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RESPONDING TO MISREPRESENTATIONS, NONDISCLOSURES AND INCORRECT ASSUMPTIONS ABOUT THE AGE OF THE ACCUSED: THE JURISDICTIONAL BOUNDARY BETWEEN JUVENILE AND CRIMINAL COURTS IN TEXAS*

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I. INTRODUCTION

Case No. 1. Joyce, a sixteen-year-old arrested for burglary of a building, informed the arresting and booking officers she was seventeen years of age. The booking search produced no documents to refute or confirm that age. She said she had no relatives in the community and was living "on the streets." Police filed a criminal complaint for burglary. In due course, Joyce received a court-appointed attorney, whom she also informed she was seventeen years old. Her fingerprints were sent to state and federal criminal history depositories and each responded that no record of a person with those prints existed. Her attorney worked out a plea bargain of five years' probation for his youthful, female first-offender client. Joyce accepted the deal and upon her plea of guilty was given five years' probation. She failed to report to her probation officer and a warrant for probation violation was issued. Two years later, when she was apprehended and brought before the court, she informed the judge that she had really been sixteen years of age at the time of the burglary and her new court-appointed attorney was able to corroborate that claim with a birth certificate. She had been handled earlier by the juvenile court

in the community and had been sent to the Texas Youth Commission, from which she had escaped before the burglary. The criminal court, realizing that it had lacked jurisdiction over the burglary case, dismissed the probation violation charge, set aside the burglary conviction, and referred her to juvenile court. Because the state could no longer find the owner of the building and because the arresting officer had quit the force and could not be located, the state was forced to dismiss the juvenile charges as well.

Case No. 2. Adam was arrested for burglary of a building. Although he was seventeen years of age, he informed the arresting officer he was sixteen. Consequently, his case was handled by a Youth Division officer in the police department. Adam had no documents on his person to verify or refute his self-reported age. A check of the Youth Division files revealed no records, which did not surprise the officer since Adam informed him he had recently arrived in town from out of state. He provided police with an out-of-state address and phone number for his parents, but police soon learned the phone number was not a working number. Adam told them it was the only number he knew. Since he reported his age as sixteen, he was referred to juvenile court. Juvenile court intake personnel attempted to locate the out-of-state parents, but were unable to do so. A court petition charging burglary was filed. When the parents could not be located, the juvenile court appointed Adam's attorney as his guardian-ad-litem for the proceedings. Adam stipulated to his guilt, including that he was sixteen years of age at the time of the offense and was placed on probation for one year, subject to renewals of one year each until he became eighteen years of age. He failed to report to his probation officer and a motion to modify disposition was filed in the juvenile court. When he was apprehended one year later, he revealed to the court that he had really been seventeen years of age, not sixteen, at the time of the offense. His new court-appointed attorney was able to corroborate this assertion with a birth certificate. The juvenile court, realizing that it lacked jurisdiction over the case, dismissed the juvenile proceedings. The prosecutor immediately filed criminal charges for the same offense, but was unable to prove them because critical evidence had been lost in the meantime. Criminal charges were dismissed.

Case No. 3. Eric was arrested for burglary of a building. He was mildly retarded and informed police he wasn't certain how old he was, "maybe he was fifteen, maybe sixteen, maybe seventeen, some-

thing like that." Police were unable to obtain any other evidence of his age. Lacking specific evidence that he was a juvenile, and knowing the state would be required to prove age as a component of a juvenile case, the police decided to file criminal charges. They did so knowing that any conviction obtained on those charges could be set aside at any later time if it could be proved that Eric had been under seventeen years of age at the time of the offense.

* * *

There are two major procedural systems for dealing with conduct in violation of the criminal laws: the criminal justice system for adults and the juvenile justice system for children. The factor that determines whether society will respond to a perceived violation of the law with the criminal justice or the juvenile justice system is the age of the person believed to be the perpetrator of the offense. If at the time of the offense that person was under sixteen, seventeen, eighteen, or nineteen years of age (depending upon the jurisdiction),[1] he or she will be handled in the juvenile system. Otherwise, criminal charges will be filed.

Anchoring the jurisdictional boundaries of the two systems to the chronological age of the accused at the time of the offense works well most of the time. Police are able to verify self-reported ages of arrestees with documents examined as part of the booking process, with prior law-enforcement or court records about the arrestee or, if necessary, by contacting relatives or acquaintances of the arrestee. They can ordinarily determine with confidence whether to handle the matter as a juvenile case or a criminal case. This system works well in the routine case.

But not all cases are routine and police are not able to verify age in some cases despite the exercise of diligence in their attempts to do so. They must either take the arrestee's word for his or her age or, as *Case No. 3* indicates, make a guess as to age. If charges are filed in the wrong system because the arrestee is not the age police believe him to

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1. *See* THE INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 14-15 (1980). The Institute comments, "all states impose age limitations on the delinquency jurisdiction of the juvenile court. The most common requirement, imposed by nearly two-thirds of the states and the District of Columbia, is that a person must be less than eighteen years of age to come within the juvenile court provisions. Other jurisdictions limit delinquency jurisdiction to persons less than sixteen, less than seventeen, and less than nineteen."

be, then the charges have been filed in a court that lacks jurisdiction over the case. If the person's age is later disclosed, should that affect the validity of any conviction or adjudication obtained in the case? Texas courts have addressed that question on several occasions and have concluded that, because the trial court lacked jurisdiction over the case, all its proceedings were void and must be set aside. Further, it makes no difference that the person deliberately lied about his or her age to justice officials, including the court, in an effort to obtain more lenient treatment.[2]

The purpose of this article is to examine this position of Texas courts. The premise of this article is that a person ought not to be permitted to benefit from a deception as to age which induces the filing of charges in the wrong system. It concludes that current Texas law permits exactly that to occur, and that remedies for the problem are available that do not change the fundamental jurisdictional boundary between the two systems. Finally, it proposes those remedies in the form of specific statutory provisions.

II. THE SIGNIFICANCE OF THE AGE OF THE ACCUSED

Five different ages of the accused have significance in the Texas juvenile justice system—ten, fifteen, seventeen, eighteen and twenty-one.

Ages ten and seventeen form the boundaries for juvenile court jurisdiction. Under title 3 of the Family Code a child is defined as a person who is "ten years of age or older and under 17 years of age."[3] This title gives the juvenile court "exclusive original jurisdiction" over cases in which the person was a child "at the time he engaged in the conduct" that is the subject of the proceedings.[4] Therefore, if a criminal offense was committed by a person between the ages of ten and seventeen, the juvenile court has exclusive original jurisdiction over the case. The Penal Code reinforces this jurisdictional monopoly by providing that, with few exceptions, "a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age."[5] The seventeen-year-old offense ceiling applies to place exclusive jurisdiction in the juvenile court even if the offender is not appre-

2. *See infra* text accompanying notes 27-65 for a discussion of these cases.
3. TEX. FAM. CODE ANN. § 51.02(1) (Vernon 1986).
4. *See id.* § 51.04(a).
5. TEX. PENAL CODE ANN. § 8.07(b) (Vernon Supp. 1987).

hended until after he becomes seventeen years of age.[6]

Eighteen is the maximum age at which juvenile adjudication proceedings can be initiated against an offender. If a person commits an offense before age seventeen, but is not apprehended until after he is eighteen years of age, the juvenile court loses its jurisdiction to adjudicate for delinquent conduct.[7] It may, however, consider a petition to transfer the person to criminal court if a felony was committed and the state was unable, despite the exercise of diligence, to proceed before the person's eighteenth birthday.[8] If the offense was a misdemeanor, no court, juvenile or criminal, has jurisdiction over the case.

Age eighteen is also the maximum age for keeping one in the juvenile system on probation. The Family Code provides that all dispositions, except for commitments to the Texas Youth Commission, automatically expire upon the child's eighteenth birthday.[9] If the juvenile court commits the child to the Texas Youth Commission, either as an original matter or upon revocation of probation before its automatic termination at age eighteen, then the Youth Commission may maintain control over the child until he reaches the age of twenty-one.[10]

Finally, fifteen is the minimum age for juvenile court transfer of a child to criminal court for prosecution as an adult. The state must show in a juvenile court hearing that the child committed a felony offense while fifteen or sixteen years of age.[11] If the prosecution does so, the juvenile court has discretion either to transfer the child to the criminal court or to maintain jurisdiction over the case.[12] If transfer proceedings are initiated before the juvenile becomes eighteen years of age, the juvenile court retains transfer jurisdiction over the case until

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6. *See, e.g., Ex parte* Redmond, 605 S.W.2d 600, 601 (Tex. Crim. App. 1980); *Ex parte* Mercado, 590 S.W.2d 464, 466 (Tex. Crim. App. 1979).

7. Section 51.02(1)(B) of the Texas Family Code defines a child as one "seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age."

8. *See* TEX. FAM. CODE ANN. § 54.02(j)-(l) (Vernon 1986).

9. *See id.* § 54.05(b).

10. *See id.*; TEX. HUM. RES. CODE ANN. §§ 61.005(5), 61.084 (Vernon 1980). These provisions were added in 1985. Previously, all juvenile system controls ended at age eighteen.

11. *See* TEX. FAM. CODE ANN. § 54.02(a). The Texas Penal Code reinforces the minimum age requirement by providing that "a person may not be prosecuted for or convicted of any offense that he committed when younger than 15 years of age" with exceptions not here relevant. *See* TEX. PENAL CODE ANN. § 8.07(a) (Vernon Supp. 1987).

12. *See* TEX. FAM. CODE ANN. §§ 54.02(a), (g), (h) (Vernon 1986).

it is fully determined, even though the court lost jurisdiction to adjudicate for delinquent conduct when the child became eighteen.[13] Further, if a felony was committed while the person was fifteen or sixteen years of age but the state was unable despite due diligence to proceed in juvenile court prior to the person's eighteenth birthday, the Family Code permits the juvenile court, in its discretion, to transfer the case to criminal court or to dismiss it.[14]

In criminal proceedings, there is no requirement that the state prove the age of the defendant. In juvenile proceedings, however, the state must allege and prove that the respondent was a child, within the meaning of the Family Code, at the time it contends the offense was committed. If the state is seeking adjudication in the juvenile system, it must show that the respondent was at least ten but not seventeen years of age at the time of the conduct.[15] If the state is seeking transfer to criminal court, however, it must allege and prove that the child was fifteen or sixteen years of age at the time the felony was committed.[16] Although officials would much prefer to support proof of age with a birth certificate,[17] there is no requirement that it do so. Proof can be based exclusively upon the respondent's out-of-court admissions as to his age.[18]

Although any of these ages may be of importance in any particular case, the age of seventeen is of more general importance because that age determines the line between the juvenile and criminal systems. The importance of this line is illustrated by *Ex parte Redmond*[19] in which the petitioner appeared in criminal court while seventeen years of age to plead guilty to four charges of aggravated robbery. There had been no prior juvenile proceedings in the case and the trial court

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13. *See, e.g.*, R.E.M. v. State, 569 S.W.2d 613, 615-16 (Tex. Civ. App.—Waco 1978, pet. ref'd); *In re* J.R.C., 551 S.W.2d 748, 755 (Tex. Civ. App.—Texarkana 1977, pet. ref'd); R.E.M. v. State, 532 S.W.2d 645, 652 (Tex. Civ. App.—San Antonio 1975, no pet.).

14. *See* TEX. FAM. CODE ANN. § 54.02(j)-(l) (Vernon 1986); *In re* D.M., 611 S.W.2d 880, 884-85 (Tex. Civ. App.—Amarillo 1980, no pet.).

15. *See* Steed v. State, 143 Tex. 82, 85, 183 S.W.2d 458, 460 (1944); *In re* J.T., 526 S.W.2d 646, 647-48 (Tex. Civ. App.— El Paso 1975, no pet.); Miguel v. State, 500 S.W.2d 680, 681 (Tex. Civ. App.—Beaumont 1973, no pet.).

16. *See, e.g., Ex parte* Hunt, 614 S.W.2d 426, 427 (Tex. Crim. App. 1981); *In re* S.E.C., 605 S.W.2d 955, 958 (Tex. Civ. App.—Houston [1st Dist.] 1980, no pet.).

17. *See infra* text accompanying notes 170-73.

18. *See, e.g., In re* S.E.C., 605 S.W.2d 955, 958 (Tex. Civ. App.—Houston [1st Dist.] 1980, no pet.).

19. 605 S.W.2d 600 (Tex. Crim. App. 1980).

accepted the guilty pleas from the seventeen-year-old. He later challenged all four convictions on the ground that prior juvenile transfer proceedings had not been conducted so the criminal court had lacked jurisdiction over the cases. Three of the four robberies had been committed before he became seventeen, but the fourth was committed on his seventeenth birthday. The Texas Court of Criminal Appeals set aside the three earlier convictions on jurisdictional grounds, while affirming the conviction for the robbery committed by Redmond on his birthday.

III. I SAID I WAS SEVENTEEN BUT I WAS REALLY ONLY SIXTEEN

When the state is seeking to adjudicate a person in juvenile court, it must plead[20] that the person is a child within the meaning of the Family Code. While not an element of the offense, "childness" must be shown to establish the juvenile court's jurisdiction over the case.[21] Proof of childness is required because the juvenile court is not a court of general criminal jurisdiction but rather is limited to jurisdiction over those offenses committed by children.[22]

The criminal courts, on the other hand, have jurisdiction over all criminal offenses, except those committed by children.[23] Thus, there is no requirement that the age of the defendant be proved by the state to give a criminal court jurisdiction over a case. It is assumed that the person before the court is an adult or he would not be there. If he were eligible for juvenile court handling he surely would vigorously assert that right to more favorable treatment at every opportunity. In other words, juvenility is regarded as though it were a defense[24] or an

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20. The Family Code requires the state to allege in an adjudication or transfer petition "the name, age, and residence address, if known, of the child who is the subject of the petition." TEX. FAM. CODE ANN. § 53.04(d)(2) (Vernon 1986).

21. *See, e.g.*, Steed v. State, 143 Tex. 82, 85, 183 S.W.2d 458, 460 (1944); *In re* J.T., 526 S.W.2d 646, 647-48 (Tex. Civ. App.—El Paso 1975, no pet.); Miguel v. State, 500 S.W.2d 680, 681 (Tex. Civ. App.—Beaumont 1973, no pet.).

22. *See* TEX. FAM. CODE ANN. § 51.04(a) (Vernon 1986).

23. Section 8.07(a) of the Texas Penal Code provides, with exceptions not here relevant, that "a person may not be prosecuted for or convicted of any offense that he committed when younger than 15 years of age" and section 8.07(b) provides, also with exceptions not relevant, that "unless the juvenile court waives jurisdiction and certifies the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age." TEX. PENAL CODE ANN. § 8.07(a) (Vernon Supp. 1987).

24. Section 2.03 of the Texas Penal Code provides that the state need not plead or prove

affirmative defense[25] to the criminal charges. Unfortunately, that tacit assumption of the criminal system, while generally sound, is not invariably correct. *Bannister v. State*[26] illustrates this point well.

A. *Underage as a Nonwaivable Jurisdictional Defect*

In 1974, Donna Kay Bannister, using the false name of Tasha Diane Williams, entered a plea of guilty in a Dallas County District Court to the offense of burglary of a habitation,[27] a first degree felony.[28] She informed the trial court that she was nineteen or twenty years of age and had informed her court-appointed counsel that she was twenty-two years of age. She was actually only fifteen years old and was an escapee from a Texas Youth Commission juvenile facility. The criminal court accepted her plea of guilty and placed her on five years' probation.

After failing to report to her probation officer a motion to revoke probation was filed and Bannister was eventually brought before the court for a hearing. There, for the first time, she revealed her true name and age, which were substantiated by a birth certificate. She contended that the criminal court lacked jurisdiction over her case because exclusive jurisdiction was in the juvenile court and the case had never been transferred to criminal court. The state stipulated that no transfer proceedings had occurred in the case, but the trial court rejected the jurisdictional claim and revoked probation. She appealed to the Texas Court of Criminal Appeals which reversed her probation revocation. The unanimous court held that this result was compelled by sections 51.08, 51.09 and 54.02 of the Family Code and section 8.07 of the Penal Code.

Section 51.08 of the Family Code provides in relevant part: "If the defendant in a criminal proceeding is a child . . . unless he has been transferred to criminal court under Section 54.02 of this code, the

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the absence of a defense, but if evidence appears in the trial in support of the defense, then the state must disprove it beyond a reasonable doubt. *See id.* § 2.03.

25. Section 2.04 of the Texas Penal Code provides that the state has no responsibilities for disproving an affirmative defense and places the burden upon the defendant to prove it by a preponderance of the evidence. *See id.* § 2.04.

26. 552 S.W.2d 124 (Tex. Crim. App. 1977).

27. *See* TEX. PENAL CODE ANN. § 30.02 (Vernon 1974).

28. Section 30.02(d)(1) of the Texas Penal Code provides that burglary of a habitation is a first degree felony. A first degree felony is punishable by imprisonment for life or for any term of not more than 99 years or less than five years and by a fine of up to $10,000. *See* TEX. PENAL CODE ANN. § 12.32 (Vernon Supp. 1987).

court exercising criminal jurisdiction shall transfer the case to the juvenile court. . . ."[29] In 1973, this statute replaced article 2338-1, section 12 of the Civil Statutes, which provided in relevant part:

> If, while a criminal charge or indictment is pending against any person in a court . . . *it is ascertained* that the person is a child . . . it is the duty of the court . . . to transfer the child immediately . . . to the juvenile court of the county unless the child [had been transferred to the criminal court from the juvenile court].[30]

Case law under the predecessor statute required the child to raise the question of juvenility in the criminal court before or during trial or waive that claim.[31] Thus, under prior case law, Bannister, by failing to disclose her age before pleading guilty in criminal court, would have waived her jurisdictional claim. The court in *Bannister* thought it was significant that the words, "it is ascertained" were eliminated when article 2338-1, section 12 was replaced by section 51.08. The court stated:

> Consistently through these prior opinions the court has held that the rights of a juvenile defendant to be tried as a juvenile may be waived. The determination of whether a defendant should be tried as a juvenile has been termed a question "of preliminary character" which, if not raised during or before trial, was lost. . . . Though in several of this court's opinions the statutes were not specifically referred to, certainly behind the precedents which were cited lay these statutory provisions requiring a defendant to raise the issue or from some other source for the trial court to ascertain that the defendant was a juvenile. . . .
>
> [Section 51.08 of the Family Code] was in effect when the appellant herein entered her guilty plea to the burglary of a habitation in 1974. The statute is silent as to the procedure for raising the question of age "in a criminal proceeding" and no longer mentions the "if . . . it be ascertained" provision of the former statute.[32]

The court's view of this succession of statutes was that, under the predecessor statute, the criminal court, not the juvenile court, had jurisdiction over a person's case unless and until it was ascertained, presumably by the criminal court, that the person before the court

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29. TEX. FAM. CODE ANN. § 51.08 (Vernon 1986).

30. Delinquent Children Act, ch. 204, § 12, 1943 Tex. Gen. Laws, Local & Spec. 313, 316, *repealed by* Act of June 16, 1973, ch. 544, § 3, 1973 Tex. Gen. Laws 1461, 1485.

31. The cases were discussed in the *Bannister* opinion at great length. *See* Bannister v. State, 552 S.W.2d 124, 125-28 (Tex. Crim. App. 1977).

32. *See id.* at 128.

was a child. However, under the Family Code provision, the person before the court was either a child or not, and the criminal court lacked jurisdiction if he was a child, whether or not anyone in the courtroom, including the defendant, was aware of this.

There is another view of the matter. The purpose of section 51.08 of the Family Code is to require the criminal court to take action and transfer both the child and the papers in the case to the juvenile court if the criminal defendant is a child. This can be done only if the criminal court determines or "it is ascertained" that the person before the court is a child. Thus, the "it is ascertained" language, considered by the court in *Bannister* to be critically missing from the Family Code provision, can be viewed as mere surplusage. Once the purpose of the provision is considered, that language or its equivalent is implicit in the statute. Certainly, there is no evidence that the legislature in enacting the Family Code intended to change the way in which these matters had been decided in the past.[33]

A second statutory provision the court thought important was section 51.09 of the Family Code. This section prescribes certain formalities for the waiver of rights by a juvenile, including a requirement that the waiver be made by the child and his attorney and that it be made in writing or in recorded court proceedings.[34] The court in *Bannister* concluded that the defendant, under past decisions would have waived her right to be tried as a juvenile by intentionally misrepresenting her age; however, section 51.09 of the Family Code now prevented such a result.[35]

There is a difficulty with that position as well. Section 51.09 was intended to apply only in title 3 (juvenile) proceedings under the Family Code. It begins with the following provision, conditioning the specific formal requirements of that section: "Unless a contrary intent

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33. *See* Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH L. REV. 509, 524 (1974) (section 51.08 substantially restates prior Texas law).

34. *See* TEX. FAM. CODE ANN. § 51.09(a) (Vernon 1986). Section 51.09(a) provides in full:

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

35. *See* Bannister v. State, 552 S.W.2d 124, 129 (Tex. Crim. App. 1977).

clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived *in proceedings under this title* . . . ."[36]

Inasmuch as the criminal prosecution of Bannister was not a proceeding under title 3 of the Family Code, the waiver of rights section does not by its own terms apply. Moreover, there is little to gain by applying it in the context of criminal proceedings in which none of the trial officials is aware that the rules of waiver have been changed because of the undisclosed true age of the defendant.

Finally, the court determined that there was a lack of jurisdiction in the criminal court to try Bannister. This conclusion was based on section 51.02 of the Family Code, defining a child to be a person under seventeen years of age,[37] and section 51.04 of the Family Code, giving the juvenile court exclusive original jurisdiction over proceedings involving a child[38] unless that jurisdiction is transferred under section 54.02 of the Family Code.[39] But "most important to the decision before [the] court"[40] were the provisions of section 8.07 of the Texas Penal Code. That section provides in relevant part that "a person who is younger than 17 years may not be prosecuted or convicted of any offense, unless the juvenile court waives jurisdiction and certifies him for criminal prosecution."[41]

Section 8.07 is a direct descendent of article 30 of the 1925 Texas Penal Code. This article had long prohibited the criminal conviction of persons under specified ages. The original language prohibited conviction for an offense, except perjury, committed before the offender was nine years of age and for any offense "committed between the age of nine and thirteen, unless it shall appear by proof that he had discre-

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36. TEX. FAM. CODE ANN. § 51.09(a) (Vernon 1986) (emphasis added).

37. *See id.* § 51.02(1)(A) (Vernon 1986) (defining child as person "ten years of age or older and under 17 years of age").

38. *See id.* § 51.04(a) (Vernon 1986). Section 51.04(a) provides:

> This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time he engaged in the conduct, and the juvenile court has exclusive original jurisdiction over proceedings under this title.

39. *See id.* § 54.02. Section 54.02 of the Family Code authorizes juvenile court transfer to criminal court of a child who is accused of having committed a felony while 15 or 16 years of age.

40. Bannister v. State, 552 S.W.2d 124, 129 (Tex. Crim. App. 1977).

41. TEX. PENAL CODE ANN. § 8.07(b) (Vernon Supp. 1987). This provision was amended in 1975, after the plea of guilty in *Bannister*, but the amendment would not have changed its applicability to the facts of the case.

tion sufficient to understand the nature and illegality of the act constituting the offense."[42] In 1967, article 30 was amended[43] to provide in relevant part that "[n]o male under 17 years of age and no female under 18 years of age may be convicted of any offense except perjury unless the juvenile court waives jurisdiction and certifies the person for criminal proceedings."[44] In 1972, the article was amended further to provide for a uniform age of seventeen for both males and females.[45]

At no time did article 30 provide a qualification to its absolute language to require that underage be brought to the attention of the trial court. Article 30 also appears to have played no role in prior decisions of the Texas Court of Criminal Appeals establishing the raise-it-or-lose-it rule respecting underage as a bar to criminal prosecution.[46] Indeed, from 1943, when the Juvenile Delinquency Act was enacted,[47] until 1967, when article 30 was amended, the juvenile court was given exclusive jurisdiction over males under seventeen and females under eighteen.[48] In addition, procedures were in place requiring criminal courts to transfer such underage criminal defendants to juvenile court,[49] while at the same time article 30 precluded conviction only for one under the age of thirteen, and then only under certain circumstances.[50]

Nevertheless, the court in *Bannister* concluded that the criminal court lacked jurisdiction in the case:

> It is clear when the foregoing provisions of the Family Code [Sections 51.04, 51.08, 51.09 and 54.02] are read with said § 8.07 of the Penal Code that the district court did not have jurisdiction to try appellant for burglary of a habitation in view of her age despite her deliberate action in misleading the court. Such action under the foregoing statutes did not constitute waiver.[51]

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42. TEX. PENAL CODE ANN. art. 30 (1925) (repealed 1943).

43. Act of June 12, 1967, ch. 475, § 7, 1967 Tex. Gen. Laws 1082, 1086.

44. *Id.*

45. Act of Nov. 1, 1972, ch. 20, § 3, 1972 Tex. Laws, 4th Spec. Sess. 43, 44.

46. For an exhaustive discussion of these cases, see Bannister v. State, 552 S.W.2d 124, 125-28 (Tex. Crim. App. 1977).

47. Act of May 1, 1943, ch. 204, §§ 1-25, 1943 Tex. Gen. Laws, Local & Spec. 313-19.

48. *See* Delinquent Children Act, ch. 204, § 3, 1943 Tex. Gen. Laws, Local & Spec. 313, 313 (repealed 1973).

49. *See id.* § 12.

50. *See supra* text accompanying note 42.

51. Bannister v. State, 552 S.W.2d 124, 129-30 (Tex. Crim. App. 1977).

Once the court decided that the criminal court did not acquire jurisdiction over the case, it concluded that all proceedings in the criminal court were void and of no effect.[52] The trial court should have transferred the case to the juvenile court upon learning the appellant's true age. Finally, the court concluded by noting that "[w]hether the drafters of the Family Code and Penal Code intended to allow 'a child' to benefit from a fraud upon the court the statutes had such effect in the case at bar."[53]

The court, for the reasons discussed, was not required to reach the result it did. Nothing in the history of succession in article 30 of the 1925 Penal Code or section 8.07 of the 1974 Penal Code requires such a result. Nothing in the provisions of section 51.04 of the Family Code giving the juvenile court exclusive original jurisdiction, when read in light of the predecessor statute,[54] requires such a result. Section 51.09 of the Family Code, dealing with waiver of rights by a child in juvenile proceedings, is not relevant to the decision. Finally, the changes made in section 51.08 of the Family Code, dealing with transfer of a child from criminal to juvenile court, when read with the purpose of the section in mind, do not require such a result.

Bannister has been given an expansive application. In *Cordary v. State*,[55] the court applied *Bannister* to a case in which the appellant entered a plea of guilty in 1971, under the law in effect before the Family Code and 1974 Penal Code were enacted. The court concluded that the Family Code and Penal Code provisions, to which the court in *Bannister* attached such great weight, were really not that much different from their predecessors.[56]

It should be observed that the predecessor statutes did not contain any waiver of rights provision comparable to section 51.09 of the

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52. *See id.* at 130. "The fact that appellant's age was not discovered until the time of revocation of probation proceedings does not change the situation. The district court simply did not acquire jurisdiction over the appellant. . . ." *Id.*

53. *Id.*

54. *See* Delinquent Children Act, ch. 204, § 4, 1943 Tex. Gen. Laws, Local & Spec. 313, 314 (repealed 1973).

55. 596 S.W.2d 889 (Tex. Crim. App. 1980).

56. *See id.* at 891.

> It is clear that the differences between the relevant provisions of Article 2338-1 as amended in 1967 and Title 3 of the Family Code, if any, are slight. The considerations that led us to conclude that the district court never obtained jurisdiction of the defendant in *Bannister* apply with equal force here.

Id.

Family Code[57] and that the immediate predecessor of section 51.08 of the Family Code did require the criminal court to transfer a case to juvenile court only if "it is ascertained" that the person before it is a child.[58]

The court in *Cordary* applied *Bannister* to the predecessor statutory scheme in the context of a direct appeal from the revocation of probation, the same procedural context of the *Bannister* case. In *Ex parte Pierce*,[59] however, *Bannister* was not only applied to the predecessor statutes but was also applied in the procedural context of a post-conviction writ of habeas corpus[60] brought after the petitioner had already served the sentences he had received as a sixteen-year-old. The Texas Court of Criminal Appeals agreed with the trial court's conclusion that it had never acquired jurisdiction of the case because of the petitioner's undisclosed age.[61] The same result in the same procedural context was achieved in *Ex parte McCullough*,[62] with the only difference being that, because the habeas petitioner was still sixteen years of age, the court noted that he was still subject to the jurisdiction of the juvenile court. Finally, the court applied *Bannister* in *Ex parte Redmond*[63] to a habeas petitioner who had misrepresented his age to the criminal court while pleading guilty to four cases of aggravated robbery and had received a sentence of twelve years to run concurrently on each offense. It turned out that he was sixteen years of age when three of the offenses were committed, but the fourth was committed on his seventeenth birthday. The court vacated the three convictions under *Bannister* but affirmed the conviction for the offense committed by Redmond on his birthday.

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57. *See generally* Delinquent Children Act, ch. 204, §§ 1-25, 1943 Tex. Gen. Laws, Local & Spec. 313, 313-19 (repealed 1973).

58. *See* Delinquent Children Act, ch. 204, § 12, 1943 Tex. Gen. Laws, Local & Spec. 313, 316 (repealed 1973).

59. 621 S.W.2d 634 (Tex. Crim. App. 1981).

60. Article 11.07 of the Texas Code of Criminal Procedure provides a means by which one convicted of a felony and sentenced to the penitentiary can raise certain issues concerning the legality of the conviction even though time for appeal has expired. A petition for writ of habeas corpus is filed in the trial court in which the conviction occurred, which makes findings of fact and recommendations following a hearing, if necessary. The record then is transmitted to the Court of Criminal Appeals, which has exclusive authority to make the final determination. *See* TEX. CRIM. PROC. CODE ANN. art. 11.07 (Vernon 1977 & Supp. 1987).

61. *See Ex parte* Pierce, 621 S.W.2d 634, 635-36 (Tex. Crim. App. 1981); *see also Ex parte* Trehan, 591 S.W.2d 837, 840-42 (Tex. Crim. App. 1979).

62. 598 S.W.2d 272 (Tex. Crim. App. 1980).

63. 605 S.W.2d 600 (Tex. Crim. App. 1980).

The *Pierce*, *McCullough* and *Redmond* opinions give added dimension to *Bannister*. Because the court in *Bannister* concluded that the criminal court never acquired jurisdiction over the case, the defendant is not required to appeal from the conviction or claim the jurisdictional defect if he does appeal in order to take advantage of it. He can wait, if it suits his tactics. If well counseled, he will wait until the state's case is destroyed or seriously debilitated by the passage of time before raising the *Bannister* claim, for that is when raising the matter will achieve the most benefit for him.[64] If a short prison sentence has been received, it may be served before such a magic moment arrives. Even then, however, suit can be brought, as in *Ex parte Pierce*,[65] to claim vested *Bannister* benefits.

Or even better, he might be well counseled to wait until he is arrested and prosecuted for a new offense, if any, and raise *Bannister* should the state seek to prove the prior conviction before the jury in the penalty phase of the new trial.[66] Indeed, under the current court of criminal appeals doctrine, such a person would not even be required to raise his *Bannister* benefits before the trial court in the new case.[67] Because the court in the prior case lacked jurisdiction, he could raise the claim at any time and in any forum. Thus, he could wait until he was convicted in the new case and time has wounded the state's opportunity for successful reprosecution of it. He could then raise his *Bannister* claim, and if he prevails, his latest conviction would be set aside. The claim could be raised in an appeal from the latest conviction for the first time or, waiting even longer, he could raise the claim for the first time in a habeas corpus proceeding challenging the validity of the new conviction.

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64. *See infra* text accompanying notes 97-111 for a discussion of the perishability of evidence in criminal cases.

65. 621 S.W.2d 634 (Tex. Crim. App. 1981).

66. Something quite similar was attempted in Williams v. State, 669 S.W.2d 767 (Tex. App.—Dallas 1984, no pet.), in which the defendant, charged with unlawful possession of a firearm by a convicted felon, attempted to show in an appeal from that conviction that the prior felony conviction was void under *Bannister* and related cases. He failed only because his proof failed to show his true age at the time of the prior felony conviction.

67. *See, e.g.*, Duplechin v. State, 652 S.W.2d 957, 957-58 (Tex. Crim. App. 1983). In *Duplechin*, the court held that one is not required to raise before the trial court a fundamental defect in the indictment of a case used at the penalty phase of a later case for enhancement purposes. Because the fundamental defect deprived the trial court of jurisdiction, it can be raised for the first time in an appeal from or collateral attack upon the conviction in the second case. *See id.*; *see also Ex parte* Nivens, 619 S.W.2d 184, 185 (Tex. Crim. App. 1981).

B. *Liability After True Age Is Disclosed: The Availability of Juvenile Court Transfer to Criminal Court*

There is an additional set of problems in the *Bannister* opinion. The court concluded that, because Bannister had become eighteen years of age before the Texas Court of Criminal Appeals' decision was announced, no court, juvenile or criminal, could now acquire jurisdiction over her case.[68] She walks. Under that view, the court is correct when it observed that Bannister "has played the game of 'courts' and won."[69]

In 1975, the Family Code's provisions on transfer to criminal court were amended to provide for juvenile court transfer to criminal court of a person eighteen years of age or older who is alleged to have committed a felony while fifteen or sixteen years of age.[70] Under this provision, the state must allege and prove that:

> After due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
> (1) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person; or
> (2) the person could not be found.[71]

Had the events in Bannister's case occurred after the 1975 amendment to the transfer provision of the Family Code, there is no doubt that after Bannister's criminal conviction was set aside by the Texas Court of Criminal Appeals, the state could have filed a petition under that provision. If, at the transfer hearing, the juvenile court had concluded that Bannister should be transferred to criminal court, a new indictment could have been returned and she could have been put to trial again in criminal court for the same offense.

Precisely that was accomplished three years after *Bannister* in *In re D.M.*,[72] a decision of the Amarillo Court of Appeals. Arrested for murder, D.M. gave his age to police as seventeen. Nine months later, he had been found guilty of murder by a jury. While the jury was deliberating punishment, he informed his attorney that he had been only sixteen at the time of the offense, which was substantiated by a

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68. *See* Bannister v. State, 552 S.W.2d 124, 130 (Tex. Crim. App. 1977).
69. *See id.* at 125.
70. *See* TEX. FAM. CODE ANN. § 54.02(j)-(l) (Vernon 1986).
71. *Id.* § 54.02(j).
72. 611 S.W.2d 880 (Tex. Civ. App.—Amarillo 1980, no pet.).

birth certificate. The criminal court granted counsel's motion for abatement of the criminal proceedings and transferred the case to juvenile court. The state filed a transfer petition under the 1975 amendments shortly after D.M. became eighteen years of age. The juvenile court transferred D.M. to criminal court for prosecution as an adult and he appealed the transfer decision. The decision was affirmed over the contention, among others,[73] that the juvenile court lacked jurisdiction to consider the question of transfer because D.M. had become eighteen before the request for transfer was filed. The appellate court concluded that the state had shown due diligence in invoking the transfer jurisdiction of the juvenile court in view of the fact that D.M. could not be located until the day before the transfer motion was filed.

The clear availability under the 1975 Family Code amendment of juvenile court transfer of one 18 or older who has used the *Bannister* shuffle mitigates some of the harmful effects of the decision on our system of justice. Anyone who now misrepresents his age to the criminal court could still invalidate his conviction upon proof of his true age. However, no matter how old such a person may be at the time of disclosure, the state could still proceed under the 1975 amendment to the transfer section of the Family Code to transfer him to criminal court for prosecution for the same offense. While the availability of that remedy eliminates some of the harmful effects of the *Bannister* decision, it does not eliminate all of them and they should be eliminated.

C. *Limits upon and Problems with Transfer as a Solution*

There are at least four difficulties with relying upon the provisions in the Family Code authorizing transfer to criminal court as a response to *Bannister*. First, transfer is not available when the defendant was under fifteen years of age at the time the offense was committed. Second, transfer is not available when the offense was a misdemeanor. Third, the defendant has been given an unmerited second opportunity to require the state to prove guilt. Finally, the delay

73. Appellant also contended that he had been placed in jeopardy by the aborted criminal trial, but the court disposed of this contention on the ground that he had never been placed in jeopardy in the criminal proceedings because the criminal court lacked jurisdiction over the case due to underage. *See id.* at 883. This result is doubtless correct as a matter of federal jeopardy law as well. *See* United States v. Scott, 437 U.S. 82, 99 (1978).

from the first conviction to reprosecution may significantly damage or destroy the state's ability to prove its charges.

1. Defendant Was Under Fifteen When Offense Committed

Both the Family Code provision authorizing transfer of one under eighteen[74] and the provision authorizing transfer of one eighteen or older[75] require the state to show that the offense was committed when the person was fifteen or sixteen years of age. If a person commits an offense while under fifteen years of age but successfully misrepresents his age as being seventeen or older, the state will be induced to handle him as an adult.

If, before he becomes eighteen years of age, the defendant reveals his true identity and age, the juvenile court's delinquency jurisdiction can be invoked and, if adjudicated a delinquent, he can be committed to the Texas Youth Commission until he becomes twenty-one years of age.[76] If, however, he waits until he becomes eighteen years of age to reveal his true age, his criminal conviction will be set aside under *Bannister* and the juvenile court will lack jurisdiction over him as a juvenile because he has achieved his eighteenth birthday and is no longer a child under the Family Code.[77] Further, he is not subject to transfer to criminal court because he was under fifteen at the time of the conduct in issue.[78] So, he walks.

How likely such a scenario is to occur is unknown, but it is not by any means impossible. Donna Bannister was fifteen years of age but persuaded the trial court she was nineteen or twenty and her attorney she was twenty-two,[79] a greater age discrepancy than we are dealing with here. The age discrepancy here need be only slightly greater than two years. If there was a delay from commission of the offense to apprehension of the defendant, then a misrepresentation as to age

74. TEX. FAM. CODE ANN. § 54.02(a)(2) (Vernon 1986).

75. *Id.* § 54.02(j)(2).

76. *See id.* § 54.05(b); TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon 1980 & Supp. 1987).

77. Section 51.021(1) of the Texas Family Code defines a child as one who is "ten years of age or older and under 17 years of age" or "seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age." Therefore, to be a child not only must the conduct occur before the respondent reached 17, but the juvenile court proceedings must be initiated before he becomes 18.

78. *See* TEX. FAM. CODE ANN. §§ 54.02(a)(2), 54.02(j)(2) (Vernon 1986).

79. *See* Bannister v. State, 552 S.W.2d 124, 125 (Tex. Crim. App. 1977).

at the time of the offense would be even easier to make and more likely to be believed because the person's contemporaneous physical appearance would more closely approximate the age claimed at the time of the offense than would otherwise be the case. In any event, Murphy's law teaches that if it can happen, it will.

2. Offense Was a Misdemeanor

Suppose a person is arrested for a misdemeanor, such as driving while intoxicated,[80] that was committed while he was sixteen years of age but informs authorities he is seventeen. Unless officials obtain information that contradicts his self-reported age, criminal charges will be filed without prior juvenile court involvement. He may be convicted of D.W.I. and placed on probation for as long as two years.[81] If a motion to revoke probation is filed, and he reveals his true age, *Bannister* requires that the criminal conviction be set aside because exclusive jurisdiction was in the juvenile court.

If the defendant is under eighteen years of age at the time his true age is revealed, the case should be referred to the juvenile court. A petition alleging the D.W.I. as conduct indicating a need for supervision can be filed.[82] If the defendant is adjudicated a child in need of supervision, the juvenile court must place him on probation in his home or elsewhere.[83] It may not commit him to the Texas Youth Commission for conduct indicating a need for supervision.[84] However, because he was placed on probation, rather than committed to the Texas Youth Commission, the juvenile court loses all jurisdiction over him when he becomes eighteen years of age,[85] which may be a period of only a few months. In any event, having encountered difficulties as an adult probationer, he is given a second chance to succeed as a juvenile probationer. Had his true age been disclosed originally, juvenile proceedings could have been initiated promptly and he could

80. TEX. REV. CIV. STAT. art. 6701l-1 (Vernon Supp. 1987).

81. Article 6701l-1(c) authorizes imprisonment for up to two years for first offense D.W.I. Sections 3 and 3a of Article 42.12 of the Texas Code of Criminal Procedure authorize probation in a misdemeanor case for any term up to the maximum imprisonment allowable for the offense.

82. *See* TEX. FAM. CODE ANN. § 51.03(b)(4) (Vernon 1986).

83. *See id.* § 54.04(d)(1).

84. *See id.* § 54.04(d)(2).

85. *See id.* § 54.04(b). "Except for a commitment to the Texas Youth Commission, all dispositions automatically terminate when the child reaches his 18th birthday." *Id.*

have been placed on juvenile probation. A violation of that probation could lead to the filing of a delinquency petition for the violation[86] and upon adjudication, he could have been committed to the Texas Youth Commission until age twenty-one.[87]

If the defendant is eighteen years of age or older when his true age is revealed, then juvenile proceedings are not possible.[88] No matter what his age when his true age is revealed, he cannot be transferred to criminal court because transfer is possible only when a felony has been committed.[89] That means that if the defendant is eighteen or older when he reveals his true age, he must be discharged from the criminal justice system and cannot be handled in any fashion by the juvenile justice system. Again, he walks.

3. The Unmerited Second Chance

Under current law, if a defendant successfully makes a *Bannister* claim and his criminal conviction is set aside, the state may, if the offense was a felony committed while the defendant was fifteen or sixteen years of age, institute transfer proceedings in the juvenile court. If the person is under eighteen at the time of transfer proceedings, the juvenile court has discretion to retain jurisdiction over the case or to transfer it to criminal court.[90] If the defendant is eighteen or over at the time of transfer proceedings, the juvenile court can either transfer the case to criminal court or dismiss the charges.[91] If the case is transferred to criminal court, the defendant is entitled to an examining trial before the district court[92] and, if probable cause is found by the examining court, his case may be presented to the grand jury. If the grand jury indicts, he stands charged before the district court with a felony offense. At this point, he is in exactly the same position as he stood when the case was before the district court the first time.

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86. *See id.* §§ 51.03(a)(2), 54.05(g).

87. *See id.* § 54.05(b); TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon 1980 & Supp. 1987).

88. *See* TEX. FAM. CODE ANN. § 51.021(1) (Vernon 1986) (proceedings must be initiated before defendant becomes eighteen).

89. *See* TEX. FAM. CODE ANN. §§ 54.02(a)(1), 54.02(j)(2) (Vernon 1986).

90. *See id.* § 54.02(a), (g), (h).

91. *See id.* §§ 51.02(1), 54.02(j)-(l).

92. *See Ex parte* Menefee, 561 S.W.2d 822 (Tex. Crim. App. 1977). For a discussion of the problems associated with *Menefee*, see Dawson, *Prosecution of Juveniles in Texas Criminal Courts: Eliminating the Jurisdictional Requirement of an Examining Trial*, 23 HOUS. L. REV. 1067 (1986).

The defendant may plea bargain the case with the prosecutor or enter a plea of not guilty and put the state to its proof. If a plea bargain is struck, the defendant is likely to receive more favorable terms from the state than he would have received initially because of the difficulties of proof involved when charges are old.[93] If the defendant goes to trial, he is more likely to be acquitted than when before the district court the first time for the same reasons.

In addition, unless the defendant significantly changes his trial strategy on reprosecution, any punishment he receives from his second conviction cannot exceed the punishment assessed in his first conviction. Thus, if he entered a plea of guilty in the first case and the second, his punishment will be limited to that assessed the first time.[94] If he was convicted in a trial the first time and sentenced by the judge rather than the jury and elects sentencing by the judge the second time, the punishment cannot, as a general matter, exceed that which was assessed in the first trial.[95] Finally, if he received a prison sentence when he was first before the court, he is entitled to credit on any sentence received for a second conviction equal to any time served on the first sentence.[96] In short, he cannot, as a general matter, be placed in a worse position in the second trial than he found himself at the end of the first, and, as a practical matter, is very likely to find his situation significantly improved.

All of these circumstances exist whenever a criminal conviction is set aside and the law permits reprosecution for the same offense. They are the price society is willing to pay to correct legal errors in the first trial. Although the price may be high, it is believed necessary in order to vindicate the rights violated in the first proceedings. The question presented in the *Bannister* situation is whether the rights vindicated are worth the price. While keeping trial courts within their jurisdictional boundaries is important and would warrant setting aside an otherwise error-free conviction in many situations, *Bannister* presents the additional feature that the "error" occurred because of

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93. *See infra* text accompanying notes 97-111 for a discussion of the difficulties of proof when charges are stale.

94. *Compare* Bouie v. State, 565 S.W.2d 543, 545-46 (Tex. Crim. App. 1978) (where defendant pleads guilty on retrial, state may not increase punishment) *with* Alvarez v. State, 536 S.W.2d 357 (Tex. Crim. App. 1976) (where defendant changes plea to not guilty on retrial, state may seek increased punishment).

95. *See* North Carolina v. Pearce, 395 U.S. 711, 723-25 (1969).

96. *See id.* at 718-19.

the deliberate fraud by the defendant upon the system. The "error" was, to say the least, invited by the defendant. His second chance before the courts is, therefore, unmerited. If ways can be found to prevent this unmerited second chance, they should be implemented.

4. Delay May Have Compromised the Prosecution's Case

Proof in a criminal trial depends almost entirely upon the in-court testimony of witnesses. Lacking the extensive deposition rights common in civil litigation,[97] the ability of the state to prove its charges at trial depends upon the availability and believability of witnesses. The passage of time from the occurrence of a criminal incident until the trial can damage or destroy the ability of the state to prove its charges. Justice Powell enumerated some of the causes for this phenomenon in his dissenting opinion to *Vasquez v. Hillery*,[98] in which a criminal conviction was set aside by the United States Supreme Court almost twenty-five years later.

> [W]hen relief is granted many years after the original conviction . . . the State may find itself severely handicapped in its ability to carry its heavy burden of proving guilt beyond a reasonable doubt. Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the state's ability to reconstruct its case. Even where credibility is not central, the passage of time may make the right to retry the defendant "a matter of theory only." . . . Witnesses die or move away; physical evidence is lost; memories fade. For these reasons, the Court has noted that "[t]he greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary."[99]

To the above argument should be added that prosecutorial zeal in attempting to secure a reconviction is likely to be substantially less than when the case was first before the courts. Added to the difficulties in reconstructing the proof—attempting to contact witnesses to determine their availability and continued recollection of the events—is the fact that the prosecutor must allocate time between reprosecution and the prosecution of new cases. Faced with such choices, he is likely to conclude that resources should first be allocated to a case of

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97. *See* TEX. CRIM. PROC. CODE ANN. art. 39.02 (Vernon 1979) (authorizing trial court discretion to grant defendant right to take deposition of witness).

98. __ U.S. __, 106 S. Ct. 617, 88 L. Ed.2d 598 (1986).

99. *Id.* at __, 106 S. Ct. at 632-33, 88 L. Ed.2d at 620.

equal seriousness in which the defendant has not been convicted and punished instead of a case with potentially greater proof problems in which there has been some punishment but it was truncated by setting aside a conviction after sentence has been partially served.

If the first conviction was obtained in a trial, then there may be some possibility of using that testimony in any reprosecution of the defendant. If a witness who testified in the prior trial is unavailable to testify in the retrial,[100] then that testimony may be read to the jury in the retrial as though it were a deposition.[101] Thus, the state may be able to plug some holes in its case.

This method, however, makes the assumption that the prior testimony is available to the state. A court reporter's notes of trial testimony will remain untranscribed unless there is a reason for transcription. If the prior conviction was appealed and the court reporter's notes were transcribed for the appeal[102] and include the testimony of the missing witness,[103] then the testimony remains available. If there was no appeal or the transcription of notes did not include the testimony of the unavailable witness, however, then availability of the prior testimony becomes problematical. Unless a prison sentence in excess of two years was imposed, Texas law requires a court reporter to keep notes of testimony for only three years.[104] After that time, they may be destroyed. Further, even if the raw notes are still available, if the original court reporter is no longer available, another re-

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100. *See* TEX. R. CRIM. EVID. 804(a). Rule 804(a) defines unavailability of a witness to include situations in which the declarant "testifies to a lack of memory of the subject matter of his statement: or . . . is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or . . . is absent from the hearing and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means." However, the definition of unavailability in the Texas Code of Criminal Procedure is slightly narrower. *See* TEX. CRIM. PROC. CODE ANN. art. 39.01 (Vernon 1979).

101. *See* TEX. R. CRIM. EVID. 804(b)(1).

102. *See* TEX. R. CRIM. APP. P. 53, 54.

103. The Rules of Appellate Procedure contemplate that each party will designate that portion of the trial which he desires to be transcribed and that some appeals will be pursued with only a partial transcription or with no transcription at all. *See* TEX. R. CRIM. APP. P. 53.

104. *See* TEX. GOV'T CODE ANN. § 52.046(a)(4) (Vernon 1987); *see also* David v. State, 704 S.W.2d 766, 767-68 (Tex. Crim. App. 1985) (court reporter may destroy notes after three years). If a prison sentence in excess of two years was imposed and no appeal was taken, Texas Rule of Appellate Procedure 11(d) requires the court reporter to file untranscribed notes with the clerk of the court. The clerk is required to keep the untranscribed notes for at least 15 years. *See* TEX. R. CRIM. APP. P. 11(d).

porter may experience difficulties in transcribing those notes.[105] Therefore, merely because the witness has testified at the prior trial of the same case does not automatically solve a witness availability problem.

Statistically, it is much more likely that the prior conviction set aside under *Bannister* was obtained on a plea of guilty than after a trial.[106] In the course of entering a plea of guilty in a felony case in Texas, the defendant will likely have made a number of admissions. In addition to the plea of guilty itself, it is likely that the defendant made a written or oral judicial confession to all the elements of the offense insofar as Texas law requires substantiation of felony pleas of guilty by evidence in addition to the plea itself.[107] If the plea and incriminatory statements made by the defendant during plea acceptance ceremonies are admissible against him in a subsequent trial as an admission by a party-opponent,[108] then the state's hand is significantly strengthened on reprosecution because it can introduce admissions by the defendant as to all the elements of the offense in addition to the testimony of those of its witnesses who are still available.

However, it is doubtful that the plea or judicial admissions made during the plea acceptance ceremony or any statements made by the defendant during plea bargaining would be admissible under Rule 410 of the Texas Rules of Criminal Evidence.[109] Although Rule 410 deals by its terms only with pleas of guilty "later withdrawn" as opposed to

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105. *See* Hartgraves v. State, 374 S.W.2d 888, 889 (Tex. Crim. App. 1964). In *Hartgraves*, the appellant received a new trial because he had been deprived of a transcription of the court reporter's notes. The court noted that "the court reporter . . . was, because of physical and other disability, incompetent and unable to perform his duties and that his notes and recordings could not be read or understood." *Id.*

106. In fiscal year 1984, 57.7 percent of the criminal cases disposed of by the district courts in Texas were on pleas of guilty, while the defendant was convicted following plea or trial in 61.1 percent of the cases. *See* TEXAS JUDICIAL COUNCIL/OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT 126 (8th Ann. Rep. 1985). Of those criminal cases disposed of by the county-level courts (misdemeanors), 45 percent involved a plea of guilty, while 46.1 percent of the cases were dismissed. *See id.* at 140.

107. *See* TEX. CRIM. PROC. CODE ANN. art. 1.15 (Vernon 1977).

108. *See* TEX. R. CRIM. EVID. 801(e)(2) (admission by party-opponent is not hearsay).

109. *See id.* 410. Rule 410 provides in relevant part:

> Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty or nolo contendere which was later withdrawn; (2) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding a plea of guilty or nolo contendere which was later withdrawn; or (3) any statement made in the course of plea discussions with an

those set aside by subsequent action of a trial or appellate court, the rationale for the rule—to give effect to the decision to permit withdrawal of the plea[110]—applies as well to cases in which the conviction was set aside but the defendant did not literally withdraw his plea of guilty. Were it otherwise, once a guilty plea, with associated admissions by the defendant, is received by a trial court, a later trial or appellate court would be effectively powerless to police that process because the state could respond to setting aside that conviction with proof in a later trial of an admission by the defendant of his guilt of the very same offense.[111] It therefore seems unlikely that either the plea itself or anything said by the defendant in the plea acceptance ceremony would be admissible against the defendant in a later trial as an admission by a party-opponent. Consequently, the state must attempt to reconstruct its case as though there had been no prior judicial admissions by the defendant.

D. *Proposed Judicial Solution: Retrospective Waiver Hearing*

There exists a remedy that could be employed by the judiciary without new statutory authority. That remedy is not to set aside a criminal conviction on the ground the criminal court lacked jurisdiction because of undisclosed underage, but rather to order a *nunc pro tunc* transfer hearing. This approach is similar to the one the Texas Court of Criminal Appeals has employed for years in the area of competency to stand trial. When a claim is made, on appeal from or collateral attack upon a criminal conviction, that the trial court erred in determining that the defendant was competent to stand trial, the Texas Court of Criminal Appeals, if it concludes that the trial court erred, does not reverse the conviction but orders the trial court to conduct a competency hearing to determine whether the defendant

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attorney for the prosecuting authority which do not result in a plea of guilty or a plea of nolo contendere or which result in a plea of guilty or nolo contendere later withdrawn. Texas Rule 410 is for our purposes identical to Federal Rule of Evidence 410.

110. *See* C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5342 (1977).

111. *See id.* Wright and Graham argue that Federal Rule of Evidence 410 should apply to pleas set aside, as well as those withdrawn. With respect to set-aside pleas, "the policy that supports exclusion of withdrawn guilty pleas would seem to be equally applicable when the guilty plea is set aside by an appellate court; i.e., the decision to set aside the plea would be almost a meaningless gesture if the plea could be used against the defendant as an admission in the ensuing trial." *Id.* There is some pre-Rules of Evidence Texas authority to the contrary. *See* Wallace v. State, 707 S.W.2d 928, 934 (Tex. App.—Texarkana 1986, no pet.).

was competent to stand trial at the time when he should have been given such a hearing.[112] If the trial court concludes that the defendant would have been found to be competent had the matter been litigated when it should have been, then the conviction is not invalidated for lack of such a hearing. If the trial court concludes that it is not feasible to conduct such a competency hearing or that the defendant would have been found incompetent at the hearing, the conviction is invalidated.

This approach has impressive credentials in juvenile law. In *Kent v. United States*,[113] the United States Supreme Court held, in an appeal from a criminal conviction, that the petitioner, by then twenty-one years of age, had been improperly transferred from juvenile to criminal court. The court stated:

> Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment in the District Court would be dismissed. . . . However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case . . . we do not consider it appropriate to grant this drastic relief. Accordingly, we . . . remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion. If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed . . . to enter an appropriate judgment.[114]

Thus, the remedy the Supreme Court fashioned in *Kent* was not to set aside an otherwise valid criminal conviction, but to order a *nunc pro tunc* waiver hearing in accordance with the procedural standards it had just set. This remedy has been used by courts in other states in addressing cases similar to *Bannister*.[115]

Nunc pro tunc waiver hearings have been criticized on the ground the judge conducting such a hearing "must attempt to imagine the

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112. *See, e.g.*, *Ex parte* Winfrey, 581 S.W.2d 698, 699 (Tex. Crim. App. 1979).

113. 383 U.S. 541 (1966).

114. *Id.* at 564-65.

115. *See, e.g.*, State v. Tweedy, 277 N.W.2d 254, 255 (Neb. 1979); Edwards v. State, 591 P.2d 313, 321-22 (Okla. Crim. App. 1979).

juvenile as he or she was at the time of the original hearing"[116] and that is to "ask judges to do what may be impossible. . . ."[117] While one must acknowledge the difficulties of using such hearings as a remedy, the alternative of simply setting aside an otherwise valid criminal conviction presents even greater problems.

It should be emphasized that under this approach the criminal conviction is not disturbed unless the criminal court concludes on remand that transfer to criminal court could not or would not have been ordered had there been a timely request and hearing. Use of this remedy under the existing juvenile transfer provisions requires setting aside the criminal conviction and a new prosecution should the juvenile court decide to transfer the person to the criminal court.[118]

E. *Proposed Statutory Remedy: Requiring Timely Raising of Underage*

There is also a possibility of enacting a statutory provision that would not only provide a remedy for this circumstance but would avoid the *Bannister* problem totally. That approach is to require, as Texas law was interpreted for years to require,[119] that the defendant in a criminal case timely raise the question of underage or forfeit the underage claim. That approach avoids the problems associated with invalidating a criminal conviction after perhaps years have passed, on the one hand, or requiring the trial judge to conduct a *nunc pro tunc* waiver hearing with its associated problems, on the other hand. Such a solution also avoids the problems of the person who was under fifteen at the time of the conduct[120] and of the misdemeanant.[121] Because it has so much to commend it, the conclusion of this article presents such a proposed statutory remedy.

IV. I LIED WHEN I SAID I WAS ONLY SIXTEEN

Donna Bannister would not have been placed on probation by a juvenile court after a finding she had committed burglary of a habita-

116. INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS RELATING TO TRANSFER BETWEEN COURTS 53 (1980).

117. *Id.* at 55.

118. *See supra* text accompanying notes 90-96.

119. *See supra* text accompanying notes 31-32.

120. *See supra* text accompanying notes 74-79.

121. *See supra* text accompanying notes 80-89.

tion if the court had been informed of her identity and status as a Texas Youth Commission escapee. If she had been retained in the juvenile system,[122] she would have again been committed to the Texas Youth Commission as a delinquent child.[123] Indeed, the most likely outcome in the juvenile system is that the juvenile court adjudicatory process would not have been invoked and she would simply have been returned to the Texas Youth Commission as an escapee.[124]

If she had told the truth about her age and identity, juvenile transfer proceedings could have been initiated and she might have been transferred to criminal court.[125] If transferred, and if she elected to be punished by the jury in the event of a conviction,[126] her juvenile record would not be admissible in evidence against her.[127] As an adult without a prior felony conviction, she would be eligible to receive probation from the jury.[128] As a young person convicted of a non-violent felony and with no prior record, she would have a excellent chance, although no guarantee, of receiving probation from a jury. If, however, she elected to be punished by the trial court, instead of the jury, her juvenile record could be considered at punishment,[129] and

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122. *See supra* text accompanying note 125.

123. *See* TEX. FAM. CODE ANN. § 54.04(d)(2) (Vernon 1986).

124. *See* TEX. HUM. RES. CODE ANN. § 61.093 (Vernon Supp. 1987). Section 61.093 provides: "A delinquent child who has been committed to the [Texas youth] commission and placed by it in any institution or facility and who has escaped . . . may be arrested without a warrant . . . and may be kept in custody in a suitable place and detained until the child is returned to the custody of the commission."

125. *See* TEX. FAM. CODE ANN. § 54.02 (Vernon 1986).

126. *See* TEX. CRIM. PROC. CODE ANN. art. 37.07, § 2(b) (Vernon Supp. 1987) (allowing defendant in a non-capital case to elect jury punishment or to permit punishment to be determined by trial court).

127. *See* Slaton v. State, 418 S.W.2d 508, 511 (Tex. Crim. App. 1967); Cavazos v. State, 703 S.W.2d 710, 713 (Tex. App.— Corpus Christi 1985, no pet.). If the defendant was convicted of capital murder, then juvenile records are admissible before the jury at the penalty phase under article 37.071 of the Texas Code of Criminal Procedure. *See* East v. State, 702 S.W.2d 606, 614 (Tex. Crim. App. 1985); Goodman v. State, 701 S.W.2d 850, 867 (Tex. Crim. App. 1985).

128. *See* TEX. CRIM. PROC. CODE ANN. art. 42.12, § 3a(b) (Vernon Supp. 1987). Section 3(b) permits the jury to give probation if the defendant "has never before been convicted of a felony in this or any other state." A juvenile court adjudication is not a conviction of a criminal offense. *See* TEX. FAM. CODE ANN. § 51.13(a) (Vernon 1986). Section 51.13 provides in part: "An order of adjudication or disposition in a proceeding under this title is not a conviction of crime. . . ." *Id.*; *see also* Ruth v. State, 522 S.W.2d 517, 518-19 (Tex. Crim. App. 1975) (juvenile adjudication not admissible in subsequent criminal prosecution); Rivas v. State, 501 S.W.2d 918, 919 (Tex. Crim. App. 1973) (juvenile adjudication not admissible for impeachment purposes).

129. Frequently, this information would be provided to the trial judge in a pre-sentence

whether she would receive probation from the trial judge would be quite doubtful.

If she received probation from the jury or the judge, she could still be returned to the Texas Youth Commission as an escapee even though she was also on adult probation.[130] The Commission could keep her until required by law to discharge her. Under current law, she could be retained under Commission control until she reached age twenty-one.[131] On balance, then, it seems unlikely that Bannister would have been "on the streets" had she disclosed her true age and identity.

By assuming a new identity, she became a "first offender" in adult court, and she was virtually certain to receive plea-bargained probation, which, of course, is what happened. While it is doubtful she considered these precise scenarios, she undoubtedly perceived at least that her chances of receiving lenient treatment were substantially greater as a first offender in criminal court than as a Texas Youth Commission escapee in juvenile court and that is why she lied about her age to her attorney and the court.

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report. Article 42.12, section 4(a) of the Texas Code of Criminal Procedure empowers the trial court to "direct a probation officer to report to the court in writing on the circumstances of the offense with which the defendant is charged, the criminal and social history of the defendant, and any other information relating to the defendant or the offense requested by the court." In Walker v. State, 493 S.W.2d 239 (Tex. Crim. App. 1973), the Texas Court of Criminal Appeals approved of a trial judge questioning a criminal defendant at length about his juvenile record before deciding whether to grant probation. The Texas Court of Criminal Appeals commented, "It would be ridiculous to conclude that an 18-year old with a lengthy juvenile record should be granted the same consideration [for probation] as someone of the same age with a spotless record." *Id.* at 240. When a trial judge inquires about a defendant's juvenile record, he can consider juvenile arrests that had not resulted in adjudications as well as those which have. *See* Pitts v. State, 560 S.W.2d 691, 692 (Tex. Crim. App. 1978).

130. The Texas Attorney General was asked whether the Texas Youth Commission retains jurisdiction over one committed to it who is also on adult probation. He responded: "We think it clear . . . that TYC has jurisdiction of and control over any child who has been adjudged 'delinquent' within the meaning of the Human Resources Code and the Family Code and has been properly committed to it until such time as the child reaches eighteen [now, twenty-one] years of age or is otherwise released from its jurisdiction. We can find nothing that indicates, or even suggests, that TYC forfeits its jurisdiction over a delinquent child who has been properly committed to it, and who would otherwise clearly be under its control and eligible for its services, merely because the child is placed on adult probation following conviction of some other offense." Op. Tex. Att'y Gen. No. MW-237 (1980).

131. *See* TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon Supp. 1987).

A. *Consequences of Misrepresentation as to Age*

It is easy to imagine the converse of the *Bannister* situation. A seventeen-year-old arrested for an offense might reasonably perceive it to be in his interest to lie about his age in an attempt to have the case handled in juvenile court rather than in adult court. If he is successful in his effort to deceive investigating and prosecuting officials as to his age, he will be proceeded against in a court that lacks jurisdiction[132] over him just as surely as the criminal court lacked jurisdiction over Donna Bannister. If later, such as upon attempt to modify the juvenile disposition by revoking probation,[133] he perceives it to be in his self-interest to reveal his true age, he can do so under current law and thwart the effort of the juvenile system to deal severely with him.

There are, of course, some differences between this circumstance and those of the *Bannister* case. When her true age was revealed and its significance determined by the Texas Court of Criminal Appeals, Bannister was eighteen years of age and could not be adjudicated a delinquent in juvenile court. If she was charged with a felony committed while fifteen or sixteen years of age, the juvenile court could use the special transfer provisions of the Family Code[134] to transfer her to criminal court for prosecution as an adult. If that were done, the case would be placed in the circumstance where it rested when Bannister first misrepresented her age.

In the converse of the *Bannister* situation, when the seventeen-year-old claims to be sixteen, however, once the person reveals his true age as an adult, the criminal system can respond with arrest and indictment. Further action by the juvenile court beyond setting aside the juvenile adjudication on jurisdictional grounds is unnecessary. A double jeopardy claim that the juvenile adjudication precludes adult proceedings would fail because the juvenile court lacked jurisdiction over the case and the adjudication would have been set aside for that reason.[135] The consequences of a converse-*Bannister*-shuffle are not

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132. Section 51.04 of the Texas Family Code gives the juvenile court exclusive original jurisdiction over proceedings involving a person who was a child at the time he engaged in the conduct. Section 51.02(1) of the Texas Family Code defines a child as one under eighteen years of age who engages in delinquent conduct or conduct indicating a need for supervision before age seventeen.

133. *See* TEX. FAM. CODE ANN. § 54.05 (Vernon 1986).

134. *See id.* § 54.02(j)-(l).

135. Double jeopardy protections apply to the juvenile as well as the criminal system and preclude, for example, a criminal conviction for the same offense for which one was adjudged

as severe as they were in *Bannister* itself.

That is not to say that the consequences are unimportant to society. If one or two years have elapsed since the juvenile adjudication before the respondent's true age is revealed, the state's case may become stale. Witnesses may not be able to be found, physical evidence may have been destroyed or returned to its owner, memories of the event will have significantly dimmed.[136] It is just as unlikely that the state will be able to use the respondent's plea as an admission[137] or the prior testimony of now-unavailable witnesses as a deposition[138] in the criminal trial as when the prior trial was in criminal court. Further, juvenile proceedings are declared by law to be confidential and it is arguable that the Family Code itself precludes such evidentiary use of juvenile proceedings[139] even if criminal evidence law permitted their

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in juvenile court. *See* Breed v. Jones, 421 U.S. 519, 541 (1975). However, if the prior adjudication was void and set aside because the court lacked jurisdiction over the proceedings, double jeopardy protections would not preclude subsequent proceedings to affix liability for the same offense. *See In re* D.M., 611 S.W.2d 880, 883 (Tex. Civ. App.—Amarillo 1980, no pet.). In *D.M.*, a criminal prosecution was aborted after conviction but before sentencing when the defendant disclosed he was underage. He then sought to preclude juvenile court transfer to criminal court for the same offense by claiming double jeopardy. The court responded, "[I]f the court has no jurisdiction, all proceedings are absolutely void and, therefore, no bar to subsequent proceedings in a court which has jurisdiction." *Id.* Nor would the defendant have a claim under the Texas Speedy Trial Act, TEX. CRIM. PROC. CODE ANN. art. 32A.02 (Vernon Supp. 1987). The Speedy Trial Act applies only to criminal, not juvenile, proceedings. *See* Garcia v. State, 673 S.W.2d 696, 697 (Tex. App.—Corpus Christi 1984, no pet.); Op. Tex. Att'y Gen. No. H-1252 (1978). The Speedy Trial Act time period would begin after the juvenile adjudication was set aside and when the defendant was arrested for or charged with a criminal offense, whichever occurred first. *See* TEX. CRIM. PROC. CODE ANN. art. 32A.02, § 2(a) (Vernon Supp. 1987). There may, however, be a statute of limitations claim that could be pressed by a defendant as a bar to criminal proceedings after the juvenile adjudication was set aside on jurisdictional grounds. Article 12.05(b) of the Texas Code of Criminal Procedure provides: "The time during the pendency of an indictment, information or complaint shall not be computed in the period of limitation." For these purposes, a court ought to equate the pendency of a juvenile petition with an "indictment, information or complaint." However, article 12.05(c) of the Texas Code of Criminal Procedure defines "during the pendency" as "that period of time beginning with the day the indictment, information, or complaint is filed in a court of competent jurisdiction, and ending with the day such accusation is, by an order of a trial court having jurisdiction thereof, determined to be invalid for any reason." Because the juvenile court lacked jurisdiction over the case brought by petition, the state may not be able to claim this exemption from the applicable statute of limitations.

136. *See supra* text accompanying notes 97-111.

137. *See supra* text accompanying notes 106-11.

138. *See supra* text accompanying notes 100-05.

139. *See* TEX. FAM. CODE ANN. § 51.13(b) (Vernon 1986). Section 51.13(b) provides:

> The adjudication or disposition of a child or evidence adduced in a hearing under this title may be used only in subsequent proceedings under this title in which the child is a party

use. In short, the state may have great difficulty in presenting a persuasive case in criminal court. Daunted by such obstacles, the state may simply drop prosecution or dispose of the case on terms significantly more favorable to the defendant than the facts of the case, could they be proved, would warrant.[140] Thus, the consequences of the converse-*Bannister*-shuffle may, in particular cases, be quite serious.

B. *Juvenile System Proof-of-Age Requirements*

Deception as to age is more likely to be promptly discovered in the juvenile system than in the adult. This is because proof of age is part of the state's case in juvenile court. The Family Code requires or encourages an official inquiry into age at several points before adjudication in the typical handling of a juvenile case.

The Family Code encourages police taking a young person into custody to determine the arrestee's age as promptly as possible. In order to deal lawfully with an arrestee, the police are required to determine whether he should be handled as a juvenile or an adult.[141] If custodial interrogation is contemplated, additional steps are required before

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or in subsequent sentencing proceedings in criminal court against the child to the extent permitted by the Texas Code of Criminal Procedure, 1965.

Id.; *see also* Ruth v. State, 522 S.W.2d 517, 518-19 (Tex. Crim. App. 1975).

140. *See supra* text accompanying notes 97-99.

141. If the arrestee is an adult, article 15.17 of the Texas Code of Criminal Procedure requires the police to take the arrestee "without unnecessary delay" to a magistrate in the county. The same article requires the magistrate to inform the arrestee of the charges that have been filed, his right to counsel and to remain silent, and his right to an examining trial. The magistrate is also required to set bail for the release of the adult arrestee. If the arrestee is a juvenile, section 52.02(a) of the Texas Family Code provides:

> A person taking a child into custody, without unnecessary delay and without first taking the child elsewhere, shall do one of the following: (1) release the child to his parent, guardian, custodian, or other responsible adult upon that person's promise to bring the child before the juvenile court when requested by the court; (2) bring the child before the office or official designated by the juvenile court; (3) bring the child to a detention facility designated by the juvenile court; (4) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or (5) dispose of the case under Section 52.03 of this code [authorizing law enforcement agencies to dispose of a case without referring it to the juvenile court].

Further, the Family Code requires the segregation in detention of juveniles from adults. *See* TEX. FAM. CODE ANN. § 51.12(a) (Vernon 1986). Section 51.12 provides that "a child shall not be detained in or committed to a compartment of a jail or lockup in which adults arrested for, charged with, or convicted of crime are detained or committed, nor be permitted contact with such persons."

questioning if the arrestee is a juvenile.[142] If the arrestee informs police he is seventeen years of age or older, the police will handle him as an adult, probably without further inquiry. Although there will be an effort to verify name and date of birth from documents on the person of the arrestee inspected as part of booking, if the documents are false or do not exist, police have little choice but to handle the arrestee as an adult. Further scrutiny is likely only if the arrestee's physical appearance does not correspond at all to his self-reported age. There is no requirement in the criminal process that the parents of a teenage defendant be notified of the pendency of charges or that they appear in court with him.[143]

An arrestee who reports an adult age will be fingerprinted as part of the police booking process and the arrest records and prints will be sent to the Department of Public Safety[144] and the Federal Bureau of Investigation.[145] In due course, those agencies respond with any records in their files of prior cases concerning the person reported. If the arrestee is a juvenile claiming to be an adult, however, this procedure is unlikely to yield a discrepancy in age because the Family Code prohibits the fingerprinting of juveniles as a routine part of book-

142. If the arrestee is an adult whom the police wish to question, they must first give the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966) and article 38.22 of the Texas Code of Criminal Procedure. Although the police may take the adult arrestee before a magistrate to be Mirandized under article 15.17 of the Texas Code of Criminal Procedure, they are not required to do so and may administer the warnings themselves. If a written statement results, it is not required to be signed by the arrestee in the presence of a magistrate. If the arrestee is a juvenile, section 51.09(b) of the Texas Family Code requires the police to take the arrestee before a magistrate. The magistrate gives the juvenile his Miranda warnings and, in addition, informs him that "if he is 15 years of age or older at the time of the violation of a penal law of the grade of felony the juvenile court may waive its jurisdiction and he may be tried as an adult." TEX. FAM. CODE ANN. § 51.09(b)(1)(E) (Vernon 1986). If the juvenile arrestee informs the magistrate he is willing to talk to the police, he is returned to detention and interrogated. If he makes a statement that is reduced to writing, the juvenile must "sign the statement in the presence of a magistrate who must certify that he has examined the child independent [sic] of any law enforcement officer or prosecuting attorney and determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived" his rights. *See id.* § 51.09(b)(1).

143. There are two situations in which parents of a teenager are required to appear in criminal court with a child. If a teenager is being prosecuted in criminal court for a traffic offense, article 6701l-4 of the Texas Revised Civil Statutes requires that at least one parent appear in court with the defendant. If a teenager is charged with being a minor in possession of alcoholic beverages, section 106.11 of the Texas Alcoholic Beverage Code requires parental presence in court.

144. *See* TEX. REV. CIV. STAT. art. 4413(14) (Vernon 1976).

145. *See* 28 U.S.C. § 534 (1982).

ing,[146] requires the segregation of local law enforcement records of juveniles from those of adults,[147] and prohibits the transmittal of juvenile arrest records to a state or federal depository.[148] Therefore, the falsity of a reported name and date of birth by a juvenile claiming to be an adult is unlikely to be revealed by fingerprints.

If, however, the arrestee's stated date of birth shows he should be handled as a juvenile, then the law requires further inquiry. The Family Code requires that information be provided by the arresting agency to the juvenile court "pertaining to the identity of the child and his address, the name and address of the child's parent, guardian, or custodian."[149] In many police agencies, there will be records of any prior arrests of the person claiming to be a juvenile. In addition, the arresting or investigating officer may be expected to check those records because the Family Code requires that the arresting agency provide the juvenile court with "a complete statement of all prior contacts with the child by officers of that law-enforcement agency."[150] If the date of birth referenced in those prior records does not match the date of birth claimed by the arrestee, further inquiry at the police investigatory level would be expected.

If an arrestee is referred to the juvenile court, the Family Code requires that "the intake officer, probation officer, or other person authorized by the court shall conduct a preliminary investigation to determine whether . . . the person referred to juvenile court is a child within the meaning of this title."[151] The Family Code also requires that if, after this intake inquiry it is determined that the person referred to the juvenile court is not a child, he "shall immediately be

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146. *See* TEX. FAM. CODE ANN. § 51.15(a) (Vernon 1986). Section 51.15(a) provides:

> No child may be fingerprinted without the consent of the juvenile court except as provided in Subsection (f) of this section. However, if a child 15 years of age or older is referred to the juvenile court for a felony, his fingerprints may be taken and filed by a law-enforcement officer investigating the case.

Section 51.15(f) authorizes fingerprinting a child to determine whether the prints match latent prints found during a criminal investigation. It also restricts what can be done with the print records once the comparison is made.

147. *See id.* § 51.14(c). Section 51.14(c) provides that "[l]aw-enforcement files and records concerning a child shall be kept separate from files and records of arrests of adults. . . ."

148. *See id.* § 51.15(c). "Law-enforcement files and records concerning a child . . . shall be maintained on a local basis only and not sent to a central state or federal depository." *Id.*

149. *Id.* § 52.04(a)(1).

150. *Id.* § 52.04(a)(4).

151. *Id.* § 53.01(a)(1).

released and proceedings terminated."[152] Ordinarily, it would be expected that the intake officer would make this required determination upon information provided to the juvenile court by the arresting agency and upon any court records of prior referrals of the person.

In addition to determining whether the person arrested is a child, the intake officer must determine whether there is "probable cause to believe the child engaged in delinquent conduct or conduct indicating a need for supervision"[153] and whether "further proceedings in the case are in the interest of the child or the public."[154] The last determination would ordinarily require the intake officer to discover from the juvenile court's own records whether the person has been referred to the court previously. If he has, it is reasonable to expect that any discrepancy in the records concerning date of birth would be noted at this point. The intake determination is required before any further steps may be taken in the juvenile process, including the intake conference and adjustment (informal probation) process statutorily authorized.[155]

If the case is not disposed of by some informal process at or near intake, a formal court petition will be drafted by a prosecuting attorney and filed with the juvenile court. The Family Code requires an allegation in that petition of "the name, age, and residence address, if known, of the child who is the subject of the petition."[156] Again, the law focuses attention on the age of the person at a critical stage of the process. A petition containing an allegation of age is required to bring a case to juvenile court seeking either adjudication[157] in juvenile court or transfer to criminal court.[158] Presumably, the prosecuting attorney will find the factual basis for the allegation of age from the materials forwarded by the law-enforcement agency[159] or assembled by the intake staff[160] or both.

Finally, proof that the respondent is a child is a prerequisite to ad-

152. *Id.* § 53.01(b).
153. *Id.* § 53.01(a)(2).
154. *Id.* § 53.01(a)(3).
155. *See id.* § 53.03.
156. *Id.* § 53.04(d)(2).
157. *See id.* § 53.04(a).
158. *See id.* § 54.02(b).
159. *See id.* § 52.04(a)
160. *See id.* § 53.01(a)

judication in juvenile court.[161] For transfer to criminal court, the state is required to prove that the respondent is a child and was fifteen or sixteen years of age at the time he is alleged to have engaged in the felony conduct that is the subject of the proceedings.[162]

Appellate cases indicate that proof of age can be based totally upon an out-of-court admission of the respondent. A statement to a police officer or intake worker of a date of birth or of a current age is admissible in evidence as an admission by a party[163] and would, by itself, constitute sufficient proof of age to satisfy the Family Code's proof-of-age requirement. In *In re S.E.C.*,[164] for example, the state was unable to obtain an out-of-state birth certificate to introduce in respondent's transfer hearing. Respondent was arrested for a murder that had been committed the day before his arrest. He informed the arresting officer that he was 16 years of age. In both his written statement to police and his statement to a doctor conducting the pre-transfer diagnostic study, respondent gave his date of birth as July 16, 1963, which would have made him sixteen years of age at the time of the offense. The appellate court held that despite the absence of a birth certificate, the state had produced sufficient evidence of age for transfer.

> Appellant correctly contends that it was the state's burden to prove by competent evidence that he was a child as defined by the Family Code. . . . Appellant contends that his statements to the various witnesses as to his birth date was [sic] hearsay, and as such inadmissible. These statements were admissions by the appellant and admissible as substantive evidence on the issues [sic] of his age. This is true even though his statements may have been based upon hearsay.[165]

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161. *See id.* § 54.03; *see also* Steed v. State, 143 Tex. 82, 85, 183 S.W.2d 458, 460 (1944); *In re* J.T., 526 S.W.2d 646, 647-48 (Tex. Civ. App.—El Paso 1975, no pet.); Miguel v. State, 500 S.W.2d 680, 681 (Tex. Civ. App.—Beaumont 1973, no pet.).

162. *See* TEX. FAM. CODE ANN. § 54.02(a)(2) (Vernon 1986); W.L.J. v. State, 658 S.W.2d 333, 333-34 (Tex. App.—Austin 1983, no pet.); *In re* S.E.C., 605 S.W.2d 955, 958 (Tex. Civ. App.—Houston [1st Dist.] 1980, no pet.).

163. *See* TEX. R. CRIM. EVID. 803(e)(2).

164. 605 S.W.2d 955 (Tex. Civ. App.—Houston [1st Dist.] 1980, no pet.).

165. *Id.* at 958. Prior to a transfer hearing, the juvenile court is required by section 54.02(d) of the Texas Family Code to order and obtain "a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Section 54.02(e) of the Texas Family Code authorizes the juvenile court to consider written reports of the investigation it ordered at the transfer hearing. In W.L.J. v. State, 658 S.W.2d 333 (Tex. App.—Austin 1983, no pet.), a date of birth recited in such a report filed with the juvenile court was held to be sufficient proof of age to authorize transfer to criminal court.

In addition to proof of age by admission of the juvenile respondent, the state can call as a witness one of the respondent's parents for the purpose of proving date of birth. The Family Code requires juvenile officials to identify the respondent's parents in a court petition[166] and to summon at least one of them to the court hearing.[167] While the juvenile court is authorized to proceed with a transfer or adjudication hearing even when a parent has not responded to summons,[168] there is at least the requirement that officials attempt to obtain the presence of a parent at the hearing. If present, that person could be called by the state to prove age.[169]

Although proof of age can be based solely upon admissions by the respondent or testimony of a parent, there are independent reasons why juvenile officials desire, if at all possible, to obtain a birth certificate of a person referred to the juvenile court. The duration of juvenile dispositions, unlike adult criminal sentences, is determined by the chronological age of the child, not by a term of years or months. The Family Code provides that all juvenile dispositions, except commitments to the Texas Youth Commission, expire when the child reaches the age of eighteen.[170] Commitments to the Texas Youth Commission expire when the person reaches the age of twenty-one.[171] It is, therefore, important that juvenile officials have as accurate information as possible concerning date of birth. Further, if the juvenile court commits a child to the Texas Youth Commission, either directly or later upon revocation of probation, the court is required by Youth Commission administrative regulations to accompany the commitment with a birth certificate of the child.[172] Even if the birth certificate is

166. *See* TEX. FAM. CODE ANN. § 53.04(d)(3) (Vernon 1986).

167. *See id.* § 53.06(a), (b).

168. *See id.* § 51.11(a). In that circumstance, the juvenile court is required to appoint a guardian-ad-litem for the child. *See id.*

169. For a transfer hearing, "The first witness the prosecuting attorney should call is one of the child's parents, for the sole purpose of establishing the birthdate of the child—unless the child and his attorney will stipulate into the record the child's birthdate." 29 MORGAN, JUVENILE LAW AND PRACTICE § 810 (Texas Practice 1985). The same advice is given for the adjudication hearing. *See id.* § 668.

170. *See* TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1986).

171. *See* TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon Supp. 1987).

172. *See* Tex. Youth Comm'n, 37 TEX. ADMIN. CODE § 87.13(b) (Hart 1980). "The committing county shall also provide the following information . . . a birth certificate or certified copy." *Id.*

not introduced into evidence at the adjudication hearing,[173] it would have been used administratively before the hearing to verify the date of birth provided to juvenile officials by the respondent or others.

C. *Proposed Statutory Remedy: Estoppel to Deny Representation of Age or Filing Criminal Charges*

If a juvenile misrepresents himself to be an adult and is convicted of an offense, that conviction is void under *Bannister* because the criminal court lacked jurisdiction over the offense. The proposed statutory solution to that problem is to require the criminal defendant to raise the bar of underage before the adjudication of the case begins. If he does so and shows underage, he is transferred to juvenile court. If he fails to do so, he is estopped from denying later that he was the age he previously claimed himself to be. That is a perfectly adequate solution to the *Bannister* situation since it denies to the defendant any benefit of the misrepresentation and permits the criminal sanction to run its natural course.

If an adult induces juvenile court handling of a criminal charge by claiming to be a juvenile and later, as self-interest dictates, reveals his true age, the juvenile adjudication and disposition would, under current law, almost certainly be held to be void for lack of jurisdiction, based on the reasoning of *Bannister*. Under current law, the juvenile adjudication can be set aside and criminal charges filed for the same offense. That remedy does not, however, eliminate all the possible benefits to the juvenile respondent. If the state's case has become stale from passage of time, it might be unable to prove its charges in criminal court. In such an event, the defendant could reap a substantial benefit from his misrepresentation.

It would be possible to provide a statutory remedy that is similar to that proposed to remedy the *Bannister* case: estop the respondent from denying that he is the age he represented himself to be. In some situations, such as when the evidence is stale at the time true age is discovered, that remedy would be preferred by the state to the one provided under current law. At least the disposition ordered by the juvenile court would be permitted to run its course and the respondent would not go free. In other situations, however, the state would

173. It would, however, be admissible under Texas Rule of Evidence 803(9) upon proof that the person named in the certificate is the respondent before the court.

prefer to vacate the juvenile proceedings and file the criminal charges it would have originally filed if its assessment of the evidence is that those charges can now be proved. The juvenile may have only a few months until his eighteenth[174] or twenty-first birthday,[175] when discharge from the juvenile system is required, while if criminal charges can be proved, appropriate penalties can be imposed for the offense. For that reason, the best statutory solution is one that provides the state with a choice of remedies in the converse-*Bannister* situation: it can either request an order estopping the respondent from denying the age he represented himself to be to induce juvenile handling or it can request an order vacating juvenile proceedings to enable it to file criminal charges for the same offense. The conclusion of this article includes statutory language that would implement this policy.

V. CONCLUSION: PROPOSED STATUTORY REMEDIES

The premise underlying both of the proposed statutory remedies is that neither a juvenile respondent nor a criminal defendant ought to be permitted to benefit from a misrepresentation as to age that induced the filing of a case in the wrong justice system. Current law permits exactly that.

To implement this policy with respect to the juvenile who misrepresents himself as an adult requires an amendment to the Texas Penal Code and the Texas Family Code, reinstating, with some improvements, the raise-it-or-lose-it requirements of pre-*Bannister* criminal law. To implement the policy with respect to an adult who misrepresents himself as a juvenile requires an amendment in the Texas Family Code giving the state the option of estopping a denial that the person is a juvenile or vacating the juvenile proceedings to permit new criminal charges.

A. *When Criminal Charges Were Filed Because of Age Misrepresentations*

The pre-*Bannister* requirement that underage be raised in the trial court or the claim, although jurisdictional, is forfeited can be implemented by adding a subsection to section 8.07 of the Texas Penal

174. *See* TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1986).

175. *See* TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon Supp. 1987).

Code and by amending section 51.08 of the Texas Family Code as follows:

Texas Penal Code § 8.07. Age Affecting Criminal Responsibility. [Subsections (a) through (d) remain unchanged.]

(e) A claim that the criminal court lacks jurisdiction because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under subsection (a) of this section or did not waive jurisdiction under subsection (b) of this section must be made by written motion in bar of prosecution filed with the court in which criminal charges are filed. The motion must be filed and presented to the presiding judge of that court (1) before the defendant enters a plea of guilty, no contest or nolo contendere, (2) before selection of the jury begins if trial on guilt-innocence or penalty is to be by jury, or (3) before the first witness is sworn if trial is to be to the court on a plea of not guilty. Unless the truth of the averments in the motion is conceded, the presiding judge shall promptly set a hearing and rule on the motion without a jury. The movant bears the burden of establishing by a preponderance of the evidence the existence of any facts necessary to prevail on the motion. Failure timely to file and present the motion as required by this subsection, or failure to prove the averments of the motion, shall forfeit any claim that the criminal court lacked jurisdiction because exclusive jurisdiction is in the juvenile court. Appellate review of the correctness of the trial court's ruling on the motion may be had, if otherwise authorized by law, only after conviction in the criminal court. If the criminal court finds that it lacks jurisdiction because exclusive jurisdiction is in the juvenile court, it shall dismiss the criminal charges and remand the person to the appropriate juvenile court, using the procedures of section 51.08 of the Texas Family Code.

Texas Family Code § 51.08. Transfer from Criminal Court.

If, *after proceedings under section 8.07(e) of the Texas Penal Code, the court in which criminal charges are filed determines that* the defendant in a criminal proceeding is a child who is charged with an offense other than perjury or a traffic offense, unless he has been transferred to criminal court under section 54.02 of this code, the court exercising criminal jurisdiction shall transfer the case to the juvenile court, together with a copy of the accusatory pleading and other papers, documents, and transcripts of testimony relating to the case, and shall order that the child be taken to the place of detention designated by the juvenile court, or shall release him to the custody of his parent, guardian, or custodian, to be brought before the juvenile court at the time designated by that court.

COMMENTARY

These amendments to section 8.07 of the Texas Penal Code and section 51.08 of the Texas Family Code would change Texas law as announced in *Bannister v. State*.[176] That case held that a claim that a criminal court lacked jurisdiction over a case because exclusive jurisdiction was in a juvenile court can be raised after conviction even though the defendant failed to raise the underage issue before trial and fraudulently misrepresented her age to the criminal court. Section 8.07(e) would require that a claim of underage be made before adjudicatory proceedings are begun in criminal court. Failure to raise underage in a timely fashion would forfeit the claim that the criminal court lacked jurisdiction because jurisdiction was in the juvenile court.

The first sentence makes it clear that only claims of underage in which the juvenile court either could not or did not order transfer are subject to these rules. Errors in the juvenile transfer process would continue to be cognizable as under current law by direct appeal as authorized by section 56.01(c)(1) of the Texas Family Code or, if the error deprived the juvenile court of jurisdiction to hear the transfer petition, by appropriate collateral attack as authorized by case law.[177]

Although pre-*Bannister* case law required that underage be raised as part of the trial proceedings, it was not precise as to timing requirements and, thus, the point at which forfeiture would occur.[178] The second sentence of section 8.07(e) requires the filing and presentation of the motion before the adjudicatory process begins and would not, contrary to pre-*Bannister* law,[179] permit the matter to be raised during trial.

The third sentence requires a hearing on a motion raising a claim of underage and provides that the court without a jury is to rule on the

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176. 552 S.W.2d 124 (Tex. Crim. App. 1977).

177. *See, e.g.*, Hardesty v. State, 659 S.W.2d 823, 824 (Tex. Crim. App. 1983) (attacking jurisdiction because of invalid summons); Johnson v. State, 594 S.W.2d 83, 85 (Tex. Crim. App. 1980) (lack of affirmative showing of service deprived juvenile court of jurisdiction); Grayless v. State, 567 S.W.2d 216, 219 (Tex. Crim. App. 1978) (invalid certification summons operated to deprive juvenile court of jurisdiction).

178. Some of the prior cases had required that the claim of underage must be raised before the defendant announced ready in the criminal case, while others appeared to permit the question to be raised during the criminal trial. *See* Bannister v. State, 552 S.W.2d 124, 126-28 (Tex. Crim. App. 1977) (discussion of prior case law concerning claim of underage).

179. *See id.*

motion. Since age is not an element of the offense, there is no need to have facts found by a jury any more than there would be a necessity for a jury trial on a claim of denial of a speedy trial under the Texas Speedy Trial Act.[180] The fourth sentence places the burden of proof on the movant by a preponderance of the evidence.

It should be emphasized that this amendment covers situations in which the juvenile had not knowingly misrepresented himself as an adult. It places on the defendant the obligation of raising all claims of underage at the appropriate time in the criminal case or forfeit that claim. This seems an appropriate burden to place on the criminal defendant. He will be represented by counsel.[181] Information as to true age is more likely to be available to the defendant and his attorney than to the state. If there is any question as to age, it seems fair to require the defense to place the question in justiciable form by a motion in bar. Thus, this amendment would cover *Case No. 3* at the beginning of this article in which the arrestee himself was in doubt as to his age. It would require the defense attorney to conduct an appropriate investigation in order to present a claim of underage or forfeit that claim, even though the defendant may not have misrepresented his age to any officials.

The fifth sentence establishes the rule that failure timely to raise an underage claim or to prove it once raised works a forfeiture of the claim. If the claim is raised and ruled upon by the court, appellate review of the correctness of that ruling ought to be made available to the defendant, just as for any other trial court ruling that could determine the result of the case. The sixth sentence requires that appellate review await the outcome of the trial. Even though the claim of underage deals with the court's jurisdiction and, arguably, should be treated like a double jeopardy claim in which interlocutory appellate review is provided,[182] there appears no more justification for interlocutory review here than in many other circumstances in which review

180. TEX. CRIM. PROC. CODE ANN. art. 32A.02 (Vernon Supp. 1987). Prior case law also provided that a claim of underage would be determined by the court, not a jury. *See* Valdez v. State, 265 S.W. 161, 162 (Tex. Crim. App. 1924).

181. *See* TEX. CRIM. PROC. CODE ANN. art. 26.04(a) (Vernon 1966). Article 26.04(a) requires the trial court to appoint counsel for an indigent "charged with a felony or a misdemeanor punishable by imprisonment."

182. *See, e.g.*, Abney v. United States, 431 U.S. 651, 662 (1977); *Ex parte* Robinson, 641 S.W.2d 552, 555 (Tex. Crim. App. 1982).

must await conviction.[183] The final sentence simply directs the criminal court to the requirements of section 51.08 of the Texas Family Code, dealing with the mechanics of remanding the defendant to juvenile court if it is determined that the juvenile court has exclusive jurisdiction.

Section 51.08 of the Texas Family Code would be amended only as indicated by the italics to emphasize that it is merely a procedural vehicle for transfer from criminal to juvenile court and that the standards for determining whether a transfer is appropriate are contained in section 8.07(e) of the Texas Penal Code.

B. *When the Juvenile System Was Invoked Because of Age Misrepresentations*

When the juvenile system was invoked because of misrepresentation of age, the principle that the respondent should not be permitted to benefit from the misrepresentation requires adding a section to the Texas Family Code to give the state the choice whether to hold the respondent to his representation and keep him in the juvenile system or to vacate the juvenile proceedings to permit filing of criminal charges.

Texas Family Code § 54.11. Effect of Misrepresentation of Age

(a) The juvenile court shall enter an order required by subsections (d) or (e) of this section if it finds beyond a reasonable doubt:

(1) that the respondent knowingly misrepresented his age to law enforcement or juvenile officials; and

(2) that an effect of that misrepresentation was to induce the filing of a case in juvenile court rather than in criminal court because although the respondent was 17 years of age or older at the time of the offense he represented that he was under 17 years of age; and

(3) that law enforcement and juvenile officials employed due diligence in seeking to determine the respondent's true age.

(b) A claim for relief from misrepresentation as to age may be filed as a petition to modify disposition under section 54.05 of this Code. A petition may be filed and relief granted even though respondent is 18 years of age or older at the time the petition is filed.

(c) If the juvenile court finds that respondent misrepresented his

183. *See, e.g.*, *Ex parte* Mattox, 683 S.W.2d 93, 95-96 (Tex. App.—Austin 1984, pet. ref'd) (holding pretrial habeas corpus not available despite petitioner's claim that trial court lacked jurisdiction because indictment contained a fundamental defect).

age under the circumstances described in subsection (a) of this section, the state shall be given 10 days from oral recitation of that finding by the court within which to exercise its right to do one of the following:

(1) file a criminal complaint alleging the same offense or a different offense arising out of the same transaction as that for which respondent was previously charged in juvenile court, or

(2) elect to hold the respondent to the representation he made by treating him in all respects under this title and the Texas Human Resources Code as though he were the age he misrepresented himself to be.

(d) If the state elects to proceed under subsection (c)(1) of this section, the juvenile court shall vacate its adjudication and disposition on the ground its jurisdiction was based upon the misrepresentation of the respondent. In criminal proceedings, respondent shall have no defense of former jeopardy because of the vacated juvenile proceedings. Respondent shall be given credit and good time credit on any criminal sentence for the same offense or a different offense arising out of the same transaction for any detention or other incarceration incurred during the vacated juvenile proceedings.

(e) If the state elects to proceed under subsection (c)(2) of this section, the juvenile court shall enter an order estopping the respondent from claiming in juvenile proceedings or to the Texas Youth Commission that his age is other than the age he had represented himself to be.

COMMENTARY

If a person commits an offense while seventeen years of age or older but induces charges to be filed in juvenile court because he misrepresented his age to be under seventeen, the juvenile court did not have jurisdiction of the case. Under the reasoning of *Bannister v. State*,[184] juvenile proceedings would be set aside when true age is disclosed. While criminal charges for the same offense could be brought, that might not be an adequate response depending upon the staleness of the charges and the ability of the state to prove them once again. This new section 54.11 of the Texas Family Code is intended to deprive the respondent of receiving any benefits from his misrepresentation.

Subsection (a) details three requirements that, if met, entitle the state to elect to hold the respondent to his misrepresentation as to age or to file criminal charges for the same offense. Since juvenile pro-

184. 552 S.W.2d 124 (Tex. Crim. App. 1977).

ceedings are unlikely to have been initiated at all without a representation from the respondent that he was a juvenile,[185] there is a requirement that the state show that the respondent misrepresented his age. In the absence of such a showing, all the state has proven is that officials made a mistake in filing the case in juvenile rather than criminal court. It seems inappropriate to permit the state to benefit from its own mistake and to reevaluate the case later to exercise the options that this section makes available. Subsection (a)(1) also requires that the misrepresentation be a knowing one. If the respondent misstated his age but did not do so knowingly, it seems inappropriate to permit the state to reevaluate the situation later to exercise its choice when there was no element of fraud involved. It is also required that the respondent be the one who knowingly misrepresented age, not a parent, relative or friend. Subsection (a)(2) requires that the misrepresentation must have induced the filing of juvenile charges—that the misrepresentation was believed by officials and acted upon by them. Finally, subsection (a)(3) requires that officials must have independently used diligence to determine true age. Because age is an ingredient of the state's proof in a juvenile case[186] and determines the jurisdictional boundary between the juvenile and criminal systems, it is appropriate to place upon law enforcement and juvenile officials the burden of seeking independently to determine the age of a respondent against whom they intend to proceed in juvenile court. The Texas Family Code requires them to do exactly that at several points in the process of handling a juvenile case.[187] Subsection (b) specifies the procedural vehicle for handling a claim for relief from misrepresentation as to age. A petition to modify disposition can be filed by the state when it discovers the misrepresentation. Subsection (b) authorizes the juvenile court to hear the matter and grant relief even though the respondent may at that time be over its normal jurisdictional ceiling of eighteen.[188]

Subsection (c) gives the state ten days in which to evaluate its situation after the juvenile court has found in its favor on the three require-

185. *See supra* text accompanying notes 141-73.

186. *See supra* text accompanying notes 161-62.

187. *See supra* text accompanying notes 141-73.

188. *See* TEX. FAM. CODE ANN. §§ 51.02(1)(B), 54.05(d) (Vernon 1986). There are other situations in the Family Code in which the juvenile court has jurisdiction over a person who is 18 years of age or older. *See, e.g., id.* § 54.02(j)-(l) (dealing with transfer to criminal court of person 18 years of age or older).

ments of subsection (a). This delay permits the state to determine whether it can prove criminal charges at this late date should it desire to exercise that option. Witnesses must be found and reinterviewed. Should the state elect to file criminal charges, it can file a charge for the same offense as the juvenile case or for any other offense arising from the same transaction. The second situation may occur either because the state cannot now prove the exact charge it proved in the juvenile proceedings or because the juvenile charge did not fully measure the respondent's culpability in the incident as a result of the structure of delinquency law.[189] If the state wishes to keep respondent in the juvenile system, it may exercise its right to do so under subsection (c)(2). This affects only the respondent's age under title 3 of the Texas Family Code or as respects the Texas Youth Commission under the Texas Human Resources Code.[190]

Subsection (d) requires the juvenile court, should the state desire to file criminal charges, to vacate the juvenile proceedings. This subsection also states that there is no defense of former jeopardy because of the vacated juvenile proceedings.[191] If the respondent is convicted in criminal court, he is required by current law to be given credit on the sentence imposed for any time detained in the juvenile process for the same transaction.[192] This subsection also requires that he be given credit for good behavior while detained in the juvenile system. This is appropriate since an adult sentenced to prison is entitled to receive good time credits on his sentence for time spent incarcerated in the case prior to arriving at the prison.[193]

Finally, subsection (e) requires the juvenile court to enter an order estopping the respondent from denying in juvenile proceedings or to

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189. *See id.* § 51.03(a)(1). Section 51.03(a)(1) defines delinquent conduct to be a violation of "a penal law of this state punishable by imprisonment or by confinement in jail." It, therefore, makes no difference whether the state charges a felony or a jailable misdemeanor, nor what degree of felony or jailable misdemeanor, to invoke the delinquency jurisdiction of the juvenile court. It might, therefore, have undercharged the conduct while invoking delinquency jurisdiction following age misrepresentation, but might reasonably wish to seek to hold the respondent fully liable for his violation of law should it choose to file criminal charges once true age is disclosed.

190. *See* TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084 (Vernon Supp. 1987) (authorizing Texas Youth Commission to hold committed juvenile until age 21).

191. *See In re* D.M., 611 S.W.2d 880, 883-84 (Tex. Civ. App.—Amarillo 1980, no pet.).

192. *See Ex parte* Green, 688 S.W.2d 555, 557 (Tex. Crim. App. 1985) (juvenile entitled to credit on his criminal sentence for time spent detained in juvenile process prior to transfer).

193. *See* TEX. CRIM. PROC. CODE ANN. art. 42.03, §§ 2, 4 (Vernon 1979 & Supp. 1987).

the Texas Youth Commission that he is the age he misrepresented himself to be in the first place, should the state elect that option.