STATE]: Okay. Could I ask you. This gentleman right here at the very end of the table, who is this young man?
[F.H.]: [P.M.].
[STATE]: [P.M.]. Who is [P.M.]? Who is he? How—how are you—are you guys related? Is he your family?
[F.H.]: (No verbal response.)
[STATE]: Is that a yes or no?
[F.H.]: Yes.
[STATE]: He's your family. And what is he in your family? Is he your mom?
[F.H.]: No.
[STATE]: No. What is he?
[F.H.]: My brother.
[STATE]: Your brother. Do you love your brother?
[F.H.]: Yes.
[STATE]: Would you do anything for your brother?
[F.H.]: (No verbal response.)
[STATE]: No. That's how I know you're brothers. Well, how about these two guys, have you ever met these two guys?
[F.H.]: No.
[STATE]: You don't know these two guys. All right. What about this lady back here, who is that nice lady?
[F.H.]: My mom.
[STATE]: She's your mom. And in the very back there, who is that guy with the shirt? Well, they all have shirts. The guy on the far left.
[F.H.]: My dad.
[STATE]: Your dad. Is your family here?
[F.H.]: (No verbal response.)
[STATE]: Okay. [F.H.], did we talk about you and your brother sometime last week?
[F.H.]: (No verbal response.)

[STATE]: We did. And when you talked with me, did you tell—did everything you tell [sic] me, was that all the truth?
[F.H.]: Yes.
[STATE]: Okay. Now, let me ask you then. So have you and [P.M.] ever taken showers together?
[F.H.]: (No verbal response.)
[STATE]: Was that a yes or a no?
[F.H.]: Yes.
[STATE]: Okay. And when you take a shower, who washes your hair?
[F.H.]: My mom.
[STATE]: Your mom washes your hair. Is she in there with you and [P.M.]?
[F.H.]: No.
[STATE]: No. How about when you and [P.M.] take showers, who washes your hair?
[F.H.]: My mom.
[STATE]: Your mom.
[F.H.]: Yeah.
[STATE]: Okay. So is she in there with you and [P.M.]?
[F.H.]: (No verbal response.)
[STATE]: No. Okay.
[F.H.]: She stays outside and then me and [P.M.] is in—inside the shower.
[STATE]: Okay. So she waits in the bathroom—she's in the bathroom while both of you guys are in there?
[F.H.]: Uh-huh.
[STATE]: Okay. Who told you to say that?
[F.H.]: Nobody.
[STATE]: Nobody told you to say that? Did you talk to anybody else? When did you talk to your mom about what you were going to say? Do you remember? You don't remember?
[F.H.]: (No verbal response.)
[STATE]: Did you talk to your mom about what you were going to say?
*5 [F.H.]: (No verbal response.)
...
[STATE]: Now, has [P.M.] ever peed in the shower?
[F.H.]: (No verbal response.)
[STATE]: He has?
[F.H.]: (No verbal response.)
[STATE]: I'm sorry. Is that a yes or a no?
[F.H.]: Yes.
[STATE]: Yes. And when he peed, what color was that pee?
[F.H.]: Gray or green.
[STATE]: So was it gray one time?
[F.H.]: (No verbal response.)
[STATE]: Now, was it green another time?
[F.H.]: (No verbal response.)
[STATE]: Okay. But was it ever gray and green at the same time?
[F.H.]: No.
[STATE]: Okay. So one time it's gray. Right?
[F.H.]: (No verbal response.)
[STATE]: And the other time it's green.
[F.H.]: (No verbal response.)
[STATE]: And this is when you were in the shower with him?
[F.H.]: (No verbal response.)
...
[STATE]: Now, whenever [P.M.] would pee in the shower, did you ever touch it?
[F.H.]: No.
[STATE]: No, you never touched it. Did it ever—did you ever—what happened when he peed, where did it go?
[F.H.]: In the middle.
[STATE]: In the middle. And then it just stayed there?
[F.H.]: (No verbal response.)

[STATE]: Then what did it do?
[F.H.]: It went into the drain.
[STATE]: Into the drain. Now, let me ask you. The gray pee—
[F.H.]: Uh-huh.
[STATE]: —and the green pee—
[F.H.]: Uh-huh.
[STATE]: —which one went to the drain faster?
[F.H.]: The green.
[STATE]: The green pee went into the drain faster. Okay. How did the gray pee go into the drain?
[F.H.]: Slow.
...
[STATE]: All right. So do you remember going to a room with a big rainbow on it and talking to a man?
[F.H.]: Yes.
[STATE]: You do. And do you remember talking to him about your brother [P.M.]?
[F.H.]: Yes.
[STATE]: Okay. Do you remember telling him that [P.M.] pees on you?
[F.H.]: Yes.
[STATE]: Okay. Were you lying to the man in the rainbow room at that time?
[F.H.]: No.
[STATE]: You weren't lying to him?
[F.H.]: Uh-uh.
[STATE]: Okay. So you were telling the truth?
[F.H.]: Yeah.
[STATE]: All right. Well—all right. [F.H.], thank you for talking to me.
The following colloquy occurred when defense counsel re-examined the child:
[DEFENSE]: Okay, buddy, so what you told this jury here today, these nice 12 people over here, that was the truth. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: And your brother didn't put his pee-pee in your mouth. Right?
[F.H.]: (No verbal response.)
[DEFENSE]: And when he peed, he peed in between you. Right? Is that—
[JUROR]: I'm sorry. Can he say "yes" or "no"?
...
THE COURT: Right, yeah, because he's shaking and nodding. Okay. So say "yes" or "no." If you want to start again.
[DEFENSE]: Sure.... And when he would pee, he would pee in between you. Right?
...
[DEFENSE]: Is that right?
[F.H.]: (No verbal response.)
[DEFENSE]: Because that's what you told Greg last week, your buddy here. Right?
[F.H.]: (No verbal response.)
THE COURT: Is that a yes?
[DEFENSE]: Is that a yes?
[F.H.]: Yes.

At the conclusion of the child's testimony, the State again sought, and the trial court again denied, admission of the video recording of the child's forensic interview. The juvenile then testified that he was a sixteen-year-old high school freshman, and acknowledged that he and his little brother had taken showers together at their apartment. He stated that he never did anything sexual to his brother in the shower and never peed on his brother in the shower. The juvenile explained that he and his brother would get into the shower, he would "shower [F.H.] first," take him out, and either his stepfather or his mother would take the child, and then he would take his shower. He stated that while in the shower, his penis was never erect and he never physically gratified himself.

On cross-examination, P.M. agreed that there were moments when he and the child were alone together in the shower, and that he washed the child's hair and body when their mother was not in the bathroom. He again explained that he would typically call his mother when he finished washing the child. He admitted that he had sometimes

urinated in the shower in front of the child, and then stated that he would urinate away from the child. He did not recall the child saying anything about what he was doing, and sometimes the child peed in the shower also. They would change places to use the drain. When the juvenile was asked whether the child's testimony that the juvenile would turn and pee in the middle was the truth or a lie, the juvenile declared it to be a lie. The juvenile also stated that his brother's testimony that P.M.'s pee was green was not true and also stated that his pee was never gray. He clarified the child's testimony that their mother waited "in the shower," and explained that she waited outside the door while the boys would shower, and sometimes their mother would bathe the child by himself, but not while the boys were showering together.

On redirect examination, the juvenile denied ever discussing sex or sexual things with his brother, and on recross-examination agreed that his relationship with his stepfather was good and that he and his brother were not having any fights or disagreements prior to the child's outcry. During rebuttal, M.H. testified that he had personal knowledge that the juvenile and the child had showered together on October 27, 2013, and the trial court judicially noticed that the date occurred on a Sunday, two days before the child made his outcry. M.H. testified that the child had never informed him that the alleged acts did not occur.

The jury deliberated, and as requested was read a portion of M.H.'s testimony. The jury then returned verdicts that the juvenile had engaged in delinquent conduct consisting of aggravated sexual assault of a child and indecency with a child. All jury members were polled and affirmed their verdicts, and the trial court entered an order of adjudication. At the conclusion of the disposition hearing, the trial court found the juvenile to be in need of rehabilitation and that the protection of the community and the juvenile required that disposition be made. The court ordered the juvenile to complete sex offender treatment, deferred imposing registration as a sex offender, and entered a judgment of intensive supervised probation until the juvenile's eighteenth birthday, imposing terms and conditions of probation.

In Issue Three, the juvenile argues the outcry witness testimony was improperly admitted in violation of the Sixth Amendment's confrontation clause because the State failed to call the child as a witness, failed to show the inherent reliability of the child's statements, and failed to show that the State's failure to call the child to testify was necessary to protect the child's welfare. The State counters that the juvenile has not properly preserved error because he failed to make a timely, contemporaneous confrontation-clause objection and he failed to obtain a ruling from the trial court as required by Rule 33.1. TEX. R. APP. P. 33.1(a). It also argues that no confrontation-clause violation occurred. The State presents no constitutional harmless-error analysis.

Held: Reversed and remanded

Opinion:

Preservation of Error

We first determine whether the alleged Sixth Amendment confrontation-clause error has been preserved. To preserve a complaint for appellate review, the record must show that a defendant made a timely and specific objection to the trial court in compliance with the rules of evidence or the rules of appellate procedure, that the objection was sufficiently specific to make the trial court aware of the complaint unless the specific grounds were apparent from the context, and that the trial court ruled on the objection, either expressly or implicitly, or refused to rule and the complaining party objected. TEX. R. APP. P. 33.1(a)(1)(A), (a)(2)(A-B); Lovill v. State, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009). Failure to properly preserve error for appellate review may also waive constitutional error. See Holland v. State, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991)(en banc); Briggs v. State, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990). In making the objection, terms of legal art are not required, but a litigant should at least "let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992). An objection stating one legal basis may not be used to support a different legal theory on appeal. See Heidelberg v. State, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004)(objection based on Fifth Amendment did not preserve state constitutional ground). The two-fold purpose of requiring a specific objection in the trial court is: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint. Resendez v. State, 306 S.W.3d 308, 312 (Tex. Crim. App. 2009).

We initially note that the juvenile filed a motion "pursuant to Article 38.071 (Section 6) of the Texas Code of Criminal Procedure and the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I Sections 10 and 19 of the Texas Constitution" that the child victim be required to testify. During the outcry hearing, and as a component of his post-testimony argument, the juvenile objected to Zimmerly's testimony, in part because "[a]llowing this statement in, [Zimmerly's] statement, would be a violation of my client's Sixth Amendment rights to confront and cross-examine witnesses on statements that they have made." Before ruling, the trial court heard the State's responsive arguments and received cases from counsel. Having heard testimony and argument, the trial court ruled that M.H. and Zimmerly were proper outcry witnesses.

After the child's father testified at the disposition hearing, and in advance of Zimmerly being called to testify, the juvenile asked that the trial court reconsider his objection to the outcry testimony of Zimmerly on the basis that "it is a violation of my client's right to confront, cross-examine witnesses that'll come in and testify against him, specifically accusers." In addition to other objections and arguments, the juvenile also argued, "We believe that this is a violation of my client's right to confront and cross-examine witnesses under the Sixth Amendment, specifically in article 1, section 10 of the Texas Constitution." The State's prosecutor responded that the child was present and available to testify, and argued, "[S]o that would remedy that situation right from the outgo." The arguments and discussions then addressed the video recording of the forensic interview. The State argued that the juvenile could address the specific techniques and methods of the advocacy center and the interview by cross-examining Zimmerly, but the juvenile countered that if he did that, the State would argue that he had opened the door to allowing the video in, and therefore, his cross-examination of Zimmerly would be limited. The juvenile clarified that his objection was "to the violation of confrontation.... It is a violation of the Constitution of the United States and the State of Texas." In response to the juvenile's Sixth Amendment objections, the State noted that the outcry witness statute is a well-settled exception to the hearsay rule in Texas, reminded the court that it had already found Zimmerly to be a credible outcry witness, and informed the trial court, "The child witness is here available to testify should they want to call him as a witness." The trial court declared that it would wait and "take it as it comes," and the juvenile asked that the trial court note its objection.

The juvenile's Sixth Amendment confrontation-clause objections were timely and specific during the outcry and disposition hearings. At the outcry hearing, the trial court implicitly overruled the juvenile's confrontation-clause objection, and at the disposition hearing the trial court refused to rule. The juvenile then objected to the trial court's refusal to rule on his confrontation-clause objection. For these reasons, we find the juvenile complied with the requirements of Rule 33.1, and the alleged error in permitting Zimmerly to testify has been preserved for our consideration on appeal. TEX. R. APP. P. 33.1.

Applicable Law

Rule 801(d) defines "hearsay" as a statement that a declarant does not make while testifying at the current trial and which a party offers in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). The admissibility of hearsay is determined by the Texas Rules of Evidence and the Sixth Amendment to the U.S. Constitution. See Sanchez v. State, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011). In Texas, unless hearsay is allowed by a statute, Rules 803 or 804, or other rules prescribed pursuant to statutory authority, it is rendered inadmissible. TEX. R. EVID. 802, 803, 804.

Article 38.072 of the Texas Code of Criminal Procedure provides for the admission of hearsay evidence if its provisions are satisfied. TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 2017). In the prosecution of certain offenses committed against a child younger than 14 years of age, including indecency with a child by exposure and aggravated sexual assault of a child, article 38.072 allows a complainant's out-of-court hearsay statement to be admitted into evidence if the statement describes the charged offense and is offered by the first adult other than the defendant to whom the child described the offense, commonly known as the outcry witness. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 1, § 2(a)(1)(A)(West Supp. 2017); TEX. PENAL CODE ANN. § 21.11(a)(2)(A)(West Supp. 2017)(indecency with a child by exposure); TEX. PENAL CODE ANN. §§ 22.021(a)(1)(B)(ii), (a)(2)(B)(West Supp. 2017) (aggravated sexual assault of a child); Sanchez, 354 S.W.3d at 484. The admissibility of the statement is conditioned upon the State providing timely notice and a written summary of the witness's statement to the adverse party, the trial court's finding that the statement is reliable based on time, content, and circumstances of the statement, and the child testifying, or being available to testify, at the court proceeding or in any other manner provided by law. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(West Supp. 2017).

The admission of hearsay evidence is limited by the Sixth Amendment to the United States Constitution, which bestows on a defendant the right to be confronted with the witnesses against him. U.S. CONST. amend. VI. To overcome a Sixth Amendment objection to testimonial hearsay, the State is required to show that the declarant of the out-of-court statement is unavailable, and that the defendant had a prior opportunity to cross-examine the declarant.2 See Crawford v. Washington, 541 U.S. 36, 51–52, 68-69, 124 S.Ct. 1354, 1364, 1374, 158 L.Ed.2d 177 (2004) (at a minimum, the term "testimonial" applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial); Sanchez, 354 S.W.3d at 485. The Court of Criminal Appeals has held that outcry testimony admitted under article 38.072 comports with the guarantees of the Sixth Amendment because the child declarant is available for cross-examination or to testify at trial. Buckley v. State, 786 S.W.2d 357, 359–60 (Tex. Crim. App. 1990); see also Crawford, 541 U.S. at 59–60, 124 S.Ct. at 1369 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Sanchez, 354 S.W.3d at 486 n.26.

At an adjudication hearing, the juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding. See In re Winship, 397 U.S. 358, 359, 365, 90 S.Ct. 1068, 1070, 1073, 25 L.Ed.2d 368 (1970). Neither the protections afforded by the Fourteenth Amendment nor the Bill of Rights are limited to adults. In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967); State v. C.J.F., 183 S.W.3d 841, 847 (Tex.App.—Houston [1st Dist.] 2005, pet. denied) (citations omitted). The United States Supreme Court determined in Gault that juveniles are entitled to notice of charges, defense counsel, the privilege against self-incrimination, and confrontation of and cross-examination of witnesses. In re Gault, 387 U.S. at 49-57, 87 S.Ct. at 1455-59; Hidalgo v. State, 983 S.W.2d 746, 751 (Tex. Crim. App. 1999); In re M.H.V.-P., 341 S.W.3d 553, 557 (Tex.App.—El Paso 2011, no pet.).

Sixth Amendment Analysis

The Texas Court of Criminal Appeals has recognized that "Virtually all courts that have reviewed the admissibility of forensic child-interview statements or videotapes ... [are] 'testimonial' and inadmissible unless the child testifies at trial or the defendant had a prior opportunity for cross-examination." Coronado v. State, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011); see Crawford, 541 U.S. at 68, 124 S.Ct. at 1374 (in order to introduce testimonial hearsay over a Sixth Amendment objection, State must show that the declarant who made the out-of-court statement is unavailable, and that defendant had prior opportunity to cross-examine that declarant); Sanchez, 354 S.W.3d at 485. More recently, the Texas Court of Criminal Appeals has held that the State, as a proponent of outcry evidence, bears the burden to satisfy each stringent predicate to admission of that evidence as statutorily prescribed by article 38.072. See Bays v. State, 396 S.W.3d 580, 591 (Tex. Crim. App. 2013)(hearsay exception for outcry testimony applies only if statute's stringent procedural requirements are met), citing Long v. State, 800 S.W.2d 545, 547-48 (Tex. Crim. App. 1990)(as evidence proponent, State must satisfy each element of predicate for admission of outcry testimony under article 38.072 or invoke other hearsay rule exception).

Under the first article 38.072 predicate to admission of the outcry witness's testimony, the State was required to provide the juvenile timely notice of its intent to use outcry testimony, the name of the outcry witness and a written summary of the witness's statement. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(1)(A-C)(West Supp. 2017). As we have acknowledged, the State satisfied these requirements.

The second predicate requires that the trial court find, in a hearing conducted outside the jury's presence, that the statement is reliable based on the time, content, and circumstances of the statement. TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(2)(West Supp. 2017). This provision does not charge the trial court with determining the reliability of the statement based on the credibility of the outcry witness. Sanchez, 354 S.W.3d at 488 (also noting that outcry witness bias and ability to remember are not matters given by legislature to trial court).

The juvenile challenged the reliability of the statement during the outcry hearing and prior to Zimmerly's testimony at the disposition hearing. Although not expressly ruling on the specific issue of reliability, at the outcry hearing conducted in the absence of a jury, the trial court openly declared Zimmerly to be a proper outcry witness for the aggravated sexual assault by penetration and admitted his testimony at the disposition hearing. In light of the record and the trial court's rulings, we conclude the trial court's rulings encompassed an implied finding that the statement was reliable under article 38.072.

The last predicate for admissibility of an outcry witness's testimony under article 38.072 requires that the child testify or be available to testify at the proceeding in court or in any other manner provided by law. TEX. CODE

CRIM. PROC. ANN. art. 38.072, § 2(b)(3). Article 38.072 does not expressly require that the State call the child to testify.

In Briggs v. State, the Court of Criminal Appeals examined earlier versions of articles 38.071 (admissibility of video recording of child victim's statement) and 38.072, which also included the requirement that "the child testifies or is available to testify at the proceeding in court." Briggs v. State, 789 S.W.2d 918, 922 (Tex. Crim. App. 1990); see TEX. CODE CRIM. PROC. ANN. art. 38.071; Act of May 27, 1985, 69th Leg., R.S., ch. 590, § 1, sec. 2(b)(3), 1985 Tex. Gen. Laws 2222, 2223 (H.B. 579)(amended 2001) (current version at TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(b)(3)). In Briggs, the Court determined the statutory provisions were not facially unconstitutional but may be unconstitutional as applied:

In some cases the accused may well be forced to call the child to the stand himself, or else forgo his right to cross-examine the principal witness against him. But not every defendant would be put to this unconstitutional choice. In the instant case, for example, the State called M.T. to the stand during its case in chief, permitting appellant the opportunity to cross-examine her without appearing himself to violate the apparent purpose of the statute.4 In the event the State merely makes the child "available," but forces appellant to call her to the stand, the statute may indeed function to deprive the accused of due process and due course of law. Briggs, 789 S.W.2d at 922.

In footnote four of this passage, the Court declared, "Thus, in order to utilize the statute in a constitutional manner the State would have to call its child witness to the stand during its case in chief." Briggs, 789 S.W.2d at 922 n.4.

After deciding Briggs, the Court addressed a similar situation in Holland v. State, 802 S.W.2d 696, 699-700 (Tex. Crim. App. 1991). There the Court explained:

> *When the State proffers an out-of-court statement of a child witness pursuant to Article 38.072, supra, it is incumbent upon the accused to object on the basis of confrontation and/or due process and due course of law. At that point the State can respond by following either one of two courses. First the State can announce its intention to call the child declarant to the stand to allow confrontation without the accused having to call the child to the stand himself. See Buckley v. State, supra, at 360–61; Briggs v. State, supra, at 922. Alternatively the State can make a showing both that 1) the out-of-court statement is one that is reliable under the totality of circumstances in which it was made, Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), which Article 38.072, § 2(b)(2) already requires; and 2) use of the out-of-court statement in lieu of the child's testimony at trial "is necessary to protect the welfare of the particular child witness" in that particular case. Maryland v. Craig, 497 U.S. 836, [855], 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666, 685 (1990); see also Buckley v. State, supra, at 360; Long v. State, supra, at 312. If the State follows either of these two courses, the accused's objection on confrontation grounds should be overruled. Otherwise, the confrontation objection is a valid one and should be sustained, irrespective of whether the State has satisfied all of the statutory predicate for admissibility of hearsay under Article 38.072, supra.Holland, 802 S.W.2d at 699–700 (emphasis added).*

In Holland, the State had failed to call the child witness to testify and did not make a particularized showing of its necessity for failing to do so, but because the appellant had failed to preserve its confrontation-clause complaint in the trial court for review on appeal, the Court did not directly address the State's failure to call the child to testify. Holland, 802 S.W.2d at 700. The Court observed, however, that the United States Supreme Court had acknowledged in California v. Green, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489, 495 (1970), that confrontation-clause values may be abridged despite the admission of statements admitted under a recognized hearsay exception. Holland, 802 S.W.2d at 699. In constructing its analytical framework regarding outcry witness testimony under article 38.072, Holland also drew from the Supreme Court's two-part test in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Holland, 802 S.W.2d at 699. Under Roberts, the statement of an unavailable witness could be admitted against the defendant in a criminal trial if it bore adequate "indicia of reliability," meaning generally that the statement fell under a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66, 100 S.Ct. at 2539.

Since issuing its Holland opinion in 1991, the Supreme Court has rejected the Ohio v. Roberts standard in favor of the standard declared in Crawford v. Washington, 541 U.S. 36, 68-69, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). Under Crawford, "Where testimonial evidence is at issue, ... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68, 124 S.Ct. at 1374. The Court of Criminal Appeals has recognized that Crawford "[makes] clear that, in order to be

constitutionally sufficient, any system of ensuring the reliability of testimonial statements must include a defendant's ability to confront the witness." See Ex parte Keith, 202 S.W.3d 767, 768 (Tex. Crim. App. 2006).

Here, the State made the child available to testify at trial in compliance with Section 2(b)(3) of article 38.072, and after the State failed to call the child as a witness, Appellant called the child to testify. Compare Soto v. State, 736 S.W.2d 823, 828 (Tex.App.—San Antonio 1987, pet. ref'd)(holding appellant was not denied right to confront and cross-examine child witness where State made child available to testify, and defendant refused to call child to testify). In this case, the State did not call the child to testify nor did it establish that the use of the outcry testimony was necessary to protect the welfare of the child.

Relying on Holland, the juvenile contends his confrontation rights under the Sixth Amendment were violated because the State did not call the child to testify as required, did not establish that its failure to call the child as a witness was necessary to protect the child's welfare, and failed to show that the outcry statement was inherently reliable. See Holland, 802 S.W.2d at 699-700. The juvenile argues that the very harm sought to be avoided in Holland resulted in this case because he was required to call the child to testify under direct examination.

Because the State did not call the child to testify nor showed that the outcry testimony of M.H. and Zimmerly was necessary to protect the welfare of the child, we conclude the trial court should have sustained the juvenile's confrontation objections as valid, regardless of the State's compliance with the article 38.072 predicates for the admissibility of hearsay, and erred in failing to do so. Holland, 802 S.W.2d at 699–700; see also Briggs v. State, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990)(where child was available and in fact did testify during the State's case in chief, appellant was afforded a full and fair opportunity to cross-examine her, thus vindicating his confrontation rights without being forced to call the child himself for the purpose of securing those rights), citing Buckley v. State, 786 S.W.2d 357, 360 (Tex. Crim. App. 1990).

Constitutional Error Standard of Review

The trial court's error of allowing M.H. and Zimmerly to testify as to the child's statements absent the State's showing the admission of this hearsay was necessary to protect the welfare of the child is of constitutional dimension. The test for determining whether a federal constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Under Chapman, a federal constitutional error "did not contribute to the verdict obtained" if the verdict "would have been the same absent the error[.]" Neder v. United States, 527 U.S. 1, 15–18, 119 S.Ct. 1827, 1837-38, 144 L.Ed.2d 35 (1999). The Chapman test is codified in Texas Rule of Appellate Procedure 44.2(a), and provides that if the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a).

Harmless Error Analysis

In assessing the likelihood that the jury verdicts dispensing appellant's conviction and punishment would have been the same absent the trial court's admission of M.H. and Zimmerly's outcry testimony, we must consider the entire record. Neder, 527 U.S. at 15–16, 119 S.Ct. at 1837. In determining whether the error was harmless, we consider the importance of the hearsay statement to the State's case, whether the hearsay evidence was cumulative of other evidence, the absence or presence of evidence either contradicting or corroborating the hearsay statement on material points, and the overall strength of the case against the defendant. Woodall v. State, 336 S.W.3d 634, 639 n.6 (Tex. Crim. App. 2011), citing Davis v. State, 203 S.W.3d 845, 852 (Tex. Crim. App. 2006). We may also consider other factors contained in the record that shed light on the likely impact of the error on the mind of an average juror. Davis, 203 S.W.3d at 852. The error is harmless when the reviewing court is convinced beyond a reasonable doubt that the barred statement would probably not have had a significant impact on the mind of an average juror in making their determination. Id.

The question to be resolved is not whether the verdict was supported by the evidence but, rather, the likelihood that the constitutional error was a contributing factor in the jury's deliberations in arriving at their decision, that is, whether the error adversely affected the integrity of the process leading to the decision. Langham v. State, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010), citing Scott v. State, 227 S.W.3d 670, 690-91 (Tex. Crim. App. 2007). We also consider other constitutional harm factors, if relevant, such as the nature of the error, whether or to what extent it

was emphasized by the State, probable implications of the error, and the weight a juror would probably place on the error. Snowden v. State, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). We then consider whether there is a reasonable possibility that the Crawford error moved the jury from a state of non-persuasion to one of persuasion on a particular issue. Scott, 227 S.W.3d at 690; Davis, 203 S.W.3d at 852–53, quoting Wesbrook v. State, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.' " Snowden, 353 S.W.3d at 822, quoting TEX. R. APP. P. 44.2(a); see also Langham, 305 S.W.3d at 582; Scott, 227 S.W.3d at 690-91.

The State's outcry evidence presented through Zimmerly was vital because it presented details about the nature and extent of the offensive exposure and contact that were not presented through the testimonies of M.H. and other witnesses. Although heavily laden with non-verbal responses or no responses, the child was available to testify, and did testify, as a defense witness under direct examination. The child's testimony provided some evidence regarding the alleged offenses, portions of which corroborated or contradicted the erroneously-admitted outcry witness testimony. The juvenile presented contradictory evidence on material points, asserting that he did not commit the alleged offenses. Overall, the State's case was of moderate strength, partly as a result of the State's decision not to call the child as a witness.

However, that defense counsel was required to call the child to testify cannot be said to have had no or but a negligible effect on the jury. Defense counsel called the child to testify and answer questions about showers, touching, and "pee," when the State had not first presented the child's testimony. Average jurors may have viewed defense counsel's direct examination of the child as a victimization of the young, largely inarticulate alleged victim. We consider this to be a significant factor that increases the likelihood that the error was a contributing factor in the jury's deliberation.

It is possible that the juvenile's testimony lessened the probable negative impact of the error on the jurors. Through his testimony, the juvenile provided the jury the opportunity to consider his demeanor and credibility, thus permitting the jury to fully gauge the erroneously admitted outcry testimony in light of the juvenile's testimony as well as that of the child and the child's father. This opportunity may reduce to some degree the likelihood that the constitutional error was a contributing factor in the jury's deliberations.

In considering other constitutional harm factors, we note that both the State and the juvenile emphasized the erroneously-admitted outcry testimony of M.H. and Zimmerly during closing argument during the guilt-innocence phase but made no reference to any of Zimmerly's testimony during the punishment phase of trial. However, because the child testified under defense counsel's direct examination at trial, the probable implications of the error in admitting the outcry testimony were significant, and as a result, a juror would probably place great weight on the error.

Conclusion: A reasonable possibility exists that the error moved the jury from a state of non-persuasion to one of persuasion, and we are unable to conclude beyond a reasonable doubt that the particular error did not contribute to the juvenile's conviction or punishment. Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Issue Three is sustained. The trial court's judgment is reversed and the case is remanded for a new trial.

JUDICIAL DISQUALIFICATION—

Knox v. State, MEMORANDUM, No. 02-17-00232-CR, 2018 WL 3385862, Tex.Juv.Rep. Vol. 32 No. 3 ¶ 18-3-4 (Tex.App.—Dallas, 7/12/2018).

RECUSAL JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING DEFENDANT'S MOTION, WHERE PRESIDING JUDGE KNEW VICTIM'S BROTHER IN MURDER TRIAL.

Facts: This case began in 1973 with the murder of Donald Rodgers in Knox's home. At the time of the murder, Donald was fourteen years old and Knox was fifteen years old. Although the State filed a petition against Knox for Donald's murder in 1973, it was dismissed for insufficient evidence and the case went cold.

In 2015, Jeff Rodgers, Jr., Donald's older brother, contacted the Fort Worth Police Department to inquire about Donald's case. The FWPD reopened the investigation into Donald's murder, and after obtaining new evidence, the State arrested Knox and charged him with murder.

On June 28, 2017, Knox pleaded guilty to the offense of murder without an agreement as to punishment. The trial court held a sentencing hearing on July 10, 2017. The State called five witnesses and Knox called three witnesses, and the trial court admitted sixteen exhibits into evidence.

One of the State's witnesses was Jeff. Following Jeff's testimony, the trial judge had the following exchange with Jeff:

THE COURT: Let me ask you something. Now, I'm only asking you this because I know you --
THE WITNESS: Yes, sir.
THE COURT: -- and that you've spent a lot of time over there with the juveniles.
THE WITNESS: That's correct.
THE COURT: This incident happened when both your brother and Mr. Knox were juveniles.
THE WITNESS: That's correct.
THE COURT: I think your brother was 14.
THE WITNESS: That's correct.
THE COURT: Mr. Knox was 15. Which was a long time ago, you're right. It was almost 44 years ago and it was tragic. What do you feel justice is in your mind?
THE WITNESS: My family and I have talked about this in depth for the last several months and we've essentially determined that justice would be at least 30 years. I understand the law allows for two to 99 years. I understand there's circumstances that may not allow for all of that. But, you know, it was a juvenile -- it was a juvenile crime back then and it is my belief that it did not have to happen the way it did. Had he come forward at that time and done the right thing, based on my knowledge of the juvenile justice system, this matter would probably be all resolved by now. You know, it wasn't. And there was a series of [sic] lasts for 44 years that covered this up, so ...
THE COURT: Did you believe back then, after you heard the story, that Mr. Knox was guilty back then, even back in '73 or did you actually believe that someone had broke into the home?
THE WITNESS: Frankly, Judge, I wasn't aware of the details until later. I disconnected myself very quickly, went back home and it wasn't until many years later that I found out -- I was under the impression that somebody had been arrested. I didn't follow through with it and my parents didn't share a lot with me because right after I graduated I was commissioned and went away to the Air Force. I wish it had been handled earlier, that way my parents would have known that somebody was held accountable for the loss of their son, their fifth child, and that still hasn't happened yet.
THE COURT: All right. Thank you, Mr. Rodgers. Appreciate it.
THE WITNESS: Sure. Uh-huh.

After hearing the remainder of the punishment evidence, the trial court sentenced Knox to forty years in the Institutional Division of the Texas Department of Criminal Justice. The trial court indicated that the factors that supported its sentencing determination were Knox's use of a bolt-action shotgun, then stabbing Donald seven times and staging the scene to look like there was a break-in. According to the trial court, these actions clearly demonstrated that Knox knew what he was doing. The trial court also noted that Knox's six subsequent convictions for various offenses coupled with Knox's admission that he had been a drug dealer demonstrated a life marked by criminal activity during the years since Donald's murder. Indeed, when pointedly asked by the trial court whether

Knox honestly believed that he deserved probation as an appropriate punishment for Donald's murder, Knox conceded, "Not really, sir."

On August 7, 2017, Knox filed a motion for new trial and motion to recuse the trial judge, Judge Wayne Salvant, based solely on the above-quoted exchange between Judge Salvant and Jeff. Judge Salvant forwarded the motion to recuse to Judge David Evans, presiding judge for the Eighth Administrative Judicial Region of Texas. The State filed a response to the motion to recuse, which included affidavits from a prosecutor and Jeff. The prosecutor indicated that she "personally heard Judge Salvant state he knew Mr. Jeff Rodgers ('Mr. Rodgers'), the victim's brother[,]" and that "[a]t first, it concerned me[.]" However, the prosecutor stated that by the time Judge Salvant finished his question and explained how he knew Jeff, she was no longer concerned. The prosecutor further stated that Judge Salvant later communicated to the prosecutors and Knox's counsel in chambers that he does not know Mr. [Jeff] Rodgers personally. When Judge Salvant saw Mr. Rodgers in the courtroom, he recognized him but did not know from where. It was only when Mr. Rodgers testified he retired from Tarrant County juvenile services that Judge Salvant realized from where he recognized Mr. Rodgers.

Jeff's affidavit likewise confirmed that during his employment with Tarrant County Juvenile Services, he had known Judge Salvant professionally through brief interactions during yearly tours that Jeff would lead for Tarrant County judges. But Jeff stated that other than brief interactions to answer questions on those tours (of which Jeff could recall no specific conversations), he had no other interactions with Judge Salvant.

After conducting a hearing, Judge Evans denied Knox's motion to recuse. This appeal followed.

Knox raises four points of error asserting an abuse of discretion by Judge Evans in denying the motion to recuse Judge Salvant because (1) Judge Salvant is a material witness, (2) Judge Salvant's impartiality might be reasonably questioned, (3) Judge Salvant has a personal bias or prejudice concerning the subject matter or Knox, and (4) Judge Salvant has personal knowledge of disputed evidentiary facts.

Held: Affirmed

Memorandum Opinion: To determine whether the court hearing the motion to recuse abused its discretion, we must determine whether it acted without any guiding rules or principles. Abdygapparova v. State, 243 S.W.3d 191, 197–98 (Tex. App.—San Antonio 2007, pet. ref'd); Mosley v. State, 141 S.W.3d 816, 834 (Tex. App.—Texarkana 2004, pet. ref'd) (adding that the "mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate judge does not demonstrate [an abuse of discretion]"). In other words, "an appellate court should not reverse a trial judge whose ruling on the motion was within the zone of reasonable disagreement." Kemp, 846 S.W.2d at 306. In reviewing the denial of the motion, we must consider the totality of the evidence elicited at the recusal hearing. Id.

A. Points One and Four

In his first point, Knox alleges that Judge Salvant should be recused because he is a material witness concerning Knox's motion for new trial. Knox contends that the extent of the relationship between Judge Salvant and Jeff remains unknown. In his fourth point, Knox similarly alleges that Judge Salvant has personal knowledge of disputed facts.

Texas Rule of Civil Procedure 18b states, in relevant part, that "[a] judge must recuse in any proceeding in which: the judge has personal knowledge of disputed evidentiary facts concerning the proceeding." Tex. R. Civ. P. 18b(b)(3). Knox fails, however, to identify any knowledge of a disputed evidentiary fact possessed by Judge Salvant. Indeed, our review of the record reveals nothing to support Knox's bare assertion to the contrary. See Yorkshire Ins. Co. v. Seger, 279 S.W.3d 755, 774 (Tex. App.—Amarillo 2007, pet. denied) (refusing to "find recusal appropriate

solely on the basis of speculation regarding facts that may or may not be known by the presiding judge" when the party seeking recusal "fail[ed] to identify any specific knowledge of disputed evidentiary facts" purportedly held by judge).

We also cannot agree with Knox's assertion that "the extent of the relationship between the trial court and Mr. Rodgers remains unknown." The State's response to Knox's motion to recuse provided affidavit testimony from a prosecutor and Jeff Rodgers explaining that Judge Salvant only knew Jeff from brief, unremarkable, professional interactions when Jeff would lead Tarrant County judges on yearly tours of Tarrant County Juvenile Services facilities. Moreover, Knox did not object to the admission of these affidavits at the recusal hearing or put on any testimony or evidence contradicting them.3

Gentry v. State, an unpublished case in which recusal was required due to a judge's personal knowledge of disputed evidentiary facts, is instructive here. No. 06-05-00237-CR, 2006 WL 932057, at *1 (Tex. App.—Texarkana Apr. 12, 2006, no pet) (mem. op., not designated for publication). Gentry had been arrested after walking in and out of traffic. Id. The trial judge denied Gentry's motion to suppress the evidence that was obtained following the arresting officer's decision to stop and frisk Gentry. Id. At the conclusion of the motion to suppress hearing, the trial judge stopped the prosecutor during closing argument and stated he would deny the motion to suppress because he had personally witnessed Gentry's actions before Gentry was arrested:

You can stop. Because I'm going to be honest with you, I remember this day. I live on that road. This Motion is going to be denied because I'm one of them that almost hit them. I'm going to deny this Motion to Suppress. I'm not so sure that I wasn't one of them who called Officer Dreesen to be honest with you. I remember this day and I remember the situation. I'm going to deny the Defendant's Motion today; it's not going to be granted.
....
Like I say, I've got firsthand knowledge of the situation ... and I believe he has the right to do this [search the defendant].
....
To be honest with you, my decision is based on what I saw that day.
Id. (emphasis added).

Thus, the court of appeals concluded that the trial judge based his ruling on personal knowledge rather than on evidence adduced at trial and in so doing committed an error requiring disqualification. See id. at *3; see also Gaal v. State, 332 S.W.3d 448, 543 (Tex. Crim. App. 2011) (identifying Gentry as "[a] clear instance of 'personal knowledge of disputed evidentiary facts' requiring recusal").

Judge Salvant's comments here are nothing like those in Gentry. Unlike the trial court judge in Gentry, Judge Salvant indicated his specific reasons for assessing punishment at forty years—none of which concerned Jeff's testimony and all of which were derived from the testimony and evidence presented at the sentencing hearing. Judge Salvant's comment that he knew Jeff from Jeff's time working with juveniles simply does not indicate that Judge Salvant possessed knowledge of disputed evidentiary facts that he attained outside of the judicial proceedings and on which he based his sentencing determination.

Therefore, we hold that the recusal judge did not abuse his discretion because it is within the zone of reasonable disagreement to conclude based on the totality of the recusal-hearing evidence that Judge Salvant did not have personal knowledge of disputed evidentiary facts and that he is thus not a material witness. Accordingly, we overrule Knox's first and fourth points.

B. Points Two and Three

In his second and third points of error, Knox argues that Judge Salvant should have been recused based on his on-the-record exchange with Jeff, because Judge Salvant's impartiality may be reasonably questioned and because Judge Salvant has a personal bias or prejudice concerning Knox or the subject matter of the sentencing hearing.

The bias or lack of impartiality of a trial judge may be a ground for judicial disqualification when it is of such a character as to deny the defendant due process. Tex. R. Civ. P. 18b(b)(1)–(2); Gaal, 332 S.W.3d at 453 (recognizing one subsection concerns bias and the other concerns impartiality but that there is "much overlap between these two subsections"); Kemp v. State, 846 S.W.2d at 305–06. A judge's remarks during trial "usually will not support a bias or partiality challenge, although they may do so if they reveal an opinion based on extrajudicial information, and they will require recusal if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Gaal, 332 S.W.3d at 454 (internal quotation marks omitted).

Judge Salvant's comments "I'm only asking you this because I know you" and "you've spent a lot of time over there with the juveniles" may, at first blush, seem to indicate some bias or lack of impartiality. Indeed, the prosecutor agreed that "[a]t first, [the comments] concerned me[.]" However, as explained above, the evidence adduced at the recusal hearing demonstrated that Judge Salvant's knowledge of Jeff was limited to once-yearly, brief, professional exchanges during tours conducted by Jeff of the Juvenile Services Facilities and that the two had no relationship outside of these interactions. And, the record from the sentencing hearing demonstrates that the trial court based the sentencing decision, not on Jeff's recommendation or any prior interaction with Jeff, but on the evidence and testimony adduced at the sentencing hearing.

Conclusion: Thus, we hold that the recusal judge did not abuse his discretion because when considering the totality of the evidence presented at the recusal hearing, it is within the zone of reasonable disagreement to conclude Judge Salvant's comments that "I'm only asking you this because I know you" and that "you've spent a lot of time over there with the juveniles" do not reveal a high degree of favoritism toward the victim and his family based on extrajudicial information so as to make a fair judgment impossible. See id. Accordingly, we overrule Knox's second and third issues. Having held that the recusal judge did not abuse his discretion in denying Knox's motion to recuse, we affirm the trial court's judgment.

JURISDICTION—

Redmond v. State, MEMORANDUM, No. 06-17-00075-CR, 2017 WL 6542839, Tex.Juv.Rep. Vol. 32 No. 1 ¶ 18-1-4 (Tex. App.—Texarkana, 12/21/2017).

JURISDICTION LIES IN ADULT COURT WHEN A DEFENDANT HAS TURNED 20 YEARS OF AGE BEFORE HE IS ARRESTED, INDICTED, AND TRIED.

Facts: A jury convicted Dontavious Terrell Redmond of aggravated sexual assault of a child and assessed a sentence of twenty-five years' imprisonment, which the trial court imposed. Redmond appeals.1

Initially, the State believed that the offense was committed in 2012 when Redmond was a juvenile. However, due to a delayed outcry, Redmond was already twenty years old at the time of his apprehension. Nevertheless, the State filed a motion for detention of a juvenile in Cass County. The juvenile court held a hearing on the State's motion, found that Redmond had engaged in delinquent conduct, and ordered him detained in the Cass County Jail for ten days "until the filing of [a] petition to transfer [the matter to the district court] or until further order of the Juvenile Court." Yet, the record does not establish that the State ever filed a petition to adjudicate juvenile conduct in the juvenile court. Instead, because Redmond was an adult, and additional information suggested that the offense could have occurred after Redmond was an adult, he was indicted and tried in district court.

Held: Affirmed

Memorandum Opinion: On appeal, Redmond argues that (1) the juvenile court had exclusive jurisdiction over the proceedings because a motion to transfer proceedings to the district court was never filed, (2) the trial court erred in refusing Redmond's request that his status as a juvenile had already been established in the juvenile proceeding, and (3) the trial court violated his "SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND PRODUCTION OF EVIDENCE" by excluding the records of the juvenile proceeding "WHICH WOULD HAVE SHOWN BIAS ON BEHALF OF THE STATE'S WITNESSES." Because Redmond was not a juvenile when he was arrested, indicted, or tried, the district court had jurisdiction over these proceedings.

Conclusion: Consequently, we overrule Redmond's first two points of error. We further find that Redmond's third point of error on appeal is not preserved. As a result, we affirm the trial court's judgment.

SUFFICIENCY OF THE EVIDENCE—

In the Matter of D.L., No. 14-17-00058-CV, --- S.W.3d ----, 2018 WL 456424, Tex.Juv.Rep. Vol. 32 No.1 ¶ 18-1-10 [Tex. App.—Houston (14th Dist.), 1/18/2018].

PRESENCE AND FLIGHT ARE THEMSELVES INSUFFICIENT TO SUSTAIN A JURY'S VERDICT FOR CRIMINAL TRESPASS OF A VEHICLE.

Facts: The Harris County District Attorney filed a petition in juvenile court seeking an adjudication of delinquency. The State alleged that D.L., a minor at the time, had engaged in delinquent conduct. Specifically, the State alleged that D.L. had committed the offenses of (1) criminal trespass of a motor vehicle while carrying a deadly weapon and (2) unlawful possession of a firearm. D.L. pleaded "not true" to both allegations, and the case proceeded to a jury trial.

Sebastian Lezama owned the vehicle in question. Lezama parked his truck outside his apartment one afternoon and went inside, leaving the keys in the truck and the truck unlocked. A few minutes later, Lezama heard a noise outside and, upon investigating, saw someone driving his truck away. He could not identify the driver or describe any identifying features of the driver.

Approximately twelve hours later, at around 4:00 a.m., Houston Police Officer Derrick Dexter and his partner, Officer Julio Flores, attempted to order coffee at a McDonald's restaurant drive-through lane. Because no employee responded over the speaker, Officer Dexter suspected something might be amiss inside the restaurant. The officers drove around the side of the restaurant and stopped next to a green truck, which was idling at the drive-through window. Three males occupied the truck, and all of them appeared to be minors. D.L. sat in the front passenger seat. According to Officer Dexter, the individuals in the truck "looked over at [the officers] and their eyes got like deer in headlights ... like, you know, caught red-handed." Because the youths were violating Houston's midnight curfew, Officer Flores ran a computer check on the truck's license plate. The search results indicated that the truck was Lezama's and had been reported stolen.

The truck left the restaurant's parking lot. The officers followed and engaged the patrol car's overhead lights and sirens. At that point, the truck began speeding. The truck entered an apartment complex. The police pursued the truck through the complex at speeds up to sixty miles per hour for four to six minutes. The truck eventually hit a transformer and stopped. All three youths fled the truck. The police officers apprehended D.L., but failed to apprehend the other two youths.

After placing D.L. in the patrol car's back seat, Officer Flores searched the truck. He found a pistol between the driver's seat and passenger seat and a loaded shotgun near "where one of the passengers was sitting." Officer Flores did not specify whether he found the shotgun in the front or back seat. Officer Flores testified over objection that a records search revealed that the guns had been reported stolen.

When the truck was returned to Lezama, he discovered it had been damaged, costing him $1,000 in repairs.

The jury found that D.L. did not commit the weapons possession offense, but found that D.L. committed the offense of trespass of a motor vehicle. The trial court placed D.L. on probation and imposed a $1,000 fine in restitution. D.L. appeals the judgment.

Held: Reversed and dismissed with prejudice

Opinion: In his first issue, D.L. argues that there is legally insufficient evidence of one of the elements of the alleged offense—namely, whether he had notice that entry into the truck was forbidden.

A. Standard of Review and Governing Law

Delinquent conduct is conduct other than a traffic offense that violates a penal law of Texas or of the United States and that is punishable by imprisonment or confinement in jail. Tex. Fam. Code § 51.03(a)(1). Proceedings in juvenile court are quasi-criminal in nature but classified as civil cases. In re Hall, 286 S.W.3d 925, 927 (Tex. 2009) (orig. proceeding); In re J.S.R., 419 S.W.3d 429, 432-33 (Tex. App.—Amarillo 2011, no pet.). Generally, juvenile proceedings are governed by the rules of civil procedure and the Family Code. Tex. Fam. Code § 51.17(a); In re R.J.H., 79 S.W.3d 1, 6 (Tex. 2002).

In a juvenile proceeding, the trial court must conduct an adjudication hearing for the fact-finder to determine whether the juvenile engaged in delinquent conduct. Tex. Fam. Code § 54.03(a). If the fact-finder determines that the juvenile engaged in delinquent conduct, the trial court then must conduct a disposition hearing. Id. § 54.03(h). Disposition is akin to sentencing and is used to honor the non-criminal character of the juvenile proceedings. See In re B.D.S.D., 289 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The burden of proof at the adjudication hearing is the beyond-a-reasonable-doubt standard applicable to criminal cases. See Tex. Fam. Code § 54.03(f). Therefore, we review the sufficiency of the evidence to support a finding that a juvenile engaged in delinquent conduct using the standard applicable to criminal cases. See In re G.A.T., 16 S.W.3d 818, 828 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Under this legal-sufficiency standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. Temple v. State, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); Criff v. State, 438 S.W.3d 134, 136-37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); see Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This standard applies to both direct and circumstantial evidence. Criff, 438 S.W.3d at 137. Accordingly, we will uphold the jury's verdict unless a rational factfinder must have had a reasonable doubt as to any essential element. Laster v. State, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); West v. State, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). In carrying out our task, "we remain cognizant that 'proof beyond a reasonable doubt' means proof to a high degree of certainty." Lane v. State, 151 S.W.3d 188, 192 (Tex. Crim. App. 2004) (internal quotations omitted).

The State alleged that D.L. committed criminal trespass of a vehicle. We measure the sufficiency of the evidence supporting the essential elements as defined by the hypothetically correct jury charge. See Cada v. State, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011). A person commits the offense of criminal trespass if he enters or remains on or in another's property, including a vehicle, without effective consent and, as relevant here, the person had notice that entry was forbidden. Tex. Penal Code § 30.05(a).1 The statute does not specify a culpable mental state, so the State must prove that D.L. acted intentionally, knowingly, or recklessly. Id. § 6.02(b), (c). Because the State alleged, and the jury charge asked, only whether D.L. "intentionally or knowingly enter[ed]" Lezama's truck, we consider the evidence applying the lesser of the two alleged mental states, i.e., knowingly. Id. § 6.02(d) (knowing is a lesser-degree mental state than intentional); Howard v. State, 333 S.W.3d 137, 139 (Tex. Crim. App. 2011) ("Because the jury could have found the appellant guilty for either of these culpable mental states, we need only address the less-culpable mental state of knowingly."). A person acts knowingly, or with knowledge, when he is aware of the nature of his conduct or that the circumstances exist. Tex. Penal Code § 6.03(b).

On appeal, D.L. challenges only the sufficiency of the evidence supporting the jury's finding that he had notice that entry into the truck was forbidden.

B. Application

Viewed most favorably to the verdict, the evidence reveals the following. At trial, Officer Dexter testified that D.L. was a passenger in the stolen truck. When the police officers first saw the truck's occupants, D.L. and the other youths looked as though they had been "caught red-handed." According to Officer Dexter, the youths were violating Houston's midnight curfew. Once the officers engaged the patrol car's lights, the truck sped away and evaded the pursuing officers. According to the officers, D.L. fled from the police once the truck came to a stop. Officer Flores searched the truck and recovered two stolen firearms.

On appeal, the State contends that the following circumstantial evidence supports the jury's verdict that D.L. was aware that entry into the vehicle was forbidden: (1) D.L. "acted guilty" when he first saw police; (2) D.L. was "riding around in a pickup truck with other juveniles at 4 [o'clock] in the morning;" and (3) D.L. fled from police when the vehicle came to a stop.

As to the State's first two points, neither circumstance is sufficient to support a reasonable inference—to the required degree beyond a reasonable doubt—that D.L. had notice that entry into the truck was forbidden. The State identifies no authority for the notion that acting startled at the appearance of a police officer or riding in a vehicle in public after curfew are circumstances from which a jury may reasonably infer a consciousness of guilt for the specific element of the charged offense here at issue.

As to the State's third point—D.L.'s flight from police—we agree that presence at or near a crime scene, and flight from a crime scene, are circumstances from which the jury may draw an inference of guilt. See Thomas v. State, 645 S.W.2d 798, 800 (Tex. Crim. App. 1983) (presence); Morales v. State, 389 S.W.3d 915, 922 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (flight). But presence and flight are themselves insufficient to sustain the jury's verdict. See King v. State, 638 S.W.2d 903, 904 (Tex. Crim. App. 1982) (mere presence at the scene or even flight from the scene, either standing alone or combined, is insufficient to sustain a conviction); Valdez v. State, 623 S.W.2d 317, 321 (Tex. Crim. App. 1979) (op. on reh'g) (flight alone is insufficient to support guilty verdict, but is circumstance raising inference of guilt); Miller v. State, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref'd) ("[M]ere presence at the scene, or even flight, is not enough to sustain a conviction."). D.L. may have fled because he was violating curfew, or because he was a passenger in a vehicle that had just evaded police, or because he wanted to distance himself from weapons in the vehicle. None of those motivations for fleeing suggest that D.L. knew the truck was stolen.

The State offered no other incriminating evidence that would, considered with the above circumstances, support the jury's verdict. See, e.g., Garcia v. State, 486 S.W.3d 602, 612 (Tex. App.—San Antonio 2015, pet. ref'd) (presence or flight, if combined with other incriminating evidence, may be sufficient to sustain a conviction). For instance, the State offered no obvious indicia of theft from which a reasonable jury could infer D.L. was on notice that the truck was stolen, and thus his entry was forbidden. See Anderson v. State, 871 S.W.2d 900, 902 (Tex. App.—Houston [1st Dist.] 1994, no pet.) ("There is evidence to support the inference that the appellant knew the car was stolen because it was obvious the steering column had been broken, he did not have the keys to the car, and the trunk had been jimmied."). Here, the truck's locks, windows, steering column, and ignition were not broken or tampered with, and Officer Dexter testified that the truck was recovered with the key in the ignition.

There is no question that D.L. had no legal right to be in Lezama's truck.3 But proof that D.L. lacked the legal right to enter the truck is not sufficient to prove criminal trespass; the State must also prove notice that entry was forbidden. Tex. Penal Code § 30.05(a).

We have found no cases in which courts have held that a person is on notice that entry is forbidden under these circumstances. In the real property context, the Texarkana Court of Appeals held the evidence legally insufficient to support a defendant's conviction for criminal trespass. Munns v. State, 412 S.W.3d 95 (Tex. App.—Texarkana 2013, no pet.). There, Munns had a key to a friend's recently vacated apartment, and she used the key to enter the apartment. Id. at 99-100. Munns was subsequently arrested for trespass. Id. at 99. Munns claimed her friend had granted Munns permission to stay at the apartment, and there was no evidence that Munns knew that her friend had terminated the lease. Id. at 99, 101. While the presence of locks on a residence normally would provide sufficient notice to a trespasser that entry was forbidden, the court noted that Munns, who entered with a key, was not a naked trespasser. Id. at 100. Based on, among other facts, Munns's possession of the key and the lack of evidence as to Munns's knowledge that her friend had terminated the lease, the court concluded that a reasonable juror could not have found beyond a reasonable doubt that Munns had notice that her entry was forbidden. Id. at 102.

Though Munns does not present an identical factual scenario, we find the court's reasoning instructive. As in Munns, "the issue is not whether [D.L.] had a legal right to be on the premises, but whether [D.L.] entered while knowing [ ]he did not have a legal right to be on the premises." Id. at 100 (emphasis added). Although a locked car, like a house, would provide a naked trespasser sufficient notice that entry was forbidden, it is undisputed here that the driver of Lezama's truck operated the vehicle with a key. Accord id. ("While a locked door would certainly qualify as notice to a naked trespasser, a locked door is not notice that entry is forbidden to a person who is provided a key by one with apparent authority to authorize his entry into the residence."). D.L. was not the driver and there was no evidence that D.L. was present when the car was stolen, that the driver told D.L. that the car was stolen, or that D.L. otherwise knew that the car was stolen. Accord id. at 102 ("The record contains no communication that informed Munns her entry was forbidden.").

Although notice of forbidden entry can be implicit,4 we hold, on this record, that a reasonable juror could not have found beyond a reasonable doubt that D.L. had notice that his entry into the vehicle was forbidden. The State (and the jury) might speculate that D.L. knew that Lezama's truck was stolen, but we cannot sustain a conviction on speculation or conjecture. Gross v. State, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012). Accordingly, the evidence is legally insufficient to support the jury's finding that D.L. committed the offense of criminal trespass of a vehicle. We sustain D.L.'s first issue.5

Conclusion: Having determined that the evidence is legally insufficient to support the trial court's adjudication that D.L. engaged in delinquent conduct, we reverse the trial court's adjudication and disposition order, render the judgment that the trial court should have rendered, and dismiss with prejudice the State's petition for adjudication of delinquency. Tex. R. App. P. 43.2(c); In re Garza, 984 S.W.2d at 347; Tex. Fam. Code § 54.03(g).

SEARCH & SEIZURE—

In the Matter of A.T.D., MEMORANDUM, No. 06-18-00028-CV, 2018 WL 4312980, Tex.Juv.Rep. Vol. 32 No.2 ¶ 18-4-2 (Tex.App.—Texarkana, 8/30/2018).

PROBATION CONDITION RESTRICTING USE OF "ANY TYPE OF ELECTRONIC [DEVICE] AT ANY TIME UNLESS IT IS FOR SCHOOL PURPOSES ... MEAN[ING] NO CELL PHONE, COMPUTER, OR IPOD, ECT. [SIC]," USED IN MOTION TO MODIFY WAS PRESENTED UNCHALLENGED, IN JUVENILE COMMITMENT TO TJJD.

Facts: On June 23, 2017, the trial court modified A.T.D.'s conditions of probation, which included additional restrictions on his use of cell phones and computers, and placed him under the supervision of his grandparents, Lewis and Felicia. The trial court issued a third directive to apprehend on July 11, 2017, based on the State's allegations that A.T.D. had continued to violate the conditions of probation. Shortly thereafter, the trial court modified A.T.D.'s conditions by restricting his use of "any type of electronic [device] at any time unless it is for school purposes ... mean[ing] no cell phone, computer, or iPod, ect. [sic]."

On March 12, 2018, the State filed a petition to modify disposition of probation alleging that A.T.D. violated the terms and conditions of his probation (1) by testing positive for THC on a drug test administered by the juvenile probation department and (2) by being in possession of an electronic device, namely, a tablet capable of internet access.

After closing arguments, the State asked the trial court to terminate A.T.D.'s juvenile probation and to commit him to the TJJD. A.T.D. asked the court to allow him to remain on probation and to order him to complete additional community service hours or to participate in counseling. The trial court granted the State's motion, revoked A.T.D.'s probation, and sentenced him to TJJD. This appeal followed.

Held: Affirmed

Memorandum Opinion: In its disposition order, the trial court found that A.T.D. had violated the terms and conditions of his probation and that it was in the best interest of A.T.D. to be placed outside of his home. In addition,

the trial court made the following findings: (1) his parents lacked the ability to provide him with a suitable home environment; (2) there was a lack of adequate placement to address his needs; (3) reasonable efforts had been made to prevent or eliminate the need for A.T.D. to be removed from the home; (4) A.T.D.'s grandparents could not provide the quality of care and level of support and supervision that he needed to meet the conditions of his probation; (5) A.T.D. had a history of aggressive behavior; (6) local resources available to the court were inadequate to properly rehabilitate A.T.D; and (7) the nature of the offense warranted A.T.D.'s transfer to a more restrictive environment.

A.T.D. does not dispute that he violated the terms of his probation (emphasis added). Rather, A.T.D maintains that the evidence was legally and factually insufficient to demonstrate that (1) placement in TJJD was in his best interest, (2) reasonable efforts were made to prevent or eliminate the need for his removal from his home, and (3) his grandparents could not provide the quality of care and level of support and supervision he needed to meet the conditions of his probation.

We are unable to conclude that the trial court acted arbitrarily or without reference to guiding principles when it revoked A.T.D.'s probation and committed him to TJJD. First, the trial court was presented with evidence that A.T.D. had been adjudicated of a serious offense, that is, injury to a child. The record also showed that the trial court had, on a number of occasions, sought available alternatives for A.T.D. and had given him multiple opportunities to successfully complete his probation. Other than increasing the amount of A.T.D.'s community service work, the evidence showed that there were no additional programs or resources available to the court to assist with A.T.D.'s rehabilitation. Despite repeated efforts on the part of the trial court, A.T.D. showed a repeated disregard for authority and continued to violate his conditions of probation by using illegal drugs and by being in possession of an electronic device which he used to discuss, among other inappropriate things, the use of illegal drugs.

Moreover, before being placed with his grandparents, A.T.D. had been placed with Jennifer, his aunt. Because A.T.D. would not abide by the conditions of his probation, Jennifer refused to continue to supervise him or to allow him to reside with her. In addition, Lewis testified that he knew of no one else who would be willing and able to assume responsibility for A.T.D. while he was on probation. Thus, the record shows that less restrictive placement options were unavailable. Contrary to A.T.D.'s position, the evidence was legally and factually sufficient to support the trial court's findings underlying its disposition order.

Conclusion: Because the trial court did not abuse its discretion in committing A.T.D. to TJJD, we overrule his point of error. We affirm the trial court's judgment.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

In the Matter of P.A.B., MEMORANDUM, No. 14-18-00290-CV, 2018 WL 4354679, Tex.Juv.Rep. Vol. 32 No.4 ¶ 18-4-4 [Tex.App.—Houston (14th Dist.), 9/13/2018].

A DISCRETIONARY TRANSFER PETITION FILED BEFORE A CHILD'S 18TH BIRTHDAY AND HEARD AFTER THE CHILD'S 18TH BIRTHDAY FOLLOWS TEX. FAM. CODE ANN. § 54.02(A) (UNDER 18 PROVISION).

Facts: In November 2017, three months before appellant turned 18, eight-year-old Amaya1 made a disclosure of ongoing sexual abuse by appellant to her grandmother, who reported the outcry to the police. Appellant was arrested, and his case was referred to the Brazoria County Juvenile Justice Department ("JJD") for its recommendation as to whether appellant should be tried as a juvenile or an adult for his offenses against Amaya. The JJD recommended appellant be certified as an adult for two reasons: (1) the seriousness of the offense, and (2) appellant's age.

Two weeks before appellant turned 18, the State petitioned the juvenile court to waive jurisdiction and transfer appellant to criminal district court. Tex. Fam. Code Ann. § 54.02(a). The petition alleged appellant committed two counts of aggravated sexual assault of a child (a first-degree felony) and one count of indecency with a child (a third-degree felony) when he was 16.2

The juvenile court conducted a hearing on the State's petition six weeks after appellant turned 18. Id. § 54.02(c). Four witnesses testified at the hearing: (1) Eric Morton, one of the detectives assigned to the investigation; (2) Michael Fuller, M.D., a psychiatrist who evaluated appellant; (3) Tiffany Jones, the JJD employee who recommended appellant be certified as an adult; and (4) Doris, appellant's half-sister. The State's petition, the police report, Dr. Fuller's report, Jones' predisposition report, appellant's school records, and letters from educators at appellant's school were admitted into evidence without objection.

The juvenile court signed a five-page order ("Transfer Order") detailing its findings and bases for granting the State's petition to waive jurisdiction and transfer appellant to criminal district court. The court expressly found the State exercised due diligence to file its petition and prosecute the case, given that appellant was three months shy of 18 when the alleged abuse was reported to police, the district attorney received the police report two months before appellant turned 18, and the JJD made its recommendation two weeks before appellant's 18th birthday.

The juvenile court then made findings about appellant and his alleged offenses. For ease of reading, we have grouped the findings by topic.

Facts and nature of the alleged offenses
• Appellant allegedly committed felonies against a person.
• Amaya was five years old when the alleged offenses began and seven or eight years old when they stopped.
• Appellant was 15 to 17 years old when he allegedly committed the offenses.
• Appellant is Amaya's uncle.
• Amaya disclosed appellant put his sexual organ on her sexual organ.
• Amaya also disclosed appellant put his mouth on her sexual organ and attempted to get her to put her mouth on his sexual organ, but she refused.
• Appellant admitted to masturbating while he rubbed Amaya's buttock.
• There is probable cause to believe appellant committed the alleged offenses.

Appellant's familial, social, and educational history
• Appellant said he was abused by his biological parents and removed from his home.
• Appellant has been adopted.
• Appellant is currently in school and gets along well with the teachers. He is not in special education classes.

Appellant's physical and mental health
• Appellant denied mental health issues or major health issues.
• Dr. Fuller conducted a diagnostic study on appellant and found as follows:
• Appellant's speech and thought processes were logical, coherent, goal directed, and devoid of the stigmata of persistent psychosis.
• Appellant showed no signs of "perseveration or flight of ideas."
• Appellant can concentrate appropriately and engage well.
• Appellant denied auditory and visual hallucinations and showed no signs of delusions.
• Appellant did not appear homicidal or suicidal.
• Appellant appears to be of below-average to average intelligence.
• Appellant displayed average ability to concentrate on a task and good short term memory.
• Appellant showed no marked impairment in his ability to make or use sound judgment.
• Appellant manifested an ability to interpret abstract thoughts, which is beneficial to rule out the vulnerability of the effects of organic medical conditions and also to show impairment in certain psychotic states.

Appellant's sophistication and maturity
• Dr. Fuller noted the following about appellant's ability to aid in his own defense:
• Appellant demonstrated significant and appropriate insight into the seriousness of the charges against him.
• Appellant can provide a full, detailed account of the events and assist his lawyer with his defense.
• Appellant understands the difference in consequences he faces if convicted. He understands he can be tried as an adult and go to prison.
• Appellant understands the court system, adversarial system, and concept of plea bargaining.
• Appellant can communicate and interact well with his attorney and others.
• Appellant is of sufficient sophistication and maturity to be tried as an adult and to aid an attorney in his defense.

Prospect of protection of the public and rehabilitation of appellant
• "[B]ecause of the records and previous history of [appellant] and because of the extreme and severe nature of the alleged offense(s), the prospects of adequate protection for the public and the likelihood of reasonable rehabilitation of [appellant] by the use of the procedures, services and facilities which are currently available to the Juvenile Court are in doubt."
• Many of the facilities normally available to the court are not available because appellant is 18 years old.
• Because of the seriousness of the alleged offenses and appellant's background, the welfare of the community requires criminal proceedings.
The preceding findings are computer-printed on the Transfer Order. The juvenile court also handwrote the following: Juvenile is 18. No effective plan for his rehabilitation in the juvenile system exists due to his age [and] offenses alleged. Due to the history of the juvenile [and] his family, intensive treatment not available in the juvenile system, for the length of time required, is necessary.

The juvenile court concluded:
The Court, after considering all of the testimony, diagnostic study, social evaluation, and full investigation of [appellant], his circumstances, and the circumstances of the alleged offense(s), finds that it is contrary to the best interest of the public for the juvenile court to retain jurisdiction.

The court granted the State's petition and waived jurisdiction.

On appeal, appellant contends (1) the evidence is legally and factually insufficient to support the Transfer Order, and (2) the juvenile court abused its discretion by finding the welfare of the community requires appellant to be tried as an adult.

Held: Affirmed

Memorandum Opinion: We begin with what is not in dispute. Appellant does not challenge the juvenile court's finding that the State exercised due diligence to file its petition and "complete the case." Tex. Fam. Code Ann. § 51.0412(3) (juvenile court retains jurisdiction if, among other things, "the court enters a finding in the proceeding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding" before the juvenile turned 18). Nor does appellant challenge the juvenile court's findings that: the alleged offenses are felonies (id. § 54.02(a)(1)); appellant was 16 at the time of the alleged offenses and no adjudication hearings have been conducted regarding those offenses (id. § 54.02(a)(2)(A), (B)); probable cause exists to believe appellant committed the alleged offenses (id. § 54.02(a)(3)); and the alleged offenses were against a person (id. § 54.02(f)(1)).

We turn to the findings in dispute. First, appellant makes three challenges to the evidentiary sufficiency of the juvenile court's findings. He contends:
• the evidence is factually insufficient to support the juvenile court's finding that appellant is of sufficient sophistication and maturity to be tried as an adult;
• the evidence is legally and factually insufficient to support the juvenile court's finding that appellant's record and history warranted transfer; and
• the evidence is legally and factually insufficient to support the juvenile court's finding that the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile court warranted transfer.
Second, appellant asserts the juvenile court abused its discretion in finding the welfare of the community requires him to be tried as an adult.

The juvenile court heard testimony from the psychiatrist who evaluated appellant, one of the detectives who investigated the alleged offenses, the JJD employee who analyzed appellant's case and recommended he be certified as an adult, and appellant's half-sister. The court also received written reports from the first three of those witnesses, appellant's school records, and six letters from educators familiar with appellant. That evidence addressed nearly every factor in the statutory framework the juvenile court is tasked to consider. With the exception of the findings regarding appellant's record and history, all the juvenile court's findings are supported by legally and factually sufficient evidence.

Conclusion: Despite the lack of evidence to support the record-and-history findings under section 54.02(f)(3), we cannot say the juvenile court's decision to waive jurisdiction was "essentially arbitrary, given the evidence upon which it was based." Id. Instead, the Transfer Order reflects "a reasonably principled application of the legislative criteria." Id. at 49. We conclude the juvenile court did not abuse its discretion in waiving jurisdiction and transferring appellant to criminal district court. We affirm the Transfer Order.

Davis v. State, MEMORANDUM, No. 05-16-01341-CR, No. 05-16-01342-CR, No. 05-16-01343-CR, 2018 WL 3629085, Tex.Juv.Rep. Vol. 32 No.3 ¶ 18-3-7 (Tex.App.—Dallas, 7/31/2018).

REPEALED STATUTE PROVIDES THAT A DEFENDANT MAY APPEAL A DISCRETIONARY TRANSFER FROM JUVENILE COURT IN CONJUNCTION WITH THE APPEAL OF A CONVICTION ... OR AN ORDER OF DEFERRED ADJUDICATION.... AND, AS A RESULT, MAY APPEAL THE TRANSFER DECISION WHEN APPEALING THE CONVICTION RESULTING FROM HIS DEFERRED ADJUDICATION VIOLATION. CASE REVERSED BASED ON *MOON*.

Facts: In April, 2014, when appellant was sixteen, the State filed a petition for discretionary transfer in a Dallas County juvenile court which alleged that appellant engaged in delinquent conduct by committing two separate offenses of aggravated sexual assault. Pursuant to the State's petition, the juvenile court waived its jurisdiction and transferred the matter to criminal district court. See TEX. FAM. CODE ANN. § 54.02 (West 2014).

Appellant was subsequently indicted for two separate offenses of aggravated sexual assault in cause numbers F14-15543-Q and F14-15544-Q. When appellant was seventeen, he was also indicted for aggravated robbery in cause number F15-45428-Q.

In November 2015, pursuant to a plea bargain agreement, appellant pled guilty to all three offenses and was placed on deferred community supervision for a period of ten years. In February 2016, the State filed a motion to revoke appellant's community supervision or proceed with an adjudication of guilt in all three cases. After a hearing, the trial court granted the State's motion, found appellant guilty as charged in each indictment, and sentenced him to twenty years' imprisonment in all three cases. In the aggravated robbery case, the trial court also made a deadly weapon finding. This appeal followed.

In his second issue, appellant contends that the judgments adjudicating guilt in the aggravated sexual assault cases are void because the district court never properly acquired jurisdiction. Appellant argues that under Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014), the juvenile court abused its discretion by waiving jurisdiction without making adequate case-specific findings in the transfer order. The State argues that under former article 44.47(b) of the Code of Criminal Procedure, this Court lacks jurisdiction to hear appellant's complaint about the juvenile transfer because he did not raise his challenge when the trial court entered its order of deferred adjudication. Secondly, the State cites article 4.18 of the Code of Criminal Procedure and argues that the issue has not been properly preserved for review. Lastly, the State argues that the transfer order was sufficient. We are not persuaded by the State's arguments and conclude that under the holding in Moon, the juvenile court abused its discretion by failing to include case-specific findings in the order waiving jurisdiction.

Held: Judgement reversed in the aggravated sexual assault cases (transfer from juvenile court). Judgement modified and affirmed in the aggravated robbery case.

Memorandum Opinion: Appellant's appeal of the transfer order is governed by former article 44.47 of the Code of Criminal Procedure. Article 44.47 provided in relevant part:
(a) A defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code.
(b) A defendant may appeal a transfer under Subsection (a) only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court.
Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 85, 1995 Tex. Gen. Laws 2517, 2584 (adding Tex. Code Crim. Proc. art. 44.47), amended by Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 30, 2003 Tex. Gen. Laws 1221, 1234–35 (amending Tex. Code Crim. Proc. Ann. art. 44.47(b)), repealed by Act of May 12, 2015, 84th Leg., R.S., ch. 74, §§ 4–6, 2015 Tex. Gen. Laws 1065, 1066 (emphasis added).

The statute uses the disjunctive "or" and by its plain language, provides, without limitation, two options for when a defendant can challenge a juvenile transfer: when appealing either a conviction or an order of deferred adjudication. See Bell v. State, No. 01-15-00510-CR, 2018 WL 3150851, at *2 (Tex. App.—Houston [1st. Dist.] June 28, 2018) (not yet reported); see also State v. Lopez, 196 S.W.3d 872, 875 (Tex. App.—Dallas 2006, pet. ref'd) (noting article 44.47(b) does not allow juvenile to appeal transfer order until after he is either convicted or receives deferred adjudication for offense in criminal court).

The State relies on Wells v. State, No. 12-17-00003-CR, 2017 WL 3405317 (Tex. App.—Tyler Aug. 9, 2017, no pet.) (mem. op., not designated for publication) and Eyhorn v. State, 378 S.W.3d 507 (Tex. App.—Amarillo 2012, no pet.) to support its argument that appellant was required to challenge the transfer order in an appeal from the order originally imposing community supervision and urges this Court to follow the holding in Wells "because the procedural facts in both cases are nearly identical." The court in Wells held that "for transfer orders issued before September 1, 2015, concerning conduct occurring after January 1, 1996, a non-jurisdictional challenge to a transfer order must be made in an appeal from the order deferring adjudication of guilt" and cited to both Eyhorn, 378 S.W.3d at 510, and Felix v. State, No. 09-14-00363-CR, 2016 WL 1468931, at *1 (Tex. App.—Beaumont Apr. 13, 2016, pet. ref'd) (mem. op., not designated for publication). Wells, 2017 WL 3405317 at *2. The State's reliance on these cases is misplaced as the courts' holdings are based on a faulty premise. As pointed out in Bell, the court of appeals in Eyhorn noted the general, well-established rule in criminal cases that non-jurisdictional complaints that arise before an order of deferred adjudication must be raised on appeal of that order or are waived, and then stated, "We see no logical reason why art. 44.47(b) should be read as jettisoning that rule simply because the accused was initially subject to being tried as a juvenile." Bell, 2018 WL 3150851, at *3. Like the court in Bell, we too must disagree with the reasoning in Eyhorn and the cases that follow it. The statutory text of article 44.47 provides a defendant the right to challenge a transfer on appeal of a conviction "or" an order of deferred adjudication. The Legislature could have limited the ability to appeal in conformance with this background principle but it did not do so. Id.

In this case, appellant appealed the transfer order when appealing his convictions. Therefore, we have jurisdiction over the appeal.

Conclusion: We conclude that the juvenile court abused its discretion by failing to make case-specific findings when waiving its jurisdiction and transferring appellant to the criminal district court for criminal proceedings in the aggravated sexual assault cases. Because of the juvenile court's error, the criminal district court lacked jurisdiction over appellant's cases. We therefore vacate the judgments of the criminal district court in cause numbers F14-15543-Q and F14-15544-Q and dismiss the cases in that court. The cases remain pending in the juvenile court.6 Accordingly, we need not reach appellant's fourth and fifth issues challenging the inclusion of fines and court costs7 in the judgments adjudicating guilt.

We modify the trial court's judgment in cause number F15-45428-Q to reflect the date of the original community supervision order as November 16, 2015 and that appellant pleaded "not true" to the motion to adjudicate. As modified, we affirm the judgment.

In the Matter of A.M., MEMORANDUM, No. 01-18-00017-CV, 2018 WL 3150700, Tex.Juv.Rep. Vol. 32 No.3 ¶ 18-3-8 [Tex.App.—Houston (1st Dist.), 6/28/2018].

PRIOR TO SEPTEMBER 1, 2013, IF A DISCRETIONARY TRANSFER WAS HEARD AFTER THE CHILD'S 18TH BIRTHDAY, THE PROSECUTOR MUST SHOW, NOT THAT THEY EXERCISED DUE DILIGENCE IN AN ATTEMPT TO COMPLETE THE TRANSFER, BUT THAT IT WAS NOT PRACTICABLE TO PROCEED BEFORE THE JUVENILE'S 18TH BIRTHDAY FOR A REASON BEYOND THE CONTROL OF THE STATE. C&T REVERSED, CASE DISMISSED.

Facts: This case involves the interpretation and application of a since-amended statute concerning the transfer of minors to criminal district court to be tried as adults. The statute has been amended in a manner that may have avoided the result we are bound to reach here, but the disposition of this appeal must be resolved under the earlier version of the statute.

When Antonnyer Morrison was a minor, he was indicted for murder. In June 2012, after Morrison had turned 18, the juvenile court heard and granted the State's petition for discretionary transfer from juvenile court to criminal district court. The case was transferred, and Morrison was tried as an adult, convicted of murder, and sentenced to 45 years' confinement.

Our sister court subsequently vacated the criminal district court's judgment because the juvenile court did not make the requisite findings under Section 54.02(j) of the Family Code. Morrison v. State, 503 S.W.3d 724, 725, 728 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Relying on a recently-issued opinion by the Court of Criminal Appeals, our sister court explained that when a transfer occurs after a juvenile's 18th birthday, Section 54.02(j)(4) requires the State to prove that it was not practicable to proceed to certification before the juvenile's 18th birthday. Id. at 727 (citing Moore v. State, No. PD-1634-14, 2016 WL 6091386 (Tex. Crim. App. Oct. 19, 2016)). At the June 2012 transfer hearing, the State presented no evidence that it was not practicable to proceed before Morrison turned 18. The State instead argued that Section 54.02(j) required only that the transfer petition be filed—but not ruled on—before Morrison turned 18. Our sister court rejected this argument, remanded the case to the juvenile court to afford the State an opportunity to satisfy its burden of proof, and ordered that the juvenile court file findings of fact in support of its ruling. Morrison, 503 S.W.3d at 728.

On remand, the State filed an amended petition, and the juvenile court held a hearing at which the State presented testimony from the lead investigator, firearms examiner, and probation officer, among others. However, none of the district attorneys involved in the investigation or prosecution testified. The juvenile court found that the State proved by a preponderance of the evidence that, for reasons beyond its control, it was not practicable to proceed in the juvenile court before Morrison's 18th birthday. The juvenile court entered 50 fact findings detailing the murder investigation's chronology, Morrison's arrest, and the transfer proceedings. None of the fact findings addressed whether it was practicable for the State to take certain actions during various stages of its investigation to expedite the transfer hearing or whether the State's failure to take such actions was caused by the prosecutor's erroneous interpretation of Section 54.02(j). Instead, the juvenile court simply stated in a conclusion of law that it was not practicable for the State to have proceeded before Morrison's 18th birthday.

In a single issue, Morrison argues that the juvenile court erred in waiving its jurisdiction because the State failed to prove by a preponderance of the evidence that, for a reason beyond the State's control, it was not practicable to proceed to certification before Morrison turned 18. See TEX. FAM. CODE §§ 54.02(j)(4)(A), 56.01(c)(1)(A); TEX. PENAL CODE § 19.02(b).

Held: Juvenile court transfer order vacated, case dismissed.

Memorandum Opinion: After Morrison's 18th birthday, the Legislature amended the statute governing a juvenile court's jurisdiction over incomplete proceedings. Acts 2013, 83rd Leg., ch. 1299 (H.B. 2862), § 7, eff. Sept. 1, 2013. Under the current statutory scheme, when the State files a petition to transfer before the juvenile turns 18, the juvenile court retains jurisdiction to rule on the petition after the juvenile turns 18 so long as the juvenile court finds that the prosecutor exercised due diligence in an attempt to complete the transfer proceeding before the juvenile's 18th birthday. TEX. FAM. CODE § 51.0412. But under the scheme in effect at the time of June 2012 transfer hearing—which is the version that continues to apply to this appeal—the juvenile court had to find that it was not practicable to proceed before Morrison's 18th birthday for a reason beyond the control of the State for the juvenile court to retain jurisdiction. Id. § 54.02(j)(4)(A). The former scheme imposes a higher burden on the State because impracticability is more difficult to prove than due diligence and because "the State" includes not only the prosecution but law enforcement as well.

Bound by the earlier version of the statute, we consider the evidence of impracticability for reasons beyond the State's control. The evidence demonstrates a lack of urgency at several points during the criminal investigation and while the State petitioned for transfer. To begin, no one expedited the firearms analysis, and the State waited for that analysis before proceeding against Morrison. While Morrison was charged and apprehended approximately 8 weeks before his 18th birthday, there is no evidence that the prosecutor attempted to expedite the transfer hearing after his arrest. Nor is there any evidence that the juvenile court was unable to hear the petition before Morrison's 18th birthday. Morrison's psychological evaluation and social home study report, both of which were needed for the transfer hearing, were not completed until after Morrison turned 18—but the evidence shows that both reports could

have been completed earlier had the State not delayed in providing the psychiatrist and juvenile probation officer the necessary information for the reports.

Conclusion: In other words, the evidence shows that it was practicable to proceed before Morrison's 18th birthday. But, as shown by the prosecutor's statements during the June 2012 transfer hearing, before Moore was decided, the prosecutor believed it was necessary only to file—but not resolve—the transfer motion before the defendant turned 18. Moore held otherwise, and we are bound by that ruling.

We hold that the State failed to prove that it was not practicable to proceed before Morrison's 18th birthday for a reason beyond the State's control and that the juvenile court erred in transferring the case. Accordingly, we must vacate the juvenile court's order and dismiss the case.

Taylor v. State, --- S.W.3d ----, No. 14-16-00583, 2018 WL 2306740, Tex.Juv.Rep. Vol. 32 No.3 ¶ 18-3-1 [Tex.App.—Houston (14th Dist.), 5/22/2018]. ***On rehearing from Taylor v. State that follows below.***

ARGUMENT THAT A DISCRETIONARY TRANSFER REVERSAL WHICH WOULD ALLOW THE JUVENILE COURT TO CONSIDER TRANSFER UNDER A MORE LENIENT STATUTORY PROVISION AND AS SUCH A POSSIBLE DUE PROCESS VIOLATION CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Facts: Appellant Daron Taylor was charged with committing capital murder when he was a juvenile. The juvenile court waived jurisdiction and transferred appellant to the criminal district court, where he was convicted by a jury and sentenced to life in prison. On appeal, appellant argues the criminal court lacked jurisdiction because the juvenile court erred in waiving its jurisdiction. The juvenile court's order stated that because of the seriousness of the offense, the welfare of the community required criminal proceedings, but it made no case-specific findings of fact with respect to the seriousness of the offense. Under recent precedent from the Court of Criminal Appeals, therefore, the juvenile court abused its discretion in waiving jurisdiction. We vacate the judgment of the criminal district court, dismiss the case in that court, and return the case to the juvenile court.

In appellant's reply brief, he argues that this Court should render a judgment dismissing the case in its entirety because it would violate due process to remand the case to the juvenile court, which would apply a lower transfer standard now that appellant is an adult.2 In appellant's original brief, however, he asked us to vacate his conviction and remand to the juvenile court for further proceedings. We need not consider arguments raised for the first time in a reply brief. See Tex. R. App. P. 38.3; Morales v. State, 371 S.W.3d 576, 589 n.15 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing Barrios v. State, 27 S.W.3d 313, 321–22 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)).

Held: Discretionary transfer reversed, judgment of the criminal district court is vacated and dismissed, jurisdiction returned to the juvenile court. (Substitute Opinion)

Opinion: On rehearing, appellant argues that he simply modified his request for relief in his reply brief, which is permissible because the appropriate relief is a subsidiary question fairly included in his issue challenging the juvenile court's waiver of jurisdiction. We disagree that appellant simply changed the relief sought in his reply brief. Appellant asked this Court to hold that allowing the juvenile court to consider transfer under a more lenient statutory provision would violate his due process rights. This constitutional challenge to a different transfer statute that has not yet been applied to appellant cannot be raised for the first time on appeal, much less in a reply brief. See Karenev, 281 S.W.3d at 434. We therefore do not address it, though the juvenile court may do so if it is raised on remand. See, e.g., In the Matter of J.G., 495 S.W.3d 354, 362, 364–69 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (addressing constitutional challenges to application of Tex. Fam. Code § 54.02(j) raised by defendant in juvenile court following vacatur of transfer order under Moon).

Conclusion: We conclude that the juvenile court abused its discretion by waiving its jurisdiction and transferring appellant to the criminal district court for criminal proceedings. Because of the juvenile court's error, the criminal district court lacked jurisdiction over appellant's case. We therefore sustain appellant's first issue, vacate the

judgment of the criminal district court, dismiss the case in that court, and declare that the case is still pending in the juvenile court. See Tex. R. App. P. 43.2(e).

Taylor v. State, --- S.W.3d ----, 2018 WL 1528332, Tex.Juv.Rep. Vol. 32 No.2 ¶ 18-2-3 [Tex.App.—Houston (1st Dist.) 3/29/18].

WHERE APPELLATE COURT VACATED DISCRETIONARY TRANSFER ORDER TO CRIMINAL COURT BECAUSE OF *MOON* VIOLATIONS, DISMISSAL OF JUVENILE CASE WAS NOT CONSIDERED BECAUSE THAT ARGUMENT WAS RAISED FOR THE FIRST TIME IN RESPONDENT'S REPLY BRIEF.

Facts: Appellant was accused of committing capital murder when he was sixteen. Because appellant was a juvenile at the time of the offense, the charge against him was originally brought in a juvenile district court. In that court, the State filed a motion to waive jurisdiction and transfer appellant to the criminal district court. Appellant was seventeen when the juvenile court conducted the certification hearing to determine whether to waive jurisdiction. The certification hearing also addressed another murder offense, which is not at issue in this appeal. At the hearing, the juvenile court heard testimony from two police officers who investigated the offenses. The juvenile court also admitted documentary evidence, including a "Court Report Information Summary" containing psychological and psychiatric evaluations of appellant and information on appellant's background.

At the conclusion of the September 2013 hearing, the juvenile court granted the State's motion to waive jurisdiction. The juvenile court's written order follows the language of the juvenile transfer statute closely. In the order, the court finds "that there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding." See Tex. Fam. Code Ann. § 54.02(a)(3) (West 2014). The court states that it considered the following statutory factors:

1. Whether the alleged OFFENSE WAS against person or property, with the greater weight in favor of waiver given to offenses against the person;
2. The sophistication and maturity of the child;
3. The record and previous history of the child; and
4. The prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court. See id. § 54.02(f).

The court also found that appellant "is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived ..., to have aided in the preparation of HIS defense and be responsible for HIS conduct;" that the alleged offense was "against the person of another;" and that the evidence and reports demonstrate that "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [appellant] by use of procedures, services, and facilities currently available to the Juvenile Court."

Appellant's capital murder case was transferred to criminal district court, where he was convicted by a jury. The trial court sentenced him to life in prison. This appeal followed.

On appeal, appellant raises three issues: (1) the criminal court lacked jurisdiction over appellant because the juvenile court erred in waiving its jurisdiction; (2) the trial court erred by denying appellant a jury instruction on a lesser-included offense; and (3) an automatic life sentence for a juvenile defendant violates the Eighth Amendment's prohibition against cruel and usual punishment.

In his first issue, appellant argues this case is controlled by Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014), and that the juvenile court abused its discretion in waiving jurisdiction because the order lacks any specifics or analysis as required by section 54.02(h) of the Texas Family Code.

Held: Judgement vacated, criminal case dismissed, case returned to the juvenile court.

Opinion: The State has the burden to persuade the juvenile court by a preponderance of the evidence that "the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both)." Moon, 451 S.W.3d at 40-41. The juvenile court must consider all four factors under section 54.02(f), but it need not find that all four factors favor transfer when exercising its discretion to waive jurisdiction. Id. at 41.

If the juvenile court waives its jurisdiction, it is required to "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court...." Tex. Fam. Code Ann. § 54.02(h). The Court of Criminal Appeals held in Moon that section 54.02(h) requires the juvenile court to include its reasons for waiver and specific findings of fact that undergird those reasons in the transfer order:

> In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable ....
>
> Moon, 451 S.W.3d at 49.

The Moon Court also laid out the appropriate standard of review of a juvenile court's transfer order, which has two parts. Moon, 451 S.W.3d at 47. First, we review the juvenile court's specific findings of fact under a traditional sufficiency of the evidence review. Id. Second, we review the juvenile court's waiver decision for an abuse of discretion. Id. We are required to limit our sufficiency review "to the facts that the juvenile court expressly relied upon," as stated in the order. Id. at 50. In determining whether the juvenile court abused its discretion, we ask: "[W]as its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?" Id. at 47.

About one year after the juvenile court transferred appellant's case, the Court of Criminal Appeals issued Moon, which addressed questions concerning the specificity required in the juvenile court's transfer order and the appropriate standard of review that applies to transfer orders. We conclude that Moon, which addressed the same statute, controls this case.

In Moon, the only reason stated in the juvenile court's order to justify waiver was that the offense charged was a serious one, and the only fact specified was that the alleged offense was against the person of another. Id. at 50. The Court concluded that the juvenile court did not "show its work" and "that waiver of juvenile jurisdiction based on this particular reason, fortified by only this fact, constitutes an abuse of discretion." Id. The Court also determined that the juvenile court's other conclusory factual findings—regarding the child's maturity and the dim prospect of protection and rehabilitation in the juvenile system—were superfluous. Id. at 51. Although those findings would have been relevant to support transfer based on the defendant's background, the juvenile court did not cite the defendant's background as a reason for transfer in the written order. Id. 50–51.

The order in this case is almost identical to the order in Moon. The juvenile court determined in its order that "there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding." The only fact found in the order that supports this determination regarding the seriousness of the offense is that the offense was "against the person of another." Moon held that waiving juvenile jurisdiction for the sole reason that the offense alleged was serious, and fortified only by this factual finding, was an abuse of discretion. See id. at 50; Guerrero v. State, 471 S.W.3d 1, 4 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding Moon was dispositive where only reason given for waiver was seriousness of offense and only specific fact supporting that reason was that offense was against the person of another). As in Moon, the other conclusory findings in the order before us are superfluous because they address the propriety of a transfer based on the defendant's background, which the juvenile court did not cite as a reason for transfer. See Moon, 451 S.W.3d at 50–51. We therefore hold that the juvenile court abused its discretion in waiving jurisdiction.

The State points out that the evidence presented at the hearing supports the juvenile court's decision to transfer. The Moon Court rejected the State's argument that the appellate court could look at the record, independent of explicit findings by the juvenile court, to determine whether the seriousness of the offense warranted criminal proceedings. See 451 S.W.3d at 49-50. We must limit our sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under section 54.02(h). Id. at

50. "The appellate court should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order." Id.

The State attempts to distinguish Moon by pointing out that at the time of the transfer hearing, the juvenile court was considering two alleged offenses: the capital murder offense and another murder offense. The order waiving jurisdiction in our record, however, addresses only the alleged capital murder offense. Moreover, the order does not reference any specific facts regarding the alleged murder offense. We fail to see how the fact that the juvenile court was considering two offenses would change our application of Moon to the transfer order that is the subject of this appeal.

Appellant also argues that the plain language of the juvenile transfer statute does not support certifying juveniles to stand trial as adults based on party liability, and that it would be unconstitutional to subject a child to an automatic life sentence as a party to an offense. This argument was not raised in the juvenile court or the criminal district court. We therefore do not address it, see Tex. R. App. P. 33.1, though the juvenile court may do so if it is raised on remand.

In appellant's reply brief, he argues that this Court should render a judgment dismissing the case because it is inequitable to remand the case to the juvenile court, which would apply a lower transfer standard now that appellant is an adult. In appellant's original brief, however, he asked us to vacate his conviction and remand to the juvenile court for further proceedings. We need not consider arguments raised for the first time in a reply brief. See Tex. R. App. P. 38.3; Morales v. State, 371 S.W.3d 576, 589 n.15 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing Barrios v. State, 27 S.W.3d 313, 321–22 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)). We do not address appellant's argument that dismissal by this Court is appropriate at this time.

Conclusion: We conclude that the juvenile court abused its discretion by waiving its jurisdiction and transferring appellant to the criminal district court for criminal proceedings. Because of the juvenile court's error, the criminal district court lacked jurisdiction over appellant's case. We therefore sustain appellant's first issue, vacate the judgment of the criminal district court, dismiss the case in that court, and declare that the case is still pending in the juvenile court.

In the Matter of J.R., MEMORANDUM, No. 02-17-00468-CV, 2018 WL 1755236, Tex.Juv.Rep. Vol. 32 No.2 ¶ 18-2-4 (Tex.App.—Fort Worth, 4/12/18).

TRIAL COURT DID NOT ABUSE ITS DISCRETION, WHERE THE SENIOR MENTAL HEALTH CLINICIAN AT THE GIDDINGS STATE SCHOOL TESTIFIED THAT THE COMMUNITY WOULD BENEFIT IF THE JUVENILE COURT SENT RESPONDENT TO TJJD (RATHER THAN CERTIFY HIM TO CRIMINAL COURT), BECAUSE THE JUVENILE COURT'S ULTIMATE DECISION RESULTED FROM A PRINCIPLED APPLICATION OF LEGISLATIVE CRITERIA.

Facts: Fourteen-year-old Kara went missing from Bedford on the evening of June 19, 2017, and her body was found in an Arlington landfill two days later. After several months of investigation, police connected sixteen-year-old Appellant with Kara's death and charged him with committing multiple felony offenses, including murder, serious bodily injury, tampering with evidence of a human corpse, and tampering with physical evidence.

Due to the seriousness of the offenses, Appellant's background, and the welfare of the community, the State filed a petition requesting the juvenile court to waive its exclusive jurisdiction and to transfer Appellant to criminal district court. The State also requested the juvenile court to order "a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offenses." The juvenile court granted the State's request for a complete diagnostic study, and after preparation of the study, a hearing was held on the State's petition.

Lenn Ortiz, an intake probation officer with Tarrant County Juvenile Services, testified that he had authored Appellant's pre-diagnostic study, which noted that Appellant had a history of being manipulative, a bad influence on children, and disrespectful to women. The social history stated that Appellant demanded his independence from his mother in February 2017 and that since that time, he had resided in motels, in the laundry room at Jane's apartment

complex, or at Trent's house. Appellant said that he had stopped going to school and that he had been working for Trent at an auto glass shop prior to his arrest.

During Ortiz's interview with Appellant, he stated that he had zero drug use because he participated in boxing and was subject to drug testing, but Appellant eventually disclosed that he had used marijuana on numerous occasions. Appellant's criminal history included a referral on July 4, 2016, for assault causing bodily injury; the Juvenile Probation Department disposed of the offense as "supervisory cautioned." On December 10, 2015, Appellant was referred to the Juvenile Probation Department for exhibiting a firearm on campus or a school bus, and that offense was also disposed of as "supervisory cautioned."

The psychological evaluation attached to the pre-diagnostic study noted that Appellant's mother had disclosed that over the previous year, Appellant's grades had dropped, he had cut more classes, and he had exhibited an increase in behavior problems at school—including defiance, talking back to authority, and fighting at school and in the community. The psychological evaluation also reflected numerous references to Appellant's temper. The psychological evaluation stated that Appellant had a history of truancy, physical aggression, and noncompliance, which resulted in arrests and detention. According to the psychiatrist, Appellant "demonstrates a persistent pattern that violates the basic rights of others," including lying and physical aggression.

Ortiz testified that he had consulted with other members of the Juvenile Probation Department about three possible placements for Appellant, but Appellant was denied admission to all three. On cross-examination, Ortiz testified that Appellant's behavior at the detention center had been rated as "[l]evel one outstanding" but that he had three incidents—two physical altercations and one verbal altercation.

Carnelius Carey, a placement probation officer for Tarrant County Juvenile Services, testified that he had reviewed the placement packet—consisting of the family history, referral history, social history, the pre-diagnostic study, and the psychological evaluation—and that there were no alternative placements for Appellant.

Dr. Jillian Erdberg, Senior Mental Health Clinician at the Giddings State School, testified that if Appellant were kept in the juvenile system, he would ultimately be sent to the Capital Offender Unit at the Giddings State School. Dr. Erdberg opined that in her professional opinion, Appellant would be held more accountable in TJJD than in the adult prison system and that TJJD would be more of a punishment than prison. Dr. Erdberg explained that it would be more of a punishment for Appellant to be sent to TJJD than prison because [h]e's going to have to relive that offense on a daily basis. So not only will he have to talk about the offense in group with his case manager, ... he's going [to] have to do it in group, in Capital Offender group, which is an extremely intensive program. He's not just going to just have to go and forget about it and never talk about it again. He's going to have to talk about it every day and talking about something that -- that severe is stuff that people want to forget[,] and we're not going to let him forget it.

Dr. Erdberg testified that the community would benefit if the juvenile court sent Appellant to TJJD before sending him to adult prison because TJJD would rehabilitate him by helping him learn empathy; would teach him coping skills to deal with anger, as well as other skills that he was never taught; and would help mature him. [emphasis added]

On cross-examination, Dr. Erdberg admitted that she had not reviewed Appellant's psychological evaluation. Dr. Erdberg agreed that Appellant would not be able to stay at the Giddings State School for the minimum period of confinement (three years) because he was already seventeen years old at the time of the hearing. Dr. Erdberg further agreed that like TJJD, the adult prison system offers educational and therapeutic opportunities, as well as the possibility of rehabilitation.

The Juvenile Court's Findings

After hearing the testimony set forth above, the juvenile court went over each of the statutory factors on the record and concluded that Appellant should be transferred to criminal district court. The juvenile court's order waiving jurisdiction made the following findings:

The Court finds that the acts alleged in Paragraphs III and IV of the Petition are First[-]Degree Felonies, the acts alleged in Paragraphs V and VI of the Petition are Second[-]Degree Felonies, and the act alleged in Paragraph VII is a Third[-]Degree Felony under the penal laws of the State of Texas if committed by an adult.

The Court finds that the offenses alleged in Paragraphs Ill and IV were against the person of another.

The Court finds that there is probable cause to believe that the Respondent committed the offenses alleged in Paragraphs III, IV, V, VI, and VII of the Petition on file in this cause.

The Court finds that the Respondent is of sufficient sophistication and maturity to be tried as an adult.

The Court further finds that the likelihood of reasonable rehabilitation of the Respondent by the use of procedures, services, and facilities currently available to the Juvenile Court is low and, after considering all the testimony, diagnostic study, social evaluation, and full investigation, finds that it is contrary to the best interests of the public to retain jurisdiction.

The Court finds that because of the seriousness of the alleged offenses and the background of the Respondent, the welfare of the community requires criminal proceedings.

....

The Court bases its findings on evidence presented by the State in support of its motion regarding the Respondent's actions and conduct as a principal or a party in the commission of the acts alleged in Paragraphs III, IV, V, VI, and VII of the Petition; specifically, the heinous nature of these actions and conduct, the manner in which they were allegedly committed by the Respondent, and the Respondent's alleged conduct of committing the murder of [Kara] and then committing the offense of Tampering with Physical Evidence. The Court finds that the offense of murder is an offense against the person of another.

The Court also bases its findings on evidence presented during the hearing regarding the Respondent's previous history of sophistication and maturity; specifically, the adult-like sophistication demonstrated in the Respondent's living independently as well as the sophistication implicit in the manner in which the Respondent took steps to cover up and hide evidence of the murder of [Kara].

The Court also bases its findings on evidence presented during the hearing that, due to his age and the seriousness of the offenses, there is a low prospect of rehabilitation of the Respondent if left within the Juvenile System. Moreover, the Court finds that the welfare of the community requires transfer to criminal court.

The juvenile court concluded its order by waiving jurisdiction, transferring Appellant to the appropriate Tarrant County criminal district court for criminal proceedings, and certifying "said action."

In his sole issue, Appellant argues that the juvenile court abused its discretion by waiving jurisdiction because TJJD would provide sufficient safeguards for the public and "a very high probability of rehabilitation for [him]."

Held: Affirmed

Opinion: In determining whether to waive its exclusive original jurisdiction, the juvenile court shall consider, among other matters, the following: (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. Id. § 54.02(f). These are nonexclusive facts that serve to facilitate the juvenile court's balancing of the potential danger to the public posed by the particular juvenile offender with his amenability to treatment. Moon v. State, 451 S.W.3d 28, 38 (Tex. Crim. App. 2014). If the juvenile court waives jurisdiction, "it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings." Tex. Fam. Code Ann. § 54.02(h).

In evaluating a juvenile court's decision to waive its jurisdiction, the Texas Court of Criminal Appeals has instructed us to review the juvenile court's ultimate waiver decision under an abuse[-] of [-]discretion standard. That

is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the [s]ection 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that not every [s]ection 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction. Moon, 451 S.W.3d at 47. Further, we are to measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. Id. at 49.

Analysis

Here, Appellant concedes that the juvenile court made the proper findings in its transfer order as required by the Texas Family Code and by Moon. His sole argument is that with regard to the fourth consideration under section 54.02(f)—the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court—"the factual evidence introduced at trial clearly established that the juvenile court should have retained jurisdiction because there were sufficient safeguards in place for the public and a very high probability of rehabilitation for [Appellant] by use of procedures, services, and facilities currently available to the juvenile court." See Tex. Fam Code Ann. § 54.02(f)(4). Appellant points to Dr. Erdberg's testimony that Appellant would be held accountable for his behaviors in the Capital Offender Group at the Giddings State School and that TJJD would rehabilitate him by helping him learn empathy; would teach him coping skills to deal with anger, as well as other skills that he was never taught; and would help mature him. Appellant, however, ignores Dr. Erdberg's testimony that based on Appellant's age, he would not be able to stay at the Giddings State School for the minimum three-year period of confinement, thus limiting the rehabilitation that TJJD could provide to Appellant, and that the adult prison system offers rehabilitation options similar to those offered through TJJD. Accordingly, the section 54.02(f)(4) consideration, along with the other three unchallenged section 54.02(f) considerations, weighs in favor of a decision to transfer jurisdiction.

We now focus our analysis on whether the juvenile court abused its discretion—i.e., acted without reference to guiding rules or principles—in reaching its decision to waive its jurisdiction and to transfer Appellant to criminal district court. The record reflects that the juvenile court carefully considered this matter. The record from the evidentiary hearing includes crime scene photographs and police officers' testimony, which reveal that Kara suffered a violent death and that great lengths were taken to destroy evidence of her death. The juvenile court also ordered and received a pre-diagnostic study, which detailed the investigation of the current offense, Appellant's prior criminal history, and his substance-abuse history, as well as that three potential juvenile placements for Appellant were denied. Moreover, the transfer order includes the findings specified under section 54.02(f), and each of those findings is sufficiently supported by the evidence. See id. § 54.02(f).

Conclusion: On this record and in light of these findings, we cannot say that the juvenile court's decision was arbitrary or made without reference to guiding rules. Rather, the juvenile court's decision resulted from a principled application of legislative criteria. See Moon, 451 S.W.3d at 47. Accordingly, we find no abuse of discretion in the juvenile court's decision to waive jurisdiction and to transfer Appellant to criminal district court. See In re G.B., 524 S.W.3d 906, 920–21 (Tex. App.—Fort Worth 2017, no pet.) (holding that juvenile court did not abuse its discretion by waiving jurisdiction and transferring appellant to criminal district court); In re C.M.M., 503 S.W.3d 692, 709–10 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (same). We overrule Appellant's sole issue. Having overruled Appellant's sole issue, we affirm the juvenile court's order waiving its jurisdiction and transferring Appellant to criminal district court.

Villalpando v. State, MEMORANDUM, No. 01-16-00593-CR, 2018 WL 708534, Tex.Juv.Rep. Vol. 32 No.2 ¶ 18-2-1 [Tex.App.—Houston (1st Dist.) 2/6/18].

DISCRETIONARY TRANSFER VACATED BASED ON *MOON*, A NEW TRANSFER HEARING UNDER SECTION 54.02(J) IS AN ALTERNATIVE.

Facts: In juvenile court, Villalpando was charged with four crimes: two aggravated robberies, aggravated sexual assault, and—at issue here—capital murder. The State moved to waive jurisdiction in all four cases, and the juvenile court held a hearing at which it heard evidence regarding all four charges.

With respect to the capital murder charge, the juvenile court heard evidence that an individual shot the complainant in the course of robbing his home. Fingerprints and DNA left by the perpetrator matched Villalpando.

After the hearing, the juvenile court entered an order reciting its findings and granting the State's motion to waive jurisdiction. The criminal district court then tried Villalpando, and he was convicted of capital murder. He now appeals.

In his first issue, Villalpando argues that we should vacate the criminal district court's judgment and remand his case to the juvenile court because the juvenile court's order waiving jurisdiction does not contain the findings necessary to satisfy Moon.

Held: Judgement vacated, Criminal case dismissed, case remand to the juvenile court for further proceedings consistent with this opinion.

Memorandum Opinion: To waive jurisdiction and transfer a child to the criminal district court under section 54.02(a), a juvenile court must find: (1) the child was 14 years old or older at the time of the alleged offense; (2) there is probable cause to believe the child committed the offense; and (3) because of the seriousness of the alleged offense or the background of the child (or both), "the welfare of the community requires criminal proceedings." Id. In deciding whether the welfare of the community requires criminal proceedings for one or both of these reasons, the juvenile court must consider four non-exclusive factors:
(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against people;
(2) the sophistication and maturity of the child;
(3) the record and previous history of the child; and
(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.
Id. § 54.02(f).

The transfer order must show that the juvenile court took the section 54.02(f) factors into account. Moon, 451 S.W.3d at 41. Nevertheless, express findings of fact regarding these four factors are not required. Id. at 41–42 ("[T]he order should ... expressly recite that the juvenile court actually took the Section 54.02(f) factors into account in making this [waiver] determination[, b]ut it need make no particular findings of fact with respect to those factors[.]").

Conversely, Texas law requires the juvenile court to set forth in the transfer order findings of fact supporting the juvenile court's ultimate reason(s) for waiving its jurisdiction and ordering the transfer. Id. The Juvenile Justice Code states: "If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court[.]" See TEX. FAM. CODE § 54.02(h); Moon, 451 S.W.3d at 38. Accordingly, in Moon, the Court of Criminal Appeals concluded that a transfer order must specify the facts the juvenile court relied upon in making its decision. See Moon, 451 S.W.3d at 47, 49–50 (statute requires that juvenile court order "state specifically" findings regarding reasons for waiver).

Directly applicable in this case, the Moon Court—addressing a murder conviction—held that a juvenile court abuses its discretion if it waives jurisdiction based solely on the seriousness of the offense (not the background of the child) and supports its decision only by a finding that the offense was against a person.4 Moon, 451 S.W.3d at 50–51. The Court of Criminal Appeals made clear that a finding that the welfare of the community required criminal proceedings because of the seriousness of the offense must be supported by express case-specific findings about the offense, beyond a single statement that the offense was committed against a person. Moon, 451 S.W.3d at 50–51 (affirming reversal of murder conviction).

The Moon order lacked such requisite specific findings concerning the offense. There, the juvenile court's order stated that the court considered the four section 54.02(f) factors, and it included several findings:

• The offense was against a person;
• Moon was sufficiently sophisticated and mature to have intelligently, knowingly, and voluntarily waived all constitutional rights previously waived and to aid in his defense and be responsible for his conduct; and
• There was little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of Moon by use of procedures, services, and facilities currently available to the Juvenile Court. See id.; TEX. FAM. CODE § 54.02(f).

The Court of Criminal Appeals concluded that only the first of these was a case-specific finding about the offense; the rest were "superfluous" for these purposes. See Moon, 451 S.W.3d at 50–51. Thus, the Court of Criminal Appeals affirmed the court of appeals' decision to vacate the trial court's judgment of conviction, holding that the juvenile court abused its discretion. See id.

With this legal backdrop, we must determine whether the juvenile court's written order here contains explicit findings that would support the stated reason for transfer. See Ex parte Arango, 518 S.W.3d 916, 922 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Notably, our review of the sufficiency of the evidence supporting waiver is limited to the fact findings the juvenile court expressly stated in support of the reason provided. Moon, 451 S.W.3d at 50–51. If the fact findings in the order would support the stated reason for transfer, an appellate court should then "review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under 'traditional sufficiency of the evidence review.' " Moon, 451 S.W.3d at 47; see Arango, 518 S.W.3d at 922. Finally, if the findings of the juvenile court are supported by legally and factually sufficient proof, then we review the waiver decision for an abuse of discretion. Moon, 451 S.W.3d at 47.

Analysis

Moon compels our reversal. The juvenile court found that transfer was justified here based on "the seriousness of the offense," TEX. FAM. CODE § 54.02(a)(3), not because of "the background of the child." Id. Most of the juvenile court's findings in this case are substantively identical to the findings made by the juvenile court in Moon. Specifically, the court here found:
• Villalpando is of sufficient sophistication and maturity to have validly waived any rights previously waived, to aid in the preparation of his defense, and to be responsible for his conduct;
• The offense was committed against the person of another; and
• There is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of Villalpando in the juvenile system.
See Moon, 451 S.W.3d at 33.

The juvenile court's order in this case suffers from the same flaw as the Moon order: only one of the juvenile court's findings—that the offense was committed against the person of another—is a case-specific finding about the offense. See Moon, 451 S.W.3d at 48; TEX. FAM. CODE § 54.02(f).

We are required to "limit [our] sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order." Moon, 451 S.W.3d at 50. We may not "speculate as to the ... facts the juvenile court found to substantiate" its conclusion that the seriousness of the offense warranted criminal proceedings. Id. at 49–50. Thus, Moon does not allow us to review the evidence in the record—in addition to the express findings in the order—to determine whether it supports the conclusion that the seriousness of the offense warranted transfer.

Moon held that a juvenile court abuses its discretion when it concludes that criminal proceedings are required solely because of the seriousness of the offense, but the only finding about the specific offense is that it was against the person of another. See id. at 50 (waiver of juvenile jurisdiction based solely on seriousness of offense, "fortified only by [finding that offense was against person of another], constitutes an abuse of discretion"); see also Arango, 518 S.W.3d at 922–23 (under Moon, juvenile court abuses discretion when order waiving jurisdiction does not contain findings to support reason for transfer). That is precisely what we face here.

Moreover, the law is clear that where—as here—the juvenile court cited only the seriousness of the offense as the reason for transfer, the court's findings regarding the juvenile's sophistication and maturity, or the prospects for protecting the public or rehabilitation, are superfluous. See Moon, 451 S.W.3d at 48, 50–51 (only findings pertaining to specifics of offense supported conclusion that seriousness of offense warranted criminal proceedings).

The State seeks to distinguish Moon, but we are not persuaded. First, the State emphasizes that the juvenile court in this case made one finding not present in Moon: that Villalpando had a history of violence. The State contends that this finding differentiates this case from Moon because the seriousness of the offense is not the sole reason the juvenile court gave for the transfer.

Section 54.02(a)(3) lists potential reasons for transfer, however, and history of violence is not one of them. The finding that Villalpando had a history of violence may have supported a transfer based on the background of the child, had the juvenile court based the transfer on Villalpando's background. But the juvenile court did not do so here. The juvenile court also did not include this finding as a reason why the welfare of the community required criminal proceedings. Instead, the court included it in its findings supporting the stated reason for the transfer—the seriousness of the offense. We thus reject the State's argument.

Second, the State urges us to distinguish Moon on the basis that the juvenile court considered waiver in this case along with waiver in three other cases involving Villalpando. The State contends that we may consider the totality of all four orders in determining whether the reason for waiver was supported. But putting aside whether we can even look to the other three orders, the State points us to nothing in those orders that bear on our analysis.

Because the only fact explicitly set out in the transfer order that pertains to the specifics of the offense here is that it was against the person of another, we must reverse. It is settled in Texas that a waiver of juvenile jurisdiction based on this particular reason, fortified only by this fact, constitutes an abuse of discretion. Moon, 451 S.W.3d at 50 (waiver of juvenile jurisdiction based solely on seriousness of offense, "fortified only by [finding that offense was against person of another], constitutes an abuse of discretion" and failed to vest jurisdiction in district court); see Arango, 518 S.W.3d at 922–23 (juvenile transfer order was facially invalid where transfer was based upon seriousness of the offense and only finding in order regarding specifics of offense was that it was against the person of another); In re J.G.S., No. 03-16-00556-CV, 2017 WL 672460, at *3–5 (Tex. App.—Austin, Feb. 17, 2017, no pet.) (mem. op.) (vacating transfer order without reaching evidentiary sufficiency challenge, even though record included evidence regarding specifics of offense and juvenile's background, because transfer order was devoid of case-specific findings supporting statutory criteria for transfer); In re R.X.W., No. 12-16-00197-CV, 2016 WL 6996592, at *3 & n.1 (Tex. App.—Tyler, Nov. 30, 2016, no pet.) (mem. op.) (reversing transfer order for lack of case-specific findings supporting stated reason for waiving jurisdiction, and declining to address whether findings were supported by sufficient evidence on basis that juvenile court's "transfer order is deficient even if the findings were supported by legally and factually sufficient evidence"); Yado v. State, No. 01-14-00578-CR, 2015 WL 3982045, at *2 (Tex. App.—Houston [1st Dist.] June 30, 2015, no pet.) (mem. op., not designated for publication) (juvenile court abused discretion by waiving jurisdiction based solely on seriousness-of-the-offense where only finding regarding specifics of offense was that it was against person of another); Guerrero v. State, 471 S.W.3d 1, 4 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (mem. op.) (same); see also In re S.G.R., 496 S.W.3d 235, 240 (Tex. App.—Houston [1st Dist.] 2016, no pet.) ("If the juvenile court simply had concluded that the offense was against a person and made no additional findings," waiver of jurisdiction based upon seriousness of offense may have been abuse of discretion). We sustain Villalpando's first issue.

Conclusion: We hold that the juvenile court abused its discretion by waiving jurisdiction and transferring Villalpando's case to the criminal district court without including requisite findings in its transfer order. Accordingly, we vacate the juvenile court's transfer order and the criminal district court's judgment, dismiss the criminal district court case, and remand this case to the juvenile court for further proceedings consistent with this opinion. The case remains "pending in the juvenile court" where "at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another order transferring [Villalpando] to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under Section 54.02(j) of the Juvenile Justice Code" or another applicable section. Moon, 451 S.W.3d at 52 n.90; see TEX. FAM. CODE § 54.02(j).

In the Matter of D.M., MEMORANDUM, No. 13-17-00319-CV, 2018 WL 460811, Tex.Juv.Rep. Vol. 32 No.1 ¶ 18-1-9 (Tex. App.—Corpus Christi-Edinburg, 1/18/2018).

TAKING JUDICIAL NOTICE OF ALL OF THE DOCUMENTS IN THE TRIAL COURT'S FILE FOR DISCRETIONARY TRANSFER HEARING ALLOWED.

Facts: D.M. was charged with the capital murder of M.A. and the aggravated assault of F.R. On March 29, 2016, the State filed its Petition for Discretionary Transfer to Criminal Court, asking the trial court to waive its jurisdiction and transfer D.M.'s case to the adult criminal courts. See TEX. FAM. CODE ANN. § 54.02 (West, Westlaw through 2017 1st C.S.). D.M. subsequently filed a motion to determine whether he was unfit to proceed, as a result of mental illness or mental retardation. The trial court ordered a social study to be conducted by the juvenile probation department and appointed Dr. David Moron and Dr. Gregorio Pina to conduct evaluations of D.M. under chapter 55 of the Texas Family Code. See TEX. FAM. CODE ANN. ch. 55 (West, Westlaw through 2017 1st C.S.) (proceedings concerning children with mental illness or intellectual disabilities).

A two-day jury trial was held to determine if D.M. was competent to proceed with the charges filed against him, with the jury finding D.M. fit to proceed. Approximately three months later, the trial court conducted a hearing regarding the State's motion to transfer D.M. to an adult criminal court.

Held: Affirmed

Memorandum Opinion: D.M. alleges the trial court improperly considered the social study and addendum created by Arispe in making its determination. Prior to the beginning of the hearing, the State asked the trial court to take judicial notice of all of the documents in the trial court's file, specifically, Drs. Martinez and Pina's reports, as well as the social study and addendum prepared by Arispe. D.M. had no objections and asked to include the doctors' reports that had been offered during the prior competency hearing. The State then clarified that it was specifically pointing out the documents prepared by order of the trial court that were statutorily required. Again, D.M. failed to object. The trial court then took judicial notice of the court's file.

Section 54.02(c) states "the juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings." See TEX. FAM. CODE ANN. § 54.02(c). Section 54.02(d) states "prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Id. § 54.02(d). Section 54.02(e) states that "at the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." Id. § 54.02(e).

"Section 54.02(e) allows the court to consider a probation officer's written report." Matter of K.B.H., 913 S.W.2d 684, 686 (Tex. App.—Texarkana 1995, no pet.). Any complaint that the State improperly introduced the social evaluation through Arispe is "misplaced because the court could consider her report even if the State had not formally offered it into evidence." Id. at 687–88; see L.M. v. State, 618 S.W.2d 808, 818 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

Conclusion: Here, the trial court was permitted to consider the statutorily required social study and addendum Arispe completed even though it had not formally been entered into evidence as an exhibit during the hearing. Additionally, by D.M. not objecting to the trial court taking judicial notice of the court's file, with a specific request from the State to include the social study and addendum, any issue that could be raised was waived. See TEX. R. APP. P. 33.1. We overrule D.M.'s first issue.

In the Matter of E.H., MEMORNADUM, No. 01-16-00802-CV, 2017 WL 3526717, Tex.Juv.Rep. Vol. 31 No. 4 ¶ 17-4-2 [Tex.App.—Houston (1st Dist.), 8/17/2017].

SHOULD THE VIABILITY OF A DETERMINATE SENTENCE DISPOSITION BE A FACTOR IN A MOTION FOR DISCRETIONARY TRANSFER TO ADULT COURT?

Facts: The charges against E.H. stem from his young niece's allegations that he exposed himself to her and sexually abused her when she was 7 years' old and he was almost 17 years' old. The Brazoria County District Attorney's

Office filed a Petition for Discretionary Transfer to Criminal Court seeking to have proceedings against E.H. for indecency with a child and sexual assault of a child transferred from juvenile court to district court.

Held: Affirmed

Memorandum Opinion: In light of our analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, we must next review the trial court's ultimate waiver decision under an abuse-of-discretion standard, i.e., we must determine whether the juvenile court acted without reference to guiding rules or principles. In re K.J., 493 S.W.3d 140, 154 (Tex. App.–Houston [1st Dist.] 2016, no pet.) (citing Moon, 451 S.W.3d at 47). "In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?" Id.

Applying this standard, we conclude that the juvenile court did not abuse its discretion in waiving jurisdiction and transferring appellant's case to criminal district court. Section 54.02(d) of the Texas Family Code mandates the court "order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." The court must hold a hearing, § 54.02(c), during which the court may consider "written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." § 54.02(e). Finally, the court must state specifically in any transfer order the reasons for waiver.

Here, the court compiled and comprehensively reviewed all the materials required under section 54.02(d) & (e) and conducted the hearing as required under section 54.02(c). It was presented with evidence of sexual crimes, committed more than once, against a 7–year–old victim, when E.H. was almost 17 years' old. Dr. Fuller testified that E.H. has the sophistication and maturity to participate in an adult trial, and E.H.'s juvenile probation officer testified that she did not believe the juvenile court system could rehabilitate E.H.

Conclusion: Based on our review of the entire record, summarized in the background section of this opinion, we conclude that E.H. has not established that the court "acted without reference to guiding rules or principles," or that its transfer was "arbitrary, given the evidence on which it was based," Moon, 451 S.W.3d at 47. Accordingly, we hold that the juvenile court's waiver of jurisdiction and transfer to criminal district court was within the court's discretion. We overrule E.H.'s sole point of error.

Concurring Opinion: This case involves a juvenile charged with sexually molesting his 7–year–old niece. In its petition to transfer the proceedings to criminal court, the State alleged that "the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the Juvenile Court" were "in serious doubt."

The evidence at the hearing established that E.H. was 16 years old at the time of the alleged offenses. There was evidence of a history of sexual abuse in his immediate family, as E.H.'s sister testified that their father was in prison for molesting her. E.H. does not have a criminal record. He has a history of some marijuana use and acting out while confined in juvenile detention for the underlying offenses. He has exhibited an uncooperative attitude toward officials. He operates at a low average intellectual range and, possibly because of ADHD, he has had problems with school. He laughs when he is nervous, even in situations in which that reaction is inappropriate, demonstrating immaturity.

There was testimony at his transfer hearing that the juvenile probation department believes that participation in available rehabilitative programs for a minimum of two years is necessary for a "person to get what they need for a sexual charge." Significantly, E.H.'s probation officer testified that general juvenile sex-offender probation conditions, coupled with participating in a drug-treatment program, would be appropriate for E.H.

But the juvenile probation office can only confine or supervise E.H. until he turns 18. Accordingly, by the time of the adult-certification hearing, there were only five months left until E.H.'s 18th birthday. Thus, E.H.'s probation office further testified that E.H. should be certified as an adult, as the period for which the juvenile probation office would continue to have jurisdiction over E.H. was far short of the minimum two years needed to provide rehabilitative services.

The juvenile court's order waiving its jurisdiction recites that E.H. "is of sufficient sophistication and maturity to be tried as an adult," and that "because of the records and previous history of the child and because of the extreme and severe nature of the alleged offense(s), the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by use of the procedure, services and facilitates which are currently available to the Juvenile Court are in doubt." But a review of the record actually reflects that the primary evidence supporting the juvenile court's decision is the probation officer's testimony that E.H. does not have time to complete appropriate juvenile rehabilitation services before his 18th birthday.

There are provisions in the Family Code, however, that can extend the jurisdiction of the juvenile court beyond the age 18. Specifically, a habitual juvenile offender, or a juvenile accused of a laundry list of offenses (including sexual assault and aggravated sexual assault, the offenses for which E.H. was charged), may be referred by the prosecuting attorney to the grand jury for a determinate sentence. TEX. FAM. CODE § 53.045. Determinate sentences allow the juvenile courts to maintain jurisdiction beyond a juvenile's 18th birthday, resulting in several possible outcomes, including release before completion of the juvenile's sentence, supervised release at the age of 19, transfer to the Texas Department of Criminal Justice (TDCJ) to serve the remainder of a sentence, or transfer to TDCJ jurisdiction to serve a remaining sentence on parole. See, e.g., In re J.H., 150 S.W.3d 477, 480 n.1 (Tex. App.–Austin 2004, pet. denied) ("A determinate sentence places a juvenile under the custody and control of the Texas Youth Commission with several possible outcomes."). "In enacting the determinate sentencing statutes, the legislature has furthered a compelling state interest by striking a balance between the state's interest in providing for the care, protection and development of its children and its interest in providing protection and security for its general citizenry." In re S.B.C., 805 S.W.2d 1, 4 (Tex. App.–Tyler 1991, writ denied) (citation omitted).

Unlike in many adult certification cases, the State's own witnesses agreed in this case that the juvenile system has programs available that could appropriately address E.H.'s alleged sexual misconduct and his admitted substance abuse. E.H. thus argues that the juvenile court abused its discretion by waiving jurisdiction because determinate sentencing could extend the juvenile court's jurisdiction so he could avail himself of those services and because the time constraints were the only circumstance supporting adult certification. In response, the State does not argue that determinate sentencing would be insufficient to meet the needs of E.H. and the community. Rather, the State contends that the prosecutor had the discretion to pursue a determinate sentence and simply chose not to do so. Thus, the State argues that the availability of a determinate sentence to rehabilitate E.H. and to protect the community is irrelevant to this Court's analysis of whether the juvenile court abused its discretion is waiving jurisdiction.

This argument is troubling because it is the State's burden to prove that the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the juvenile court are in serious doubt. Moon, 451 S.W.3d at 40. Perhaps there is a reason that a determinate sentence would not be appropriate here, but the record does not reflect one. The testimony that E.H. would turn 18 before he could adequately avail himself of services under the juvenile court system is sufficient to support the trial court's waiver under the applicable standard of review. But when the facts of a case reflect that a determinate sentence may be feasible, and the juvenile argues that feasibility defeats the State's burden of proof in a waiver-of-juvenile-court-jurisdiction proceeding, the policies behind preserving juvenile court jurisdiction over children when possible are not served by allowing a prosecutor discretion to not avail itself of a procedure and offer no explanation for that decision.

While the State is the only party that can seek a determinate sentence, that does not mean that the State's decision not to do so when it would be appropriate should insulate it from inquiry. The State should seek a determinate sentence if aging out of the system is the only barrier to a juvenile's adequate punishment and rehabilitation. If the State chooses not to, it should be put to the burden—at a minimum—of establishing why such a choice is not appropriate unless it is otherwise obvious on the record that a determinative sentence and reasonable rehabilitation are not viable options in the case. Putting such information in the record will enable juvenile courts to make more informed decisions, decreasing the risk of juveniles being forced into criminal court simply because of their age in contravention of laws requiring that they be served in juvenile court when possible.

WAIVER OF RIGHTS—

Tugler v. State, MEMORANDUM, No. 05-17-00429-CR, No. 05-17-00430-CR, 2018 WL 3387383, Tex.Juv.Rep. Vol. 32 No. 3 ¶18-3-5 (Tex.App.—Dallas, 7/12/2018).

JUVENILE ON DETERMINATE SENTENCE PROBATION CAN STILL INVOKE HIS FIFTH AMENDMENT RIGHT TO SELF-INCRIMINATION IN CO-DEFENDANT'S TRIAL.

Facts: At a convenience store at 1:20 a.m. on June 18, 2016, a night manager had just finished with a transaction involving a female customer. A delivery driver was also present making a delivery. At that moment, two individuals ran into the store brandishing guns. Both gunmen had their faces covered, one with black-and-white fabric and the other with a mask. The assailants took the female customer's wallet, cell phone, and purse. Then the two robbers demanded the delivery driver open the registers. When the robbers collected the money (approximately $30) from the registers, they questioned the delivery driver about the store's safe. The delivery driver responded that he did not know how to open the safe, and the robbers fled the store. The driver's assistant had remained in the parking lot to close up the trailer and, from his vantage point, observed a white Dodge driven by a black female speeding from the scene. The driver's assistant then went into the store and learned that there had just been an armed robbery. The night manager dialed 9-1-1 to report the incident.

K.N.H., who had been on the phone with the female customer, heard someone say, "this is a M_____ F_____ robbery; open up the register now." K.N.H. heard the female customer ask, "is this for real?" K.N.H. screamed the female customer's name, but the female customer did not respond. K.N.H. maintained the connection with the female customer's phone and dialed 9-1-1 on her son's phone.

The police used a description of the robbers' car and the location of the female customer's phone to locate the robbers' vehicle. When the police stopped the suspect car, appellant and the two robbers got out. After obtaining a search warrant, the police discovered a black-and-white shirt, a gray skull mask, a revolver, an air-soft toy gun, a plastic bag of cash, the female customer's purse, and the female customer's phone in the back seat of the car.

Appellant was indicted for the offense of aggravated robbery in two separate cause numbers. She pleaded not guilty in both cases, which were tried concurrently before a jury. The jury found appellant guilty, and after appellant pleaded true to the enhancement paragraph identified in each cause, the jury assessed her punishment in each cause number at 37 years' confinement.

Held: Affirmed

Memorandum Opinion: In her sixth issue, appellant argues the trial court erred improperly denied her right to due process and a fair trial by refusing to allow appellant to call as a witness a co-defendant who had already disposed of his case. At trial and out of the presence of the jury, appellant attempted to call one of her co-defendants to testify. Her co-defendant C.B. was represented by counsel who asserted C.B. intended to invoke his Fifth Amendment right to refrain from self-incrimination. C.B.'s counsel stated that C.B. was "under what's called a determinate sentence[,] ... [which] means that his sentence is to be determined by, among other things, how he performs while on probation."

Appellant contends C.B. waived his Fifth Amendment right not to testify in this case when he pleaded guilty to the same offense because he cannot further incriminate himself, as he has already admitted his guilt.

The Sixth Amendment right to compulsory process assures the defendant of her ability to offer the testimony of witnesses, and to compel their attendance, if necessary, so that the defendant may present her version of the facts to the jury. See U.S. CONST. amend. VI; Washington v. Texas, 388 U.S. 14, 19 (1967). The State may not arbitrarily deny her the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense." Washington, 388 U.S. at 23.

However, an individual's constitutional privilege against self-incrimination overrides a defendant's constitutional right to compulsory process of witnesses. Bridge v. State, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986). Therefore, a trial court cannot compel a witness to answer unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken in asserting the privilege, and that the answer cannot possibly tend to incriminate the witness. See Walters v. State, 359 S.W.3d 212, 216–17 (Tex. Crim. App. 2011); Boler v. State, 177 S.W.3d 366, 371 (Tex. App.—Houston [1st Dist.] 2005, pet ref'd.). The court is required to make an inquiry into the reasonableness of a witness's assertion of the Fifth Amendment privilege against self-incrimination. Walters, 359 S.W.3d at 216. We review a trial court's decision to uphold a witness's claim of privilege for an abuse of discretion. See id. at 216–17.

The record reflects that, although they were not admitted into this record, both the State and defense counsel were in possession of a copy of C.B.'s juvenile records, including his plea. The record also contains testimony that C.B. was sixteen at the time of the offense. When a juvenile is given a determinate sentence, upon the request of the Texas Juvenile Justice Department (TJJD) to transfer the juvenile to the penitentiary, the trial court is required to hold a hearing and that at that hearing, the trial court has wide latitude and discretion to consider, among other factors, "the experiences and character of the person before and after commitment to [TJJD], the nature of the penal offense that the person was found to have committed, and the manner in which the offense was committed." See TEX. FAM. CODE ANN. § 54.11(k); Reese v. State, 03-14-00409-CR, 2016 WL 806704, at *2 (Tex. App.—Austin Feb. 25, 2016, no pet.) (mem. op., not designated for publication).

The district court may have reasonably inferred that C.B. believed that any answers he provided in his testimony could implicate him in greater or different offenses than he had already implicated himself in by pleading true to the State's allegations, and that such answers might be used against him at a subsequent transfer hearing. If C.B. had testified, he would have been subject to cross-examination not only by the State but also by counsel for appellant, both of whom, the district court could have reasonably inferred, would have had an incentive to undermine C.B.'s credibility by implicating him in greater or different offenses. Moreover, appellant's defense counsel had indicated to the trial court he intended to establish appellant drove the getaway car under duress from her co-defendants thus potentially implicating him in further, serious offenses.

Conclusion: We cannot conclude the trial court abused its discretion by upholding C.B.'s claim of privilege on this record. We overrule appellant's sixth issue. We affirm the trial court's judgment.