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THE THIRD JUSTICE SYSTEM: THE NEW JUVENILE-CRIMINAL SYSTEM OF DETERMINATE SENTENCING FOR THE YOUTHFUL VIOLENT OFFENDER IN TEXAS*

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This article focuses almost entirely on House Bill 682, enacted by the 70th Texas legislature in 1987. At the request of Senator Frank Tejeda of Bexar County, author of the bill, I worked with him, his staff and others in re-writing major portions of the bill after it had been introduced in the House. I am, therefore, not an impartial commentator. I believe House Bill 682 is a needed and useful piece of legislation. I am firmly of the view that it is constitutional and that when implemented it will prove to be a fair and effective way for the justice system to respond to violent offenses committed by juveniles.

THE WAY IT WAS . . . . .

It was late in the evening
there was no cause for alarm.
But three boys came to Junction
all bearing arms.

They stopped to ask directions
but then went the other way.
So, of course, the next question
was 'why would they stay?'

The lady reported all that she knew
and with scanners on it didn't take long
As one called another — not just a few.
But one didn't answer — could something be wrong?

So out in the night went two men
who could see the lights on at their friends.
One had to stop to lace up his shoe
as the other approached he was attacked by a youth.

Another ran out with a gun in his hand
and tried to fire at the other man.
The man ran forward but was knocked in the head
by a tall black youth who turned and fled.

The boy reloaded the gun in his hand
and came back to kill the white man.
The black approached firing and the man was hit
and the boy being held was having a fit.

It all happened so quickly that two got away
but the law was ready — what more can we say.

They set up roadblocks all around,
and with eye-witness reports the boys were found.

One man was beaten, one beaten and shot,
and neighbors were shakened up alot.
But thanks to our hospital and God up above
we still have our friends here with us to love.

Although it's not over
the boys must still stand trial
under the new Texas law
just for juveniles.

If you find this hard to believe,
as you very well might.
Just remember it really happened
on a dark quiet night.[1]

I. INTRODUCTION

The "new Texas law just for juveniles" is the determinate sentencing law passed by the 70th legislature in 1987.[2] Effective September 1, 1987, the Act provides that juveniles who have been adjudicated delinquent for one of six serious, violent offenses may receive a determinate sentence[3] of as long as 30 years' confinement. The first portion of the sentence will be served in the state training school facilities oper-

1. P.L. Adams, *The Way it Was . . .*, The Junction Eagle, Oct. 8, 1987 (reprinted by permission). The author offers this poem to illustrate the type of violent juvenile crime, and the public perception thereof, which the Texas legislature sought to address in House Bill 682. Any perceived racial overtones expressed by the poem do not reflect the view of the author or the *St. Mary's Law Journal.*

2. Act of June 17, 1987, ch. 385, 1987 Tex. Sess. Law Serv. 3764 (Vernon)(effective Sept. 1, 1987).

3. The label "determinate sentence" can mislead. In criminal sentencing law and practice, a "determinate sentence" is one that is selected by a judge or jury, within statutory limits, but does not allow for release on parole before it has been served, while an "indeterminate sentence" is one that is selected by a judge or jury but permits parole. *See* Dawson, *Sentencing Reform: The Current Round*, 88 YALE L.J. 440, 440 n.2 (1978). In traditional juvenile law, all dispositions are indeterminate in the dual sense that parole is permitted and that a judge or jury does not have discretion to select its length. For example, in conventional delinquency proceedings in Texas, all commitments to the Texas Youth Commission are for an indeterminate term not to exceed the respondent's 21st birthday. *See* TEX. HUM. RES. CODE ANN. §§ 61.001(5), .084 (Vernon Supp. 1988). The juvenile court is not authorized to commit a child to the Texas Youth Commission for a shorter term. *In re* A.N.M., 542 S.W.2d 916, 921 (Tex. Civ. App.—Dallas 1976, no writ) (juvenile court cannot commit to the Texas Youth Commission for a one-year term). By contrast, under the juvenile legislation that is the subject of this article, the sentence is determinate in the sense that a judge or jury has discretion to

ated by the Texas Youth Commission (TYC). If the juvenile has not been released by the juvenile court by the time he becomes 18 years of age, he may then be transferred by the juvenile court to the Texas Department of Corrections (TDC) to serve the balance of his sentence.

The six offenses covered by the legislation are capital murder, murder, aggravated sexual assault, aggravated kidnapping, deadly assault on a law enforcement or corrections officer or a court participant, and attempted capital murder.[4]

Under conventional delinquency proceedings in Texas, if an offense is committed by a person between the ages of 10 and 17, the juvenile court, not the criminal court, has jurisdiction over the case.[5] If the juvenile is adjudicated a delinquent, he may be placed on probation or committed to the Texas Youth Commission,[6] to be held in the Youth Commission's discretion until he is 21 years of age.[7] If the offense is a felony and was committed by a person 15 or 16 years of age, then the juvenile court, after an investigation and hearing, may transfer the juvenile to criminal court for prosecution as an adult.[8]

The major purpose of the determinate sentencing law is to provide a procedure for responding to violent offenses committed by children younger than the minimum discretionary transfer age of 15.[9] Its primary focus is upon violent offenses committed by 13 and 14-year-olds.[10] However, a secondary purpose of the legislation is to provide a prosecutor with an alternative to seeking discretionary transfer of a 15 or 16-year-old to criminal court for prosecution as an adult for one of these six serious, violent offenses. Both aspects of this legislation are examined in this article.

The determinate sentencing legislation exists because the procedure it creates is preferable to the alternative of transferring a juvenile who has committed a violent offense to the criminal court for prosecution.

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select it within the statutory range. However, the sentence is indeterminate in the sense that parole is available under it.

4. *See* TEX. FAM. CODE ANN. § 53.045(a) (Vernon Supp. 1988).

5. *See id.* §§ 51.02(1), .04(a) (Vernon 1986).

6. *Id.* §§ 54.04(d)(1), (2) (Vernon Supp. 1988).

7. TEX. HUM. RES. CODE ANN. §§ 61.001(6), .084 (Vernon Supp. 1988).

8. TEX. FAM. CODE ANN. § 54.02 (Vernon Supp. 1988). In this article, the procedure is called "discretionary transfer" or simply "transfer." It is sometimes elsewhere referred to as "certification" or "waiver of jurisdiction."

9. *See id.* § 54.02(a)(2); TEX. PENAL CODE ANN. § 8.07(a) (Vernon Supp. 1988).

10. *See infra* text accompanying notes 17-24.

Instead of transferring the case, the case remains in the juvenile system but is placed in a special category—one designed specifically for a violent offense. Under the statute, a juvenile placed in this special category is given all of the rights he would have possessed if he had been proceeded against in a conventional delinquency case and all of the rights he would have possessed if he had been transferred to criminal court and prosecuted for a felony.[11] Upon adjudication, he may receive a sentence of any term of years not to exceed thirty.[12] Until age 18, the sentence is served in Texas Youth Commission facilities.[13] He may be paroled by the juvenile court from a Youth Commission facility before reaching the age of 18.[14] If not paroled by age 18, the juvenile court may order him transferred to the Texas Department of Corrections to serve the balance of the sentence.[15]

Instead of providing for transfer of a case from the juvenile justice system to the criminal justice system, this legislation creates a new, third justice system—one that is part juvenile and part criminal—specifically for the handling of extremely violent offenses committed by juveniles.

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11. A juvenile respondent in conventional delinquency proceedings in Texas has virtually the same procedural protections as one charged in adult court with a felony. *See In re* Gault, 387 U.S. 1, 87 (1967)(14th amendment equally applicable to juveniles as adults). There are really only three important differences:

(1) The juvenile may be placed on trial upon what amounts to an information signed by the prosecutor, rather than upon a grand jury indictment as required for accused adult felons. *See* TEX. FAM. CODE ANN. § 53.04(a) (Vernon 1986)(defining a juvenile petition).

(2) If there is a jury at the adjudication hearing, it will consist of six or twelve persons, depending upon whether the court sitting as a juvenile court is a county-level or district-level court. *See In re* A.N.M, 542 S.W.2d 916, 918 (Tex. Civ. App.—Dallas 1976, no writ). An adult charged with a felony is always entitled to a twelve-person jury. TEX. CODE CRIM PROC. ANN. arts. 4.05, 33.01 (Vernon 1966).

(3) A person charged with a felony is entitled to elect jury sentencing, while a respondent in conventional delinquency proceedings has no right to a jury at disposition. *See* TEX. FAM. CODE ANN. § 54.04(a) (Vernon Supp. 1988).

A juvenile proceeded against in the determinate sentencing track is given the right to grand jury consideration of his case, the right to a twelve-person jury, even in a county-level juvenile court, and the right to a jury at disposition. *See id.* §§ 53.045, 54.03(c), .04(a).

12. TEX. FAM. CODE ANN. § 54.04(d)(3) (Vernon Supp. 1988).

13. *Id.*; TEX. HUM. RES. CODE ANN. § 61.084 (Vernon Supp. 1988).

14. TEX. FAM. CODE ANN. § 54.11(i)(1) (Vernon Supp. 1988).

15. *Id.* § 54.11(i)(2).

II. THE PERCEPTION OF THE PROBLEM AND THE RANGE OF RESPONSES

It had become an article of faith in the Texas legislature in recent years that there has been a significant increase in serious offenses committed by persons under the age of 15; that the juvenile justice system—the courts, but, particularly, the Texas Youth Commission—could not or would not respond in a manner that protected the public, and that some solution to the problem was urgently needed. In 1985, the legislature amended juvenile law to permit the Texas Youth Commission to keep a committed child to age 21, instead of age 18.[16] Another approach considered was to facilitate the transfer of young offenders to criminal court for prosecution by lowering the minimum age for transfer. Five bills reducing the transfer age from 15 to 13 were introduced in 1987. When the juvenile determinate sentencing bill was offered as an alternative to those bills, it was passed in lieu of lowering the transfer age.

In this section, the legislature's perception of the juvenile crime problem and the response of the juvenile justice system to it is examined. This article also will examine the details of the bills responding by lowering the transfer age. Problems posed by those bills, fiscal and otherwise, are identified in an effort to explain why the legislature preferred the determinate sentencing bill over reducing the transfer age.

A. *The Perceived Increase in Serious Crime by Youthful Offenders*

Perhaps in an ideal world it would be possible to identify accurately the number and kinds of offenses committed by persons under age 15 and to determine how they are handled by the juvenile justice system. It might then be possible to determine what changes, if any, should be made in the system and to calculate the fiscal costs that would be imposed by the changes. But, even if we could determine the numbers with accuracy, there would still remain major value judgments to be made by the legislature: How much control is enough for various offenses committed by various offenders under various circumstances? Is the present system working within tolerable limits in providing that control? How much tax money should the state be willing to spend to increase controls in some or all of the cases identified in which it is

16. *See* Act of April 23, 1985, ch. 45, § 3, 1985 Tex. Gen. Laws 435.

believed present controls are inadequate? What other goods would have to be sacrificed to expend those monies? How much value should be placed on the sacrificed alternatives?

In the world in which the legislature finds itself, it is warranted in taking the position that so long as one is reasonably certain there is a problem, it is not necessary that its exact dimensions be charted with precision. Millions of dollars could be spent gathering information and subjecting it to analysis and there would remain the value judgments that must, in any event, be made by the legislature about the expenditure of resources and the value of goods foregone, to say nothing about such issues as fairness and justice.

This is but to state that the legislature must proceed ordinarily more on perceptions than on hard, empirical data. Whether there really is an increased problem of violent crime by 13 and 14-year-olds is besides the point. The fact that the public perceives an increased problem requires the legislature to act to eliminate this problem.[17]

The 70th legislature, responding to this public perception, had before it impressive episodic evidence regarding the problem of serious offenses by juveniles under age 15. Testimonial evidence was given by numerous individuals, including Knox Fitzpatrick, Chief Felony Prosecutor in the Dallas County Criminal District Attorney's Office. He testified before the House Judiciary Committee in support of House Bill 682, which, at that time, would have lowered the transfer age to 13. He gave the following examples in support of the need for change:

> There was the case of David Keeler two years ago, a 14 year old son of an Arco Oil executive, who waited inside his home premeditatedly with a shotgun and shot and killed his mother and father when they arrived home from church service one morning. He could not be certified [to adult court] and instead did one year at TYC. He's now on the street. Johnny Glover, 14 years of age, killed a Dallas Morning News newspa-

17. As I stated (ineloquently, to be sure) in my testimony before the Senate Criminal Justice Committee in support of the determinate sentencing bill:

> [T]here is at least a public perception of an increased problem of violent crime by very young juveniles. We're now talking [about] 13 and 14 year olds. Whether the reality is an increase or not is in a way kind of beside the point. There is a public perception of it. The question is, what does the system do about it[?]

The Texas Determinate Sentencing Act for Juveniles: Hearings on Tex. S.B. 98 Before the Senate Criminal Justice Committee, 70th Leg. (Apr. 14, 1987)(statement of Professor Robert O. Dawson supporting Senate Bill 98)(copy on file with the *St. Mary's Law Journal*).

> per carrier in the course of aggravated robbery. This is a capital offense. He could not be certified for that capital offense, went to TYC for a short time, and on his release, he was arrested for a number of offenses and after apprehension, escaped from the Dallas County Jail, and in 1985, at 20 years of age, was sentenced to 60 years in the Texas Department of Corrections for aggravated robbery . . . .
>
> Monroe Shelton while riding as a passenger in a pickup truck randomly shot and killed an individual and fled the scene when a security guard arrived[,] at 14 years of age. He had five felony offenses pending in juvenile court at the time of the commission of this particular murder . . . .
>
> Jacqueline Warren of Dallas at 14 years of age befriended a woman, an elderly woman, and moved in with her and shortly thereafter, at the tender age of 14, stabbed this woman 60 times with a kitchen knife and . . . killed her, and was sentenced to one year TYC. She was released, stabbed another woman and at 17 years of age moved to Waco, Texas, where she befriended another elderly woman and ultimately stabbed her to death.[18]

Mr. Fitzpatrick offered the following evidence on the question of the magnitude of the problem:

> I can just tell you from the Dallas County experience, based on 1986 statistics kept in our juvenile department, there were 2200 juvenile cases filed in Dallas County in 1986. Of those 2200, approximately 1560 were felony offenses and 30% of those were committed by 13 and 14 year olds. Now, certainly, all of these offenses were not as serious as the ones I've outlined to the members of this committee, but a considerable number of them are.[19]

Other testimony on House Bill 682 was less detailed, but in the same vein. Representative Terral Smith, author of House Bill 682, remarked that: "The sad fact of the matter is that there are some very heinous crimes[;] murder, sexual assault, [and] armed robbery[,] being committed by very young children in this day and age. And in some of those cases they are being sent to TYC, and being released at age 21 is just not sufficient."[20] Responding to the question why House Bill 682 proposed a new floor of age 13, instead of no floor at all, Repre-

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18. *The Texas Determinate Sentencing Act for Juveniles: Hearings on Tex. H.B. 682 Before the House Judiciary Committee*, 70th Leg. (Mar. 2, 1987)(statement of Knox Fitzpatrick, Assistant Criminal District Attorney, Dallas County, Texas supporting House Bill 682)(copy on file with the *St. Mary's Law Journal*).

19. *Id.*

20. *Id.* (statement of Rep. Terral Smith of Travis County introducing House Bill 682).

sentative Smith said: "The fact is there are some program statistics about children who are less than age 15, and they tend to be in the 13 and 14 year old group[,] where they're big enough and they're strong enough to commit violent acts against other people, and they're doin' it."[21] A member of the Judiciary Committee reported an incident "involving a juvenile at the time who was 14 in Houston [who] killed someone and then made the statement, I think that, well, nobody could do anything to him because he was 14 years old."[22]

Senator Frank Tejeda of Bexar County, in introducing the determinate sentencing bill to the Senate Criminal Justice Committee, provided the legislators' perspective on the dramatic rise in serious juvenile crime throughout the state. He stated that constituents from all segments of the community have complained and voiced concern when 13 or 14-year-olds, who have committed a brutal crime, are let loose after only a year or year-and-a-half in custody.[23] This concern with increased juvenile crime was echoed by San Antonio's Police Chief who testified that more and more juveniles are committing vio-

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21. *Id.*

22. *Id.* (statement of Judiciary Committee member).

Federal Magistrate Steve Cappell, then executive Director of the Texas District and County Attorneys Association, echoed support for reducing the transfer age to 13, but no lower:

> Not a whole lot of statistics are available because of the nature of juvenile records of the age, but a lot of these are stuff that we've had to do with the district attorney's office themselves in trying to keep track of the age at which it seems that the violence and the size, physical maturity of the individual is kind of reaching, and that's 13.

Id. (statement of Steve Cappell, Executive Director, Texas District and County Attorneys Association supporting House Bill 682).

Representative Larry Warner, a member of the Judiciary Committee, commented that "in addition to deterrence, we also have some duties that affects [the] public's perception of justice being done, or in the cases we've been cited to, somebody getting away with murder because the juvenile justice system simply wasn't able to deal with a case of somebody who was 13 or 14 who committed murder." *Id.* (statement of Rep. Larry Warner).

23. Senator Tejeda maintained that:

> There [has] been a dramatic rise in serious juvenile crime throughout the state . . . . And certainly because our constituents, the citizens of the State[,] sometimes are upset or do not understand when someone that may have been 13 or 14 years old has committed a very brutal crime, [such as] rape, murder, and then he or she is out on the streets perhaps a year, year and a half later. [T]hat is hard to understand and hard to [f]athom and to cope with [at times]. [S]o, we certainly get calls and letters and pressure from all segments of the community.

The Texas Determinate Sentencing Act for Juveniles: Hearings on Tex. S.B. 98 Before the Senate Criminal Justice Committee, 70th Leg. (Apr. 14, 1987)(statement of Sen. Frank Tejeda introducing Senate Committee Substitute for Senate Bill 98)(copy on file with the *St. Mary's Law Journal*).

lent crimes upon other juveniles as well as adults.[24]

There was little dispute that the juvenile justice system's response to the violent juvenile was inadequate. A juvenile convicted of a crime averages only five months in a TYC institution.[25] For violent crimes covered under the determinate sentencing act the minimum length of stay in the TYC is one year and two years for capital murder.[26] Perceiving that the decision to release a youth is made by the TYC without regard for the crime committed, the victim of the crime, or the court's recommendation, the sponsor of House Bill 682 testified that justice was not being served.[27]

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24. San Antonio Police Chief, William O. Gibson, testified that

> [I]n the last three years in my jurisdiction we have experienced a noticeable upsurge in juvenile crime. The criminal activity runs a gambit [sic] from property crimes, which is significant, to the more violent crimes. We are finding more and more each day juveniles participating in violent crimes upon one another as well as against adults. It has reached proportions which have given us a great deal of concern.

Id. (statement of San Antonio Police Chief William O. Gibson supporting Senate Bill 98).

25. Mr. Ron Jackson, Executive Director of the Texas Youth Commission, testified that, "Five months is our average length of stay in an institutional setting . . . . I have requested [the 70th Legislature for appropriations] to try to hold kids on an average daily population of nine months . . . ." *Id.* (statement of Ron Jackson).

26. Mr. Neil Nichols, General Counsel to the Texas Youth Commission, testified before the Senate Criminal Justice Committee about the length of stays in the TYC for offenses that would be covered by the determinate sentencing bill: "As you know, our violent offenders deal now is a minimum length of stay of one year; two years for a capital murder, one year for the others under this bill, and they are released." (statement of Neil Nichols).

27. Representative Terral Smith, sponsor of House Bill 682, testified about current Texas Youth Commission release practices:

> If . . . a 13 or 14 year old murders an eight year old on purpose, they go to TYC. It's just their sentence. They don't get ten years, or eight years, or five years. They just go to TYC. And you don't ever really look at what happened or what kind of crime. Everything at TYC, you let them out whenever you really have no more purposes for that child. You've gone through education, you've been a good kid . . . . And that's why you can do these and be let out in a year. I have to say that on the crimes that we've selected here, it's my particular feeling here that the victim, that if someone kills my six year old child or my eight year old child, there's a certain amount of retribution that I want, and I think that society is entitled to it. The judge . . . cannot even say whether or not it's okay to let the child back out. The child goes to TYC and a year later they're able to release him and the judge cannot even call down and say I want you to keep the boy a little bit longer. So, that's why you can have a serious crime to go to TYC for a year or two. That's not to say they can't stay until they're 21, but that decision is totally TYC's and they do not take the victim or the crime really into consideration on that.

The Texas Determinate Sentencing Act for Juveniles: Hearings on Tex. H.B. 682 Before the House Judiciary Committee, 70th Leg. (Mar. 2, 1987)(statement of Rep. Terral Smith)(copy on file with the *St. Mary's Law Journal*).

B. *Responding to the Perception*

Whether the dramatic increase in serious offenses by juveniles under 15 years of age is real or imaginary, the perception clearly held by a number of legislators was that the increase was very real. Consequently, five bills were introduced to respond to this perception. Each would have lowered the minimum age for transferring a juvenile offender to criminal court from 15 to 13 years of age. Beyond that consensus, they differed from each other greatly.

House Bill 671, sponsored by Representative Al Edwards of Harris County, was the least complicated. It would simply have lowered the minimum transfer age from 15 to 13 for any felony. It died in the House Judiciary Committee.

Senate Bill 487, written by Senator J.E. "Buster" Brown, was much more restrictive. It would have lowered the transfer age to 13 but only "if the offense is a capital felony or a felony of the first degree and the person had been previously convicted of, or found to have engaged in delinquent conduct that violated, a penal law of the grade of felony."[28] It died in the Senate Criminal Justice Committee.

Each of these two bills, while addressing the problem of the commission of serious offenses by juveniles under age 15, created an additional problem: confinement of those extremely young persons in the Texas Department of Corrections. Under current transfer provisions, it is very rare for a convicted juvenile sentenced to prison to be received at the TDC while 15 or 16 years of age—most are 17 or even 18 years of age when received by the department.[29] Under these bills, one could anticipate that some 15 and 16-year-olds would be received by the Department of Corrections. That would, of course, present a significant classification and segregation problem for the Department, which could be expected to take measures to protect these youthful inmates from the rest of the population. However, given the crowded conditions at all the institutions, it is doubtful that total segregation would have been feasible, at least without significantly more resources being appropriated to the Department.

Further, this specter could be anticipated to influence the willing-

28. TEX. S.B. 487, § 4, 70th Leg. (1987).

29. On August 31, 1986, only 17 inmates (0.04%) in the Texas Department of Corrections were under 17 years of age. On that same date, there were 6,716 inmates (18.03%) between the ages of 17 and 22. *See* TEXAS DEPARTMENT OF CORRECTIONS, 1986 ANNUAL OVERVIEW 59 (undated).

ness of criminal court judges and juries to send 15 and 16 year olds to the Texas Department of Corrections, even for very serious conduct. One would expect that in a significant percentage of such cases, the judge or jury would choose adult probation over any prison sentence. Finally, one would anticipate that in some cases a juvenile court judge would be reluctant to transfer a juvenile charged with committing a felony to adult court for fear the judge or jury would impose a prison sentence. There could be, in short, concern that lowering the age to 13, without more restrictions or guidelines, would be resisted during implementation and that it would add to prison volatility in those cases in which it was "successful."

These concerns led to more elaborate bills lowering the transfer age. House Bill 780, introduced by Representative Ron Wilson, would have also lowered the transfer age for all felonies to 13. But, it mandated use of a totally separate correctional facility for any transferred juvenile—separate from both juveniles and adults. The Texas Youth Commission would supply the facility but would contract with the Texas Department of Corrections to supply the guards and other personnel. The contract between the Commission and the department would establish the respective responsibilities of the two agencies for the confinement of transferred juveniles. Each agency was further required to adopt "policies and practices in furtherance of the contract and may enter into a memorandum of understanding about shared duties and powers under the contract."[30] Although the facility remained under control of the Youth Commission, an inmate confined in it was declared by House Bill 780 to be "under the custody and control of the Texas Department of Corrections."[31] The bill further declared that "all laws relating to good conduct time and eligibility for release on parole or mandatory supervision apply to the inmate in the same manner as those laws apply to an inmate confined in any other unit of the department."[32] A transferred juvenile was to be confined in this special unit until he was released or became 21 years of age. At age 21, he was required to be transferred to another TDC unit.[33] Finally, the Bill contained a provision for retroactivity. The

30. TEX. H.B. 780, § 5, 70th Leg. (1987)(proposing addition of article 6166x-5(b) to the Texas Revised Civil Statutes).

31. *Id.* (proposing addition of article 6166x-5(d) to Texas Revised Civil Statutes).

32. *Id.*

33. *Id.* (proposing addition of article 6166x-5(c) to Texas Revised Civil Statutes).

Texas Department of Corrections was required to send to the special facility any inmate already serving a sentence as a transferred juvenile who was still under 21 years of age.[34] House Bill 780 died in the House Judiciary Committee.

While the provisions in House Bill 780 creating a special correctional facility were designed to counter the objections to lowering the transfer age to 13, they were not confined to the age 13 to 15 category. They applied to any transferred juvenile, even one who was over 18 years of age at the time the transfer hearing was conducted,[35] so long as he was still under age 21 at the time of confinement.

House Bill 1536, sponsored by Representative Jerry Beauchamp, would have lowered the transfer age to 13, but only for six categories of offenses—murder or capital murder, aggravated kidnapping, aggravated sexual assault, aggravated robbery or aggravated offenses under the Controlled Substances Act.[36] However, it introduced an entirely new concept to the Family Code in that it made transfer mandatory for those offenses. Thus, in addition to the discretionary transfer authority of the juvenile court under the Family Code,[37] if the respondent was 13 years of age or older at the time one of the enumerated offenses was committed, the only function of the juvenile court at the transfer hearing was to decide whether the State had shown probable cause to believe that the respondent committed one of the enumerated offenses. If probable cause was shown, then transfer was mandatory; if not, transfer was not permitted.[38] Finally, House Bill 1536 contained the same language as House Bill 780 requiring confinement in a separate facility of the TYC operated by the TDC.[39] This bill died in the House Judiciary Committee.

House Bill 1536 attempted to accomplish all of the objectives of the bills previously discussed, but, in addition, attempted to restrict the role of the juvenile court judge in the transfer process. The bill made transfer mandatory upon a finding of probable cause to believe that

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34. *Id.* § 6.

35. TEX. FAM. CODE ANN. § 54.02(j) (Vernon Supp. 1988)(requirements for transferring a person from juvenile court to appropriate district court).

36. *See* TEX. H.B. 1536, § 4, 70th Leg. (1987)(proposing addition of section 8.07(a)(4) to the Texas Penal Code).

37. TEX. FAM. CODE ANN. § 54.02 (Vernon Supp. 1988).

38. *See* TEX. H.B. 1536, § 7, 70th Leg. (1987)(proposing addition of section 54.021 to Texas Family Code).

39. *Id.* § 10.

the juvenile committed one of the enumerated offenses. Thus, the purpose of the bill was to carve out several of the most serious offenses and require transfer to criminal court for those, while preserving discretionary transfer for all other felonies. It would also have changed the nature of the transfer hearing for those offenses; under the law then in effect, there was no requirement that a juvenile court find probable cause to exercise discretion to transfer,[40] while under the proposed special transfer provision probable cause was required but discretion not to transfer was eliminated. The bill also failed to impose for mandatory transfer the discretionary transfer statute's requirement of a complete diagnostic study and social evaluation of the respondent,[41] thus simplifying and expediting the transfer process for those serious offenses covered by the bill.

Finally, House Bill 682, authored by Representative Terral Smith of Travis County, would have lowered the transfer age to 13, but only for the same six offenses covered by House Bill 1536.[42] It passed the House with a Judiciary Committee amendment. The amendment required that a transferred juvenile convicted for one of the six offenses would be confined in a Texas Youth Commission facility until age 18, when he would be transferred to the Department of Corrections to serve the balance of his sentence.[43] This was responsive to the concerns about sending a youthful juvenile to the Department of Corrections, but without the elaborate structure of a separate facility for the confinement of such persons provided by House Bills 780[44] and 1536.[45] Nothing was said in the bill about whether juveniles convicted and serving a prison sentence in the TYC before transfer to the TDC were to be segregated from the remainder of the population there on juvenile court delinquency commitments.

Although House Bill 682, as amended, passed the House, a substi-

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40. *See* TEX. FAM. CODE ANN. § 54.02(a) (Vernon 1986); *see also* Dawson, *Prosecution of Juveniles in Texas Criminal Courts: Eliminating the Jurisdictional Requirement of an Examining Trial*, 23 HOUS. L. REV. 1067, 1103-06 (1986). The Family Code was amended in 1987 to eliminate the jurisdictional requirement of an examining trial and to require the juvenile court to find probable cause in the transfer hearing. *See* Act of May 21, 1987, ch. 140, §§ 1-3, 1987 Tex. Gen. Laws 632.

41. TEX. FAM. CODE ANN. § 54.02(d) (Vernon 1986).

42. *See supra* text accompanying note 36.

43. *See* TEX. H.B. 682, § 5, 70th Leg. (1987)(original version of H.B. 682, proposed adding article 6166x-5 to Texas Revised Civil Statutes).

44. *See supra* text accompanying notes 30-34.

45. *See supra* text accompanying note 39.

tute establishing the determinate sentencing system for juveniles passed the Senate. When the House concurred in these Senate changes, the original version of House Bill 682 died on the House floor.

III. LEGISLATIVE HISTORY OF THE DETERMINATE SENTENCING LAW

It is useful to trace the history of a bill as it works its way through the legislature. Knowing what changes were made—language added or deleted by committee substitutes and amendments or floor amendments—frequently provides valuable clues to determining elusive legislative intent. In the case of House Bill 682, this requires understanding the changes made in, and the interrelationships between, two bills: House Bill 682 and Senate Bill 98.

A. *Senate Bill 98*

Almost all of what ultimately became House Bill 682 was derived from Senate Bill 98. Senate Bill 98 was authored by Senator Frank Tejeda of Bexar County. It received its first reading and was referred to the Senate Criminal Justice Committee.[46] As filed and referred, Senate Bill 98 was not restricted to the serious, violent offender. It covered capital murder and any first degree felony[47] and, thus, would have included aggravated robbery[48] and burglary of a habitation,[49] as well as several other offenses.[50] A juvenile petition alleging any of these offenses could be referred to the grand jury for its approval, which would consider the petition in the same manner as a request for an indictment.[51] If the petition is approved, the juvenile could be tried and sentenced to a term of imprisonment of up to 30 years or

46. S.J. OF TEX., 70th Leg., Reg. Sess. 22 (1987).

47. TEX. S.B. 98, § 4, 70th Leg. (1987).

48. TEX. PENAL CODE ANN. § 29.03 (Vernon 1974).

49. *Id.* § 30.02.

50. For example, in addition to the six offenses covered by the determinate sentencing law and in addition to aggravated robbery and burglary of a habitation, Senate Bill 98 would have covered injury to a child or elderly person under some circumstances, *see* Tex. Penal Code Ann. § 22.04 (Vernon Supp. 1987), arson under some circumstances, *see id.* § 28.02, and various aggravated offenses under the Texas Controlled Substances Act, Tex. Rev. Civ. Stat. Ann. art. 4476-15, §§ 4.03(d), 4.031(d), 4.032(d), 4.04(d), 4.041(d), 4.042(d), 4.043(d), 4.05(d), 4.051(d) & 4.053(d) (Vernon Supp. 1988).

51. TEX. S.B. 98, § 4, 70th Leg. (1987).

probation.[52] Jury sentencing[53] and a jury for probation revocation[54] were provided by Senate Bill 98. If sentenced, the respondent was to go first to the Texas Youth Commission.[55]

The Texas Youth Commission, under Senate Bill 98, retained its traditional authority to release the respondent on parole and to discharge him from parole and his sentence at any time.[56] Of course, the TYC was required to discharge any respondent who had served his full sentence while under the youth commission's jurisdiction.[57] But, if the respondent was still in a youth commission facility or under youth commission parole when his 21st birthday was approaching, authority over the case shifted to a new state agency: the Juvenile Review Board.

The Juvenile Review Board was to consist of nine citizens appointed by the Governor for staggered six year terms. The composition of the Board was specified in the bill:

> Each member of the board must be a resident of Texas. One member must be a psychologist licensed in this state. One member must be a health-care professional licensed in this state. One member must be a representative of victims of crimes as either a member of a crime victims' association or as a person who has been a victim of a felony that was committed against the person or against a member of the person's family. One member must be a minister, theologian, or other person trained in religion or ethics. One member must be an attorney licensed in this state with experience in juvenile law. One member must be a law enforcement officer or former law enforcement officer. Three members must be persons who have an interest in juvenile justice.[58]

Members of the Board were to serve part-time and were entitled to a per diem and expense reimbursement. However, the Board was authorized to employ a full-time executive director, legal counsel and other employees.[59]

Five months before the 21st birthday of a respondent still under youth commission jurisdiction, the Texas Youth Commission was re-

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52. *Id.* § 5.
53. *See id.*
54. *See id.* § 6.
55. *Id.* §§ 5-6.
56. *See id.* § 9.
57. *See id.*
58. *Id.* § 11.
59. *Id.*

quired to send to the Juvenile Review Board a notice of that person's transfer to the Texas Department of Corrections.[60] The Board was required to notify appropriate persons of the time and place of a hearing in the case.[61] The hearing had to be held at least thirty days before the respondent's 21st birthday.[62] The hearing was to be a recorded adversarial administrative hearing open to the public.[63]

The Juvenile Review Board's hearing was to decide whether to order the Youth Commission to discharge the respondent before his 21st birthday or to permit him to be transferred to the Texas Department of Corrections when he reached that age. The bill specified the criteria to be considered in making that decision:

> [T]he board may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.[64]

To order discharge of a respondent, at least seven members of the nine member Board were required to find that "the person is not a danger to himself or any other person and . . . the welfare of the person to be transferred does not require further rehabilitation through incarceration . . . ."[65] There were also provisions for requests for reconsideration by a respondent who was not ordered released by the Board.[66]

If the Juvenile Review Board ordered release, the Youth Commission was required to discharge the respondent before his 21st birthday,[67] which would satisfy the sentence he received from the juvenile court or jury. If the Review Board refused to order his release, the respondent was to be transferred by the Youth Commission to the

60. *Id.* § 10.
61. *Id.* § 11.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See id.*
67. *Id.*

Texas Department of Corrections when he became 21 years of age.[68] Once transferred, the respondent was entitled to receive "credit on his sentence for the time served in the custody of the Youth Commission."[69]

The purpose of Senate Bill 98 was to provide a mechanism for responding to serious, but not necessarily violent, offenses committed by juveniles under the minimum transfer age of 15 by confining them with persons their own age throughout the correctional process—first in the Texas Youth Commission and, if not discharged at age 21, in the Texas Department of Corrections. Importantly, this avoided the specter of confining a 13 or 14 year old in the company of adult criminals in the Texas Department of Corrections.

Correctional decisions were to be made by professionals. The Youth Commission had authority to parole and discharge the respondent any time until five months before his 21st birthday.[70] At that point, a body of citizens representing various relevant disciplines would make the decision whether the respondent would be discharged from further obligations under the sentence or would be placed in the Texas Department of Corrections. The Bill referred to this plan as "determinate sentencing" to differentiate it from the usual delinquency commitment by a juvenile court—to age 21 at the total discretion of the Texas Youth Commission—and not to imply that parole was unavailable, because the Youth Commission could still parole a juvenile.[71]

Although the major purpose of the bill was directed toward the under-15 year old offender, it was not limited to that group. The system could be invoked against any juvenile who committed a capital or first degree felony between the ages of 10 and 17 and would have, therefore, served as an alternative to discretionary transfer to criminal court for a 15 or 16-year-old, as well as an alternative to ordinary delinquency proceedings for juveniles under age 15.

There was never a public hearing on Senate Bill 98 in the form in which it was introduced because of objections to some of its features. The scope of the legislation was potentially quite large, because it included such common acts of delinquency as aggravated robbery and

68. *Id.* § 9.
69. *Id.* § 12.
70. *See supra* note 56.
71. *See supra* note 3.

burglary of a habitation. The major objections were based on fiscal concerns. A new adminstrative agency, the Juvenile Review Board, was to be established, which would have required new appropriations for the juvenile system. Although the Youth Commission retained its traditional authority to parole and discharge at will, it was concerned that it would as a practical matter be unable to parole juveniles according to its usual timetable when a judge or jury had given a substantial sentence to the repondent. Given the uncertainty as to how many cases would be handled under the bill, coupled with potentially much longer stays in Youth Commission facilities for those committed, the Youth Commission was concerned that its population would be augmented significantly by those respondents committed under the bill's provisions. Conversely, juvenile court judges, law enforcement officers, and prosecutors objected to permitting the Youth Commission to override the juvenile court's judgment by releasing or discharging a respondent long before his locally-determined sentence had been served.

These objections were discussed in various private and public meetings during March and early April of 1987. A Committee Substitute to Senate Bill 98 was drafted to take into account many of these objections. The Committee Substitute retained the basic idea of the bill, but made some significant changes in it. First, the scope was narrowed dramatically from applying to any first degree felony to only six violent first degree felonies.[72] Experience indicated that this change would greatly reduce the numbers of persons handled by the new system, especially since aggravated robbery and burglary of a habitation were excluded. Second, the Juvenile Review Board was eliminated. It was replaced by a hearing to be conducted by the committing juvenile court using substantially the same procedures and criteria that the Juvenile Review Board was to have employed.[73] Thus, the fiscal implications of creating a new state agency did not arise. Third, the traditional power of the Texas Youth Commission, to parole and discharge at its discretion, was eliminated for respondents committed under the bill. The Youth Commission could recommend parole or discharge, but the committing juvenile court, after a hearing, would make the parole or discharge decision.[74] Thus, the

72. *See* TEX. S.B. 98, § 4, 70th Leg. (1987)(Committee Substitute for Senate Bill 98).
73. *Id.* § 10.
74. *Id.* § 11.

objections of local officials to the Youth Commission's discretion over the release of respondents committed from their counties were neutralized. There were some other minor technical changes made as well.[75]

The Senate Criminal Justice Committee held a public hearing on Committee Substitute for Senate Bill 98 on April 14, 1987. No action was taken at the hearing and the bill remained as pending business before the Committee. There it would remain until the Senate Criminal Justice Committee heard House Bill 682 on May 14, 1987 and reported out the Committee Substitute for Senate Bill 98 as the Committee Substitute for House Bill 682.[76]

B. *House Bill 682*

House Bill 682 was authored by Representative Terral Smith of Travis County. It was read the first time February 11, 1987 and referred to the House Judiciary Committee.[77] As introduced, it would lower the minimum discretionary transfer age from 15 to 13, but only for murder, capital murder, aggravated kidnapping, aggravated sexual assault, aggravated robbery, or an aggravated offense under the Controlled Substances Act.[78] It was, therefore, much like the four other bills that would have lowered the transfer age to 13.[79]

The House Judiciary Committee held a public hearing on March 2, 1987 and referred the bill to a subcommittee, which, at its March 12 hearing reported it back to the Committee. On March 18, the Committee amended the bill to provide that:

> A juvenile convicted of an offense [for which a respondent 13 or older could be transferred] shall be placed in the Texas Youth Council (sic, Commission) facility until the juvenile reaches the age of 18, and shall

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75. Committee Substitute for Senate Bill 98, sections 2, 5 and 6 required that a jury consist of twelve persons, even if the court sitting as a juvenile court was a county court-at-law that would ordinarily employ a six-person jury; section 12 authorized affirmative findings to be made when it was shown that the respondent used or exhibited a deadly weapon during commission of the delinquent act; and section 14 provided that a juvenile transferred from the Youth Commission to the TDC was subject to adult parole laws and was retroactively to receive good conduct credit on his sentence for all periods of incarceration in the case. *See id.* §§ 2, 5, 6, 12, 14.

76. S.J. OF TEX., 70th Leg., Reg. Sess. 1166 (1987).

77. *See* H.J. OF TEX., 70th Leg., Reg. Sess. 280 (1987).

78. *See* Tex. H.B. 682, § 1, 70th Leg. (1987)(proposing amendment of sections 54.02(a) and (j) of Texas Family Code).

79. *See supra* text accompanying notes 28-41.

> serve the remainder of the sentence, if any, in the Texas Department of Corrections facility. The juvenile shall receive credit toward good conduct time and eligibility for release on parole or mandatory supervision at the Texas Department of Corrections for the time he was placed in the Texas Youth Council facility.[80]

With this amendment, the Committee reported the bill to the House, where it passed on second reading April 14, 1987[81] and third reading April 15, 1987[82] without further amendment.

House Bill 682 was read the first time in the Senate April 22, 1987 and referred to the Criminal Justice Committee,[83] where the Committee Substitute for Senate Bill 98 was still pending. At the May 14th hearing, the Senate Criminal Justice Committee reported out its substitute for House Bill 682. The substitute consisted of Senate Bill 98 plus unrelated provisions that were part of House Bill 683.[84] There were Senate floor amendments to lower the maximum age at which a person could be kept in the youth commission from 21 to 18,[85] thus requiring the juvenile court to make an "up or out" decision at age 18 and eliminating the option of keeping the person in the youth commission until age 21. This was responsive to the concerns expressed by the Texas Youth Commission about the fiscal effects of the program on its population. As amended, House Bill 682 passed the Senate May 22.[86] On May 27, the House concurred in the Senate

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80. TEX. H.B. 682, § 5, 70th Leg. (1987)(House Committee Amendment to House Bill 682).

81. *See* H.J. OF TEX., 70th Leg., Reg. Sess. 1108 (1987).

82. *Id.* at 1153.

83. *See* S.J. OF TEX., 70th Leg., Reg. Sess. 714 (1987).

84. House Bill 683 was authored by Representative Terral Smith, who authored the original version of House Bill 682. House Bill 683 provided that juvenile court delinquency adjudications for felonies be admissible in the penalty phase of criminal cases. It passed the legislature and was signed by the Governor. When the Senate Criminal Justice Committee replaced House Bill 682 with Committee Substitute for Senate Bill 98, it included all of House Bill 683 as well. *Compare* Act of June 17, 1987, ch. 385, 1987 Tex. Sess. Law Serv. 3764 (Vernon)(effective Sept. 1, 1987) *with* Act of June 17, 1987, ch. 386, 1987 Tex. Sess. Law Serv. 3780 (Vernon)(effective Sept. 1, 1987). In addition, the Committee Substitute for Senate Bill 98 provided that juvenile delinquency adjudications for a felony cannot be sealed. *See* Act of June 17, 1987, ch. 385, § 6, 1987 Tex. Sess. Law Serv. 3768 (Vernon)(effective Sept. 1, 1987). There is no conflict between House Bill 683 and House Bill 682, so the fact that the same amendments were made in the same sections of the Family Code by both bills affects the validity of neither.

85. *See* S.J. OF TEX., 70th Leg., Reg. Sess. 1504 (1987).

86. *See id.* at 1505.

amendments and passed the bill.[87] It was signed into law by the Governor June 17, 1987.[88]

IV. CONSTITUTIONALITY OF THE DETERMINATE SENTENCING LAW

The enactment of novel legislation in the criminal-juvenile law area is certain to provoke constitutional challenges. While there should be a strong presumption in support of the constitutionality of legislative enactments, the potential challenges must be taken seriously and, if possible, anticipated during the drafting stage. That was done during the construction of House Bill 682. Care was taken to provide juveniles to be handled under the bill with every procedural right they would have had if they had been prosecuted for a felony in criminal court or proceeded against in a conventional delinquency case. In certain instances, they were provided with procedural rights that neither a juvenile nor an adult possessed.

Three different types of constitutional challenges were anticipated. The first is based on the due process of law clause of the fourteenth amendment to the United States Constitution[89] and the cognate provision of the Texas Constitution prohibiting deprivation of "life, liberty, property, privileges or immunities . . . except by the due course of the law of the land."[90] The central argument is that it is a violation of due process of law for the state to imprison a person in a penal institution who has not been convicted of a criminal offense. The second anticipated challenge is based on the equal protection of the laws provision of the fourteenth amendment to the United States Constitution[91] and on the parallel provision of the Texas Constitution, that "[a]ll free men, when they form a social compact, have equal rights . . . ."[92] Two different equal protection arguments may be anticipated: (1) that a juvenile respondent subject to determinate sentencing is deprived of equal protection in comparison to a juvenile respondent who has been transferred to criminal court for prosecution as an adult, and (2) that such a juvenile respondent is deprived of equal protection in

87. *See* H.J. OF TEX., 70th Leg., Reg. Sess. 3674 (1987).

88. *See* Act of June 17, 1987, ch. 385, 1987 Tex. Sess. Law Serv. 3780 (Vernon)(effective Sept. 1, 1987).

89. *See* U.S. CONST., amend. XIV, § 1.

90. TEX. CONST. art. I, § 19.

91. *See* U.S. CONST., amend. XIV, § 1.

92. TEX. CONST. art. I, § 3.

comparison to a juvenile respondent handled under the conventional delinquency provisions of the Family Code. The third anticipated challenge is based on the Texas constitutional requirement that "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary . . . ."[93] The main argument would be that a juvenile subjected to the determinate sentencing law can be incarcerated in the state penitentiary without the benefit of a grand jury indictment.

A. *Due Process and Due Course of Law*

To assess correctly the due process challenge, one must state the most sympathetic case possible for the person challenging the law. For example, imagine a juvenile who is believed to have committed one of the six covered offenses and who is proceeded against in juvenile court under the determinate sentencing law. He is adjudicated a delinquent. The judge or jury gives him a sentence of thirty years imprisonment. He is committed to the Texas Youth Commission. Not having been paroled at age 17 ½, a hearing is conducted before the committing juvenile court to determine whether he will be released on parole or transferred to the Texas Department of Corrections at age eighteen. The juvenile court decides he will be transferred, and he is transferred. Thus, at age 18, he is incarcerated in the Texas Department of Corrections, not having been convicted of a felony, but only adjudicated a delinquent.

The first point in response to this argument is that his due process claim would not be ripe for decision unless and until the respondent is actually transferred to the Department of Corrections. Until that time, he is incarcerated in the Youth Commission and adjudicated a delinquent with other youths of his same age also adjudicated delinquents. While the length of the sentence imposed is such that transfer is a possibility, it is only a possibility. The Youth Commission may petition the juvenile court at any time for release on parole.[94] If he is paroled by the juvenile court and remains in the community without parole violation, he will complete his thirty-year sentence at age 21,[95]

93. *Id.* § 10.

94. *See* TEX. HUM. RES. CODE ANN. § 61.081(f) (Vernon Supp. 1988).

95. *See id.* § 61.084(c).

or earlier at the discretion of the juvenile court,[96] and will never be transferred to the TDC prison. If this occurs, he has been dealt with in no more harsh a manner than any other juvenile adjudicated to have engaged in delinquent conduct.[97]

The due process claim would be properly presented for the first time to the juvenile court in the transfer hearing[98] and on direct appeal[99] from the juvenile court's decision to transfer the delinquent to the Department of Corrections. Presumably, once the time for appeal from the transfer hearing has expired, the claim could be alternatively presented by petition for writ of habeas corpus.[100]

The essence of the due process claim is that the juvenile transferred to a TDC prison has not been convicted of a criminal offense. That is indisputably correct. The Family Code specifically provides:

> An order of adjudication or disposition in a proceeding under this title is not a conviction of crime, and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment.[101]

The legal distinction between a criminal conviction and an adjudication of delinquency is the cornerstone of the juvenile justice system. The modern juvenile system is unlike the one found wanting in 1967 by the United States Supreme Court in *In re Gault*.[102] It is a system that provides the person charged with delinquency with all of the meaningful protections of one charged with a criminal offense. At the same time, it seeks to avoid placing on adolescents the brutalizing, permanent social stigma of a criminal conviction.

Further, the modern juvenile system seeks to shelter respondents from the legal consequences of a criminal conviction. One convicted of a felony loses for a time some of his civil rights—the right to vote, to hold public office, and to serve on juries[103]—while one adjudicated

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96. *See id.* § 61.084(a).

97. *See* TEX. FAM. CODE ANN. § 54.04(d)(2) (Vernon Supp. 1988).

98. *See id.* § 54.11.

99. *See id.* § 56.01(c)(2).

100. *See* TEX. CONST., art V, § 5.

101. *Id.* § 51.13(a) (Vernon 1986).

102. 387 U.S. 1 (1967).

103. *See* TEX. CONST. art. VI, § 1. The Texas Constitution provides that "[a]ll persons convicted of any felony, subject to such exceptions as the Legislature may make" are ineligible to vote. *Id.* The Texas Election Code provides that a qualified voter is a person who:

> has not been finally convicted of a felony or, if so convicted, has:
>
> (A) received a certificate of discharge by the Board of Pardons and Paroles or com-

a delinquent does not lose any civil rights. Perhaps even more significantly, one of the most important privileges that society extends is the ability to earn a living by engaging in one of the numerous occupations that are licensed by the state or municipalities. These privileges are withheld, or at the discretion of licensing agencies may be withheld, from a person convicted of a felony.[104] Such is not the case with the person adjudicated a delinquent for the identical conduct. A delinquent released on parole from prison does not have the same legal

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pleted a period of probation ordered by a court and at least two calendar years have elapsed from the date of the receipt or completion; or

(B) been pardoned or otherwise released from the resulting disability to vote.

TEX. ELEC. CODE ANN. § 11.002(4) (Vernon Supp. 1988).

The Texas Election Code provides that to be eligible to be a candidate for elective office one must "have not been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities." *Id.* § 141.001(a)(4) (Vernon 1986).

Finally, to be qualified to serve as a juror, one must be "qualified under the constitution and laws to vote," have "not been convicted of a felony" and have not been "under indictment or other legal accusation of misdemeanor or felony theft or any other felony." TEX. GOV'T CODE ANN. § 62.102 (Vernon Supp. 1988).

104. Texas, in common with many American states, has an extensive list of statutes requiring licenses to engage in numerous occupations. As of 1976, a total of 61 occupations were licensed by the State of Texas. State Bar of Texas, *Barriers to Ex-offender Employment in Texas*, 4 (1976). There are by now doubtless many more. Further, municipalities have powers to require occupational licenses for certain kinds of activities within their city limits. For many licenses, the law specifically permits the licensing agency to exclude anybody convicted of a felony. For others, anybody convicted of a felony or a misdemeanor involving moral turpitude can be excluded. Still other statutes require that the holder of a license be of good moral character. A survey of state licensing agencies conducted for the State Bar publication revealed the following:

> In an informal telephone inquiry of 27 state boards and commissions with licensing requirements of "good moral character" or its variants, we were told that only in rare circumstances were ex-offenders rejected out of hand. Rather, they would be given "special consideration." It is very special indeed! The peculiar thing about good moral character is that for all applicants other than ex-offenders the evidence is usually negative; that is, good moral character is assumed in the absence of evidence to the contrary, if only for practical reasons. Licensing boards cannot possibly conduct FBI-like investigations of each potential licensee, and would be little better off if they could, given the nebulousness of the concept. Therefore, the whole weight of the ambiguous phrase falls almost entirely on the ex-felon, though he may in fact have positive testimony on his moral character.

Id. at 10. Although the requirement of an occupational license reaches such traditionally-regulated activities as the practice of medicine or law, it also reaches deeply into the economic fabric of the state and touches a surprising variety of activities. The following are some of the occupations that in Texas are required to be licensed: athletic trainer, auctioneer, boxer/wrestler, dental hygienist, driver training instructor, fire alarm installer, hearing aid dispenser, insurance agent, labor organizer, landscape architect, pawnbroker, physical therapist, polygraph examiner, proprietary school instructor, real estate broker and salesperson, teacher and vocational nurse. *See id.* at 18-25.

disabilities as an inmate paroled from the same prison after a felony conviction. Yet the juvenile has enjoyed the same procedural rights the convicted felon possessed.

The due process claim is fluff without substance. The sole difference between the convicted felon and the adjudicated delinquent subjected to the determinate sentencing law is that the adjudicated delinquent enjoys privileges that are denied to the convicted felon. The legislature could have provided that criminal courts have jurisdiction over any of the six covered offenses committed by a person ages 10 to 17 without prior juvenile court involvement in the case. This has been done in some jurisdictions and has been upheld by the courts.[105] The juvenile offender could be prosecuted in criminal court where he would not receive more protections than under the juvenile determinate sentencing law. As such, he would be subjected to the harsher labeling and collateral legal consequences of a felony conviction and would serve any sentence from the outset, not merely a possible segment of it, in the Department of Corrections.

B. *Equal Protection*

An equal protection claim could be made by a juvenile proceeded against under the determinate sentencing law in two contexts: as compared to a juvenile transferred to criminal court for prosecution as an adult, and as compared to a juvenile proceeded against in conventional delinquency proceedings.

1. As Compared to a Transferred Juvenile.

The claim could be made that the determinate sentencing law denies equal protection of the laws when a juvenile proceeded against under that law is compared to one who is transferred to criminal court for prosecution as an adult for the same conduct. The premise of this argument is that the conduct engaged in when the person was 15 or 16 years of age consisted of one or more of the six covered offenses. In that circumstance, the prosecutor has discretion to choose between two alternatives: he may seek transfer to criminal

105. *See, e.g.*, United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972). In *Bland*, the Court of Appeals upheld the constitutionality of a provision in the District of Columbia Code permitting a prosecutor to file criminal charges of murder, forcible rape, burglary in the first degree, robbery while armed, or an assault with intent to commit any of those offenses against a person 16 or 17 years of age without a juvenile court transfer hearing. *See id.* at 1336-37.

court under the Texas Family Code or he may seek grand jury approval of the petition and proceed under the determinate sentencing law. The equal protection argument must seek to show that the juvenile handled under the determinate sentencing law has received less favorable treatment than he would have received if he had been transferred to criminal court and prosecuted as an adult. This argument reduces to the claim that the juvenile is disadvantaged because he has not received the discretionary transfer hearing before the juvenile court that he would have received if the prosecutor had sought transfer to criminal court.

A prosecutor who seeks transfer of a juvenile to criminal court for prosecution as an adult must petition or move for a transfer hearing.[106] At that hearing he must prove that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense, or the child's background, the welfare of the community requires criminal proceedings.[107] In making that determination, the juvenile court must consider, among other matters:

> (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
> (2) whether the alleged offense was committed in an aggressive and premeditated manner;
> (3) whether there is evidence on which a grand jury may be expected to return an indictment;
> (4) the sophistication and maturity of the child;
> (5) the record and previous history of the child; and
> (6) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.[108]

The juvenile court conducts the transfer hearing without a jury.[109] The court is required before the hearing begins 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."[110] The report is admissible in evidence at the hearing, provided the child's attorney has been given a copy at least one day in

106. *See* TEX. FAM. CODE ANN. § 54.02(b) (Vernon 1986).
107. *Id.* § 54.02(a)(3) (Vernon Supp. 1988).
108. *Id.* § 54.02(f) (Vernon 1986).
109. *See id.* § 54.02(d).
110. *Id.* § 54.02(c).

advance.[111] If the juvenile court determines that the welfare of the community requires transfer, it may transfer the child to criminal court for prosecution as an adult.[112] After transfer, the child is dealt with as an adult[113] and, following grand jury indictment,[114] may be placed on trial in criminal court.

Undoubtedly, a transfer hearing is a major event for the prosecutor, the juvenile, his attorney, and the juvenile court. It is a significant proceeding because so much is at stake for the juvenile and the community. If kept in the juvenile system and handled in conventional delinquency proceedings, the respondent faces incarceration in the Youth Commission until age 21.[115] If transferred to the criminal system, depending upon the offense he could be incarcerated for ten years,[116] twenty years,[117] ninety-nine years,[118] or for life.[119]

A juvenile respondent handled under the determinate sentencing

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111. *Id.* § 54.02(a) (Vernon Supp. 1988).

112. *Id.* § 54.02(e).

113. *Id.* § 54.02(h). Before 1987, the Family Code required an examining trial before the district court prior to grand jury consideration of the case of a transferred juvenile. *See supra* note 40. The legislature amended the Texas Family Code to eliminate the mandatory examining trial. *See* Act of May 21, 1987, ch. 140, 1987 Tex. Gen. Laws 632. Instead, the court to which the child is transferred shall determine if good cause exists for an examining trial. If there is no good cause for an examining trial, the court shall refer the case to the grand jury. If there is good cause for an examining trial, the court shall conduct an examining trial and may remand the child to the jurisdiction of the juvenile court. TEX. FAM. CODE ANN. § 54.02(h) (Vernon Supp. 1988). Also added to the delinquency procedure is the requirement that at the transfer hearing the juvenile court must make a finding of "probable cause to believe that the child before the court committed the offense alleged." *See* Act of May 21, 1987, ch. 140, § 1, 1987 Tex. Gen. Laws 632.

114. *See* TEX. FAM. CODE ANN. §§ 54.02(h) (Vernon Supp. 1988) & 54.02(i) (Vernon 1986).

115. *Id.* at § 54.04(d)(2) (Vernon Supp. 1988); TEX. HUM. RES. CODE ANN. §§ 61.001(6), .084 (Vernon Supp. 1988).

116. *See* TEX. PENAL CODE ANN. § 12.34 (Vernon 1974). A third degree felony carries a punishment of not more than ten nor less than two years in the Texas Department of Corrections and a fine not to exceed $5,000. *See id.*

117. *See id.* § 12.33. A second degree felony carries a punishment of not more than twenty nor less than two years in the Texas Department of Corrections and a fine not to exceed $10,000. *See id.*

118. *See id.* § 12.32 (Vernon Supp. 1988). A first degree felony carries a punishment of life or not more than 99 nor less than 5 years in the Texas Department of Corrections and a fine not to exceed $10,000. *See id.*

119. *See id.* § 12.31 (Vernon 1974). Capital murder carries a punishment of death or life in the Texas Department of Corrections. *See id.* However, the death penalty is not available for a transferred juvenile convicted of capital murder, *see* TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1988), so the only available punishment is life imprisonment, *see* Allen v. State, 552 S.W.2d 843, 846 (Tex. Crim. App. 1977).

law has no right to a pre-adjudication transfer hearing. Like the juvenile already transferred to criminal court, he has only the right to grand jury consideration of his case.[120] He has, therefore, been deprived of a significant procedural right as a result of the prosecutor's decision to keep the case in juvenile court rather than seeking transfer to criminal court. Does this deprivation rise to the level of a denial of equal protection of the laws?

Initially, it should be observed that the juvenile proceeded against under the determinate sentencing law receives substantially less exposure to possible punishment than one who, after a pre-adjudication transfer hearing, has been transferred to criminal court and convicted as an adult. A juvenile under the determinate sentencing act cannot receive a sentence longer than thirty years.[121] A transferred juvenile may receive for each of the covered offenses, except for capital murder, a prison sentence of five to ninety-nine years or life and a fine of $10,000.[122] A transferred juvenile convicted of capital murder cannot receive the death penalty, but must be sentenced to life imprisonment.[123]

A juvenile proceeded against under the determinate sentencing law is eligible for probation from the judge or the jury for any of the six covered offenses.[124] A transferred juvenile convicted of capital murder is not eligible for probation[125] and one convicted of aggravated kidnapping or aggravated sexual assault is not eligible for probation from the trial court,[126] although the jury may grant probation.[127] Further, for any of the remaining three offenses, the criminal court judge may not grant probation if there is an "affirmative finding that the defendant used or exhibited a deadly weapon during the commis-

120. *See* TEX. FAM. CODE ANN. § 53.045(d) (Vernon Supp. 1988).

121. *Id.* § 54.04(d)(3).

122. *See supra* note 118.

123. *See supra* note 119.

124. *See* TEX. FAM. CODE ANN. § 54.04(d)(1) (Vernon Supp. 1988).

125. *See* TEX. CRIM. PROC. CODE ANN. art. 42.12, §§ 3- 3a(a) (Vernon Supp. 1988). To be eligible to receive adult probation from the court or the jury, the defendant must have been assessed a penalty of 10 years of less. *See id.* Since a transferred juvenile convicted of capital murder must receive a sentence of life imprisonment, he is not eligible for probation. *See supra* note 119.

126. *See* TEX. CRIM. PROC. CODE ANN. art 42.12, § 3g(a)(1)(B)-(C) (Vernon Supp. 1988).

127. *See id.* § 3(a)a. The jury may grant probation if the defendant has no prior felony conviction and the jury has assessed a penalty of 10 years of less, even if the offense is one for which the trial court without a jury could not grant probation. *See id.*

sion of an offense or during immediate flight therefrom."[128]

A juvenile receiving a determinate sentence is eligible for parole immediately upon recommendation of the Youth Commission and, after a hearing, approval of the committing juvenile court.[129] An adult convicted of capital murder who has received a sentence of life imprisonment is eligible for parole after serving fifteen calendar years.[130] One convicted of aggravated kidnapping or aggravated sexual assault is not eligible for parole until he has served one-fourth of his sentence without good conduct reductions or fifteen calendar years, whichever is less, but in no event until he has served two calendar years.[131] The same is true when an affirmative finding of use of a deadly weapon has been made.[132] The remaining offenders are eligible for release on parole when they have served one-fourth of their sentence with good conduct reductions or fifteen years with good conduct reductions, whichever is less.[133]

An adult released on parole must serve the balance of the sentence, without good conduct reductions, on parole, unless discharged earlier by the Board of Pardons and Paroles.[134] A juvenile given a determinate sentence must, if paroled from the Youth Commission, be discharged from parole when he becomes twenty-one years of age[135] or when the full sentence has been served,[136] whichever comes first.

A juvenile given a determinate sentence and not paroled may be discharged from that sentence at any time upon the recommendation of the Youth Commission and approval, after a hearing, by the committing juvenile court.[137] If transferred to the Department of Corrections, he becomes subject to discharge under adult law. An adult sentenced to life imprisonment, if not paroled, will never discharge

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128. *Id.* § 3g(a)(2). The jury may grant probation in the face of such a finding, however. *See supra* note 127.

129. TEX. FAM. CODE ANN. § 54.11(a)-(i) (Vernon Supp. 1988); TEX. HUM. RES. CODE ANN. § 61.081(f) (Vernon Supp. 1988).

130. TEX. CRIM. PROC. CODE ANN. art. 42.18, § 8(b) (Vernon Supp. 1988). Prior to the 1987 amendment, parole eligibility was not attained until 20 calendar years was served. "Calendar years" means without consideration of good conduct time. *See id.*

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.* § 8(a)a. The parole period is the sentence less calendar time actually served on that sentence without taking any good conduct credit into account. *Id.*

135. TEX. HUM. RES. CODE ANN. § 61.084(c) (Vernon Supp. 1988).

136. *Id.* § 61.084(a).

137. *Id.* §§ 61.079(a)(2), .084(b)(2).

the sentence in his lifetime. If given a sentence less than life for murder, aggravated kidnapping, aggravated sexual assault, deadly assault on a law enforcement or corrections officer or court participant, or for a case in which an affirmative finding of the use of a deadly weapon was made, he is not discharged until he has served the full sentence without good conduct reductions.[138] An adult convicted of attempted capital murder, without a deadly weapon finding, would be released to mandatory parole supervision when he has served his sentence reduced by good conduct credit and would serve the balance of the sentence under parole supervision.[139]

Therefore, until transfer to the Department of Corrections, the determinate sentenced juvenile is in a substantially better posture than he would have been had he been transferred to criminal court and received the identical sentence. After transfer to the TDC, he is treated identically with his adult counterpart.[140] Of course, he has not received the pre-adjudication transfer hearing mandated by the Family Code. But, before he can be transferred to the Department of Corrections, he must receive a post-adjudication transfer hearing before the same juvenile court.

The post-adjudication transfer hearing is designed to serve the same purpose as the pre-adjudication transfer hearing. It is conducted by the juvenile court without a jury.[141] Unlike a hearing to consider discretionary transfer to criminal court, the juvenile court is not required to order an investigation and diagnostic study,[142] since the juvenile has been incarcerated in the Texas Youth Commission and Youth Commission studies, which are to be considered by the court, serve the same purpose.[143] The juvenile court must consider criteria that are

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138. TEX. CRIM. PROC. CODE ANN. art. 42.18, § 8(c) (Vernon Supp. 1988).

139. *Id.*

140. TEX. REV. CIV. STAT. ANN. art. 6166z12(c) (Vernon Supp. 1988).

141. *See* TEX. FAM. CODE ANN. § 54.02 (Vernon Supp. 1988). While the Family Code does not explicitly state there is no right to a jury at the release/transfer hearing, the nature of the hearing and specific language in the statute make it clear there is no right to a jury. The hearing is much like a hearing to consider discretionary transfer to criminal court. *See id.* Reports from consultants can be considered by the court, as well as written reports and evaluations from the Texas Youth Commission or other agencies. *Id.* §§ 54.11(d)-.11(e). The Family Code provides that such documents cannot be viewed by a jury "at any time." *Id.* § 54.03(d) (Vernon 1986). It is "the court" that makes the decision at the conclusion of the hearing. Finally, "the court" is instructed by statute to consider certain criteria in making the decision. *See id.* §§ 54.11(i)-(j) (Vernon Supp. 1988).

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

143. *See supra* note 141.

much like those it must consider in a pre-adjudication transfer hearing:

> [T]he court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.[144]

The juvenile court is not required to find probable cause, since the juvenile has already been adjudicated using the beyond a reasonable doubt standard of proof.[145]

Because a juvenile kept in the juvenile system and handled under the determinate sentence law receives both less exposure to liability and the same transfer hearing that a juvenile transferred to criminal court receives, this equal protection claim should be rejected.

2. As Compared to Conventional Delinquency Proceedings

Undeniably, the juvenile whom the prosecutor has elected to proceed against under the determinate sentencing law is comparatively worse off than he would have been had he been proceeded against under conventional delinquency proceedings. Under conventional proceedings, the maximum confinement would have been until age 21,[146] while under the determinate sentence scheme, he could receive a sentence anywhere in the range of one to thirty years.[147] While the sentence under the determinate sentence statute could actually be shorter than under conventional delinquency provisions, realistically, it is much more likely to be longer. This equal protection claim is much like that of a transferred juvenile complaining of his treatment compared to a juvenile who is not eligible to be transferred to criminal court.

The test will be whether the legislature's decision to isolate the six covered offenses for special treatment was a reasonable one. Capital

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144. TEX. FAM. CODE ANN. § 54.11(j) (Vernon Supp. 1988).

145. *See id.* § 54.03(f) (Vernon 1986).

146. *See supra* note 7.

147. *See* TEX. FAM. CODE ANN. § 54.04(d)(3) (Vernon Supp. 1988).

murder, of course, stands by itself as the only capital felony.[148] Each of the other five offenses is a first degree felony,[149] but so are other offenses, such as burglary of a habitation [150] and aggravated robbery.[151] Unlike the six covered offenses, burglary of a habitation need not involve violence or threatened violence to the victim,[152] and that should be a sufficient rational basis for excluding it from the determinate sentencing scheme.

Aggravated robbery, while involving violence or threatened violence to the victim,[153] differs from the six covered offenses in the extent of violence that must be shown to support a charge. Aggravated robbery can be committed by placing another in fear of imminent bodily injury by exhibiting a deadly weapon during the course of committing theft.[154] Capital murder and murder each require actual violence resulting in the death of the victim.[155] Attempted capital murder differs only in that the effort to cause death was not successful.[156] Similarly, deadly assault requires the actual infliction of serious bodily injury with a deadly weapon.[157] Ordinarily, the violence associated with aggravated robbery can be stopped if the victim relinquishes possession of the property that is the target of the offense, while the extent and duration of violence associated with aggravated kidnapping[158] and aggravated sexual assault,[159] because of the nature

148. *See* TEX. PENAL CODE ANN. § 19.03(b) (Vernon 1974).

149. *See id.* § 19.02 (Vernon 1974)(murder); § 20.04 (Vernon 1974)(aggravated kidnapping); § 22.021 (Vernon Supp. 1988)(aggravated sexual assault); § 22.03 (Vernon Supp. 1988)(deadly assault on law enforcement or corrections officer, member or employee of Board of Pardons and Paroles, or court participant); and § 15.01 (Vernon Supp. 1988)(attempted capital murder).

150. *See id.* § 30.02(d) (Vernon 1974).

151. *See id.* § 29.03(b).

152. *See id.* § 30.02(a).

153. *See id.* § 29.03(a).

154. *See id.* §§ 29.02(a)(2), .03(a)(2). We normally think of a deadly weapon as being a firearm, but the Texas Penal Code defines it more broadly to include "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 1.07(a)(11)(B).

155. *See id.* §§ 19.02, .03.

156. *See id.* § 15.01(a) (Vernon Supp. 1988).

157. *See id.* § 22.03(a).

158. *See id.* § 20.04 (Vernon 1974)(abduction with intent to hold for reward, use as shield, facilitate commission of felony, inflict bodily injury or sexual abuse, terrorize, or interfere with governmental function).

159. *See id.* § 22.021 (Vernon Supp. 1988).

of those offenses,[160] is of much greater seriousness.

Therefore, it was reasonable for the legislature to identify those six offenses, and only those six offenses, for special treatment because of the common thread of serious violence necessarily a part of each offense.

C. *Right to Grand Jury Indictment*

The Texas Constitution provides that "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary . . . ."[161] Determinate sentencing proceedings are initiated by the prosecutor referring the case to the grand jury.[162] The Family Code provides that the grand jury is to consider the referral in the same manner as a request for an indictment:

> (a) A grand jury may approve a petition submitted to it under this section by a vote of nine members of the grand jury in the same manner that the grand jury votes on the presentment of an indictment.
> (b) The grand jury has all the powers to investigate the facts and circumstances relating to a petition submitted under this section as it has to investigate other criminal activity but may not issue an indictment unless the child is transferred to a criminal court as provided by Section 54.02 of this code.
> (c) If the grand jury approves of the petition, the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case. For the purpose of the transfer of a child to the Texas Department of Corrections as provided by Section 61.084(c), Human Resources Code, a juvenile court petition approved by a grand jury under this section is an indictment presented by a grand jury.[163]

Thus, it is clear that the juvenile proceeded against under the determinate sentencing law has the same substantive and procedural rights as

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160. Aggravated kidnapping requires that the actor abduct another. *See* TEX. PENAL CODE ANN. § 20.04(a) (Vernon 1974). "Abduction" is defined as restraining the other with intent to prevent liberation. *See id.* § 20.01(2). "Restrain" is, in turn, defined as "to restrict a person's movements without consent, so as to interfere substantially with his liberty, by moving him from one place to another or by confining him." *Id.* § 20.01(1). Aggravated sexual assault requires penetration or sexual contact. *See id.* § 22.021(a) (Vernon Supp. 1988).

161. TEX. CONST. art. I, § 10.

162. *See* TEX. FAM. CODE ANN. § 53.045(a) (Vernon Supp. 1988).

163. *Id.* § 53.045(b), (c), (d)(under section (d), petition approved by grand jury is indictment).

one whose case is presented to a grand jury for indictment. The resulting document—a petition approved by the grand jury—is an indictment in all aspects but its name.

Further, under the 1985 amendment to the Texas Constitution a delinquency petition approved by the grand jury is an indictment as required by the Texas Constitution.[164] Prior to 1985, the Texas Constitution imposed formal requirements that would have precluded juvenile delinquency petitions from being indictments: "All prosecutions shall be carried on in the name and by authority of the State of Texas, and shall conclude: 'Against the peace and dignity of the State.' "[165] In 1985, the voters approved a constitutional amendment that effectively left it to the legislature to specify the contents of an indictment. The Texas Constitution now reads:

> An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense. The practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment of an indictment or information to a court invests the court with jurisdiction of the cause.[166]

Indeed, under this amendment a juvenile court petition presented to the juvenile court by a prosecuting attorney[167] and approved by the grand jury is both an indictment and an information. As such, it should satisfy any requirements imposed by the Texas Constitution.[168]

V. HOUSE BILL 682 AND THE FEDERAL JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT

Congress enacted the Juvenile Justice and Delinquency Prevention

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164. TEX. CONST. art. V, § 12 (1891, amended 1985)(Senate Joint Resolution 16 of the 69th Leg. was approved by the voters November 5, 1985).

165. *Id.*

166. *Id.*

167. *See* TEX. FAM. CODE ANN. § 53.045(a) (Vernon Supp. 1988).

168. The language in section 53.045(d) of the Family Code that "a juvenile court petition approved by a grand jury under this section is an indictment presented by a grand jury", *Id.*, *see also* text accompanying note 163, is a legislative implementation of the constitutional authorization that "the practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency and requisites, are as provided by law." TEX. CONST. art. V, § 12(b); *see also* text accompanying note 164.

Act in 1974.[169] Under the Act, the Office of Juvenile Justice and Delinquency Prevention of the Department of Justice makes federal money available to states for improving their juvenile justice systems. During the fiscal year ending September 30, 1987, the State of Texas received $3,098,000 under this program.[170]

Among the Congressional findings that preamble the Act is the observation that the juvenile justice system should give additional attention to the problem of juveniles who commit serious crimes, with particular attention given to the areas of sentencing, providing resources necessary for informed dispositions, and rehabilitation.[171] The Act defines a "serious crime" as criminal homicide, forcible rape or other sex offenses punishable as a felony, mayhem, kidnapping, aggravated assault, robbery, burglary or breaking and entering, extortion accompanied by threats of violence, and arson punishable as a felony.[172]

The federal government has a few simple requirements that a state must meet in order to receive the federal funds. The Act requires states who wish to participate in federal funding to submit state plans for juvenile rehabilitation to the federal government.[173] Among other requirements, the state plan must include

> advanced techniques . . . to provide programs for juveniles, including those processed in the criminal justice system, who have committed serious crimes, particularly programs which are designed to improve sentencing procedures, provide resources necessary for informed dispositions, provide for effective rehabilitation, and facilitate the coordination of services between the juvenile justice and criminal justice systems.[174]

The federal emphasis upon serious crimes is further explained in the regulations[175] implementing the Act:

> [T]he Office [of Juvenile Justice and Delinquency Prevention] encour-

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169. Juvenile Justice Delinquency and Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974); Pub. L. No. 96-509, 94 Stat. 2750 (1980)(codified as amended at 42 U.S.C. §§ 5601-5672 (1982)).

170. STATE OF TEXAS, FISCAL YEAR 1987 FORMULA PLAN AND APPLICATION FOR JUVENILE JUSTICE ACT FORMULA GRANT FUNDS, STANDARD FORM 421 (Dec. 19, 1986).

171. *See* 42 U.S.C. § 5601(a)(8) (1982).

172. *See id.* § 5603(14).

173. *See id.* § 5633.

174. *Id.* § 5633(a)(10) (1982).

175. 28 C.F.R. §§ 31.1-31.403 (1987).

> ages States that have identified serious and violent juvenile offenders as a priority problem to allocate formula grant funds to programs designed for serious and violent juvenile offenders at a level consistent with the extent of the problem as identified through the State planning process. Particular attention should be given to improving prosecution, sentencing procedures, providing resources necessary for informed dispositions, providing for effective rehabilitation, and facilitating the coordination of services between the juvenile justice and criminal justice systems.[176]

Each of the six covered offenses in House Bill 682 is a serious crime under the federal definition. Capital murder, murder, aggravated sexual assault and aggravated kidnapping are explicitly included in the federal definition.[177] Attempted capital murder and deadly assault on a law-enforcement officer, corrections officer or court participant are each forms of aggravated assault under the federal definition.[178]

However, in addition to mandating that special attention be paid to the problem of the serious juvenile offender, the Act also provides for the separation of juvenile and adult offenders. A state plan must "provide that juveniles alleged to be or found to be delinquent . . . shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges."[179]

Further, federal regulations preclude one possible method of responding to the commission of serious crime by juveniles; that is, administrative transfer from a juvenile to an adult correctional facility. Regulations require state plans to:

> assure that adjudicated offenders are not reclassified administratively and transferred to an adult (criminal) correctional authority to avoid the intent of segregating adults and juveniles in correctional facilities. This does not prohibit or restrict waiver of juveniles to crimial court for prosecution, according to State law. It does, however, preclude a State from administratively transferring a juvenile offender to an adult correctional authority or a transfer within a mixed juvenile and adult facil-

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176. *Id.* § 31.303(b).

177. *See supra* text accompanying note 172.

178. *Id.* In addition to enacting House Bill 682, the Texas legislature in 1987 concurred with the federal concern over the commission of serious juvenile offenses by directing the Texas Youth Commission in its reception study of each committed juvenile "to identify recidivists or other children who may need long-term residential care." TEX. HUM. RES. CODE ANN. § 61.071, *amended by* Act of June 20, 1987, ch. 1099, § 31, 1987 Tex. Sess. Law Serv. 7519 (Vernon)(effective Sept. 1, 1987).

179. 42 U.S.C. § 5633(a)(13) (1982).

> ity for placement with adult criminals either before or after a juvenile reaches the statutory age of majority. It also precludes a State from transferring adult offenders to juvenile correctional authority for placement.[180]

Does the provision in House Bill 682 permitting the juvenile court, after notice and a hearing, to transfer one given a determinate sentence to the Texas Department of Corrections at age 18[181] violate this federal regulation? Obviously, the Texas legislature wished not to jeopardize federal funding and was cognizant of the requirements of federal law when House Bill 682 was drafted.

First, the Texas statute does not literally come within the federal prohibition. The federal regulation deals with the administrative transfer of an adjudicated delinquent from a juvenile to an adult correctional institution. Texas law prohibits adminstrative transfer but authorizes judicial transfer.[182] Statutes in other states have authorized administrative transfers to adult correctional institutions as one of the disciplinary remedies available to administrators of juvenile institutions when a resident disrupted the program.[183] Often, there was no right to notice and a hearing, or a provision for only a very cursory hearing before transfer to the adult institution.[184] Clearly, those statutes and practices would come within the federal prohibition. The Texas statute, by contrast, carefully provides for notice and procedural due process rights for the juvenile. Further, the decision to transfer is made by the juvenile court, not an administrative agency, and must be made under criteria provided by statute.[185] Finally, appellate review of the correctness of the juvenile court's transfer decision is available.[186] These procedural protections were usually missing from the traditional administrative transfer statutes that were the target of the federal regulations.

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180. 28 CFR § 31.303(d)(1)(v) (1987).

181. TEX. FAM. CODE ANN. § 54.11. (Vernon Supp. 1988).

182. *See id.* § 51.13(c).

183. *See* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (Children's Bureau Pub. No. 415, 1964); Dawson, *Delinquent Children and Children in Need of Supervision: Draftman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH L. REV. 509, 532 (1974).

184. *See, e.g., In re* Rich, 216 A.2d 266, 268 (Vt. 1966)(hearing not criminal in nature).

185. *See* TEX. FAM. CODE ANN. § 54.11(j) (Vernon Supp. 1988).

186. *See id.* § 56.01(c)(2). The appellate court may modify the juvenile court's transfer decision on abuse of discretion grounds without a showing that an error was made in the proceedings. *See* Tex. Fam. Code Ann. § 56.01(i) (Vernon 1986).

Second, the Texas statute comes within an exception to the prohibition on commingling juveniles with adults recognized by federal authorities. After a juvenile court transfers a juvenile to criminal court for prosecution, federal law permits that person to be incarcerated with adults or with juveniles:

> Juveniles waived or transferred to criminal court, who retain their juvenile status, are members of neither group or category [juvenile offender or criminal offender] subject to the . . . prohibition [of 42 U.S.C. § 5633(a)(13)]. Therefore, such juveniles may be detained or confined in institutions where they have regular contact with either group or category covered by the prohibition. They are a "swing group" of individuals who can be placed with whomever the legislature or the courts deem appropriate based on treatment, rehabilitation, or other relevant considerations.[187]

It seems clear, therefore, that the Texas legislature could have taken the same six offenses covered by House Bill 682 and provided for transferring juveniles to criminal court for those offenses. After conviction in criminal court, those transferred juveniles could have been initially confined in the Texas Youth Commission with provision for transfer to the Texas Department of Corrections at age 18. Such a statute would clearly be permissible under federal regulations because the transferred juveniles would be a "swing group" under those rules. Thus, the same result would have been obtained, with one exception: the transferred juvenile would have been convicted of a felony, with all the adverse collateral consequences such a status entails,[188] rather than being adjudicated a delinquent, which, carries significantly fewer adverse legal consequences as well as substantially less social stigma. That, by itself, argues that House Bill 682 juveniles should be treated under federal law as within the same "swing group" as juveniles transferred to criminal court for prosecution.

However, there is another element to the argument. The federal "swing group" concept was expanded in 1982 to include juveniles who are handled in criminal court not because of a discretionary

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187. Legal Opinion Letter from John J. Wilson, Attorney-Advisor, Office of General Counsel to Mr. Joe Higgins, Arizona State Justice Planning Agency, April 25, 1983. *See* Legal Opinion Memorandum from John J. Wilson, Acting General Counsel to Charles A. Lauer Acting Administrator, Office of Juvenile Justice and Delinquency Prevention, January 5, 1982 (to same effect); *see also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MONITORING POLICIES & PROCEDURES MANUAL: POLICY 23 (undated).

188. *See supra* text accompanying notes 103-04.

transfer decision by a juvenile court judge, but because a prosecutor has elected to charge them directly in criminal court without prior juvenile court action. Under the District of Columbia Code, a prosecutor may charge a 16 year old with murder or certain other serious offenses directly in criminal court or may file the case in juvenile court. The decision is solely one for the prosecutor to make administratively and does not allow for participation by the juvenile court nor provide the defendant with an opportunity for a hearing.[189] The Office of Juvenile Justice and Delinquency Prevention concluded that a 16 year old charged directly in criminal court with murder and convicted of that charge could thereafter be confined either with adults or with juveniles—that he, too, was a member of the "swing group." It would be an absurd formalism to permit such a person to be confined with juveniles, but not to permit a person handled under House Bill 682 to be confined with adults upon reaching age 18.

Unless one attributes magical powers to the label which is attached to an adjudiciation—crime vs. delinquency—one must conclude that the major purpose of the federal segregation requirement is to protect younger offenders from being incarcerated with older offenders. Hence, state authorities are allowed to treat members of the chronologically-median "swing group" as either an adult or a juvenile. House Bill 682 is intended to do exactly that; it keeps the adjudicated offender with persons his own age throughout the correctional process, thereby protecting him from exploitation by others and others from him. Only when he reaches age 18, only when he outgrows the juvenile system, can he be transferred to an adult facility where he will be confined once again with persons his own age.[190] Thus, House Bill 682 does exactly what the segregation requirements are intended to accomplish, and does it much better than the traditionally-permissible alternative of transfer to criminal court and confinement in an adult penal institution with older criminals.

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189. *See* D.C. CODE ANN. § 16-2301(3)(A) (1981); *see also* United States v. Bland, 472 F.2d 1329, 1330 (1972)(prosecutional discretion does not violate due process).

190. On August 31, 1986, only 17 (0.04%) inmates in the Texas Department of Corrections were under the age of 17, while 6,716 (18.03%) were between the ages of 17 and 22. *See* TEXAS DEPARTMENT OF CORRECTIONS, 1986 ANNUAL OVERVIEW 59 (undated). Almost nobody in the Texas Youth Commission is over the age of 18. On August 31, 1987, only 7 juvenile students (0.06%) in TYC institutions were 18 years of age or older. About 2 % of the 2327 parolees of the TYC were 18 years of age or older. *See* TEXAS YOUTH COMMISSION, QUARTERLY PROGRAM EVALUATION REPORT: FOURTH QUARTER/FY'87 4 (undated).

VI. WORKING WITH THE NEW SYSTEM

Legislation provides the legal framework for a system of justice, but it determines few of its details. That task is deliberately left by the legislature to courts and officers of the executive branch. Yet, how details are handled can have an important impact on the success and, sometimes, even the validity of a statutory framework. It is, therefore, imperative at the outset of new legislation to examine as many details as possible to guide public officials in working with a new system. The objective of such an examination is to make the statutory scheme work to achieve its purposes and to avoid, if possible, abuses that might arise. That is the purpose of this section. Here, we shall take a juvenile case through the new system step-by-step, examining the questions that are certain to arise when actual cases are handled.

A. *Scope of the Legislation*

The effective date of House Bill 682 was September 1, 1987.[191] It applies "only to offenses and conduct occurring on or after its effective date . . . . [A]n offense or delinquent conduct based on an offense occurs on or after the effective date if all the elements of the offense occur on or after the effective date."[192] If the offense or any of its elements occur before September 1, 1987, the prior law governs.[193]

Only six of the most serious felony offenses are covered by the legislation: (1) murder, (2) capital murder, (3) aggravated kidnapping, (4) aggravated sexual assault, (5) deadly assault on a law enforcement officer, corrections officer, or court participant, or (6) criminal attempt if the attempted offense was capital murder.[194]

Capital murder committed by an adult is punishable by death or by life imprisonment.[195] The death penalty is not available for a transferred juvenile convicted of capital murder.[196] The only punishment available in that circumstance is life imprisonment.[197] Under adult law, each of the remaining five offenses is a first degree felony. For an

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191. *See* Act of June 17, 1987, ch. 385, § 21, 1987 Tex. Sess. Law. Serv. 3780 (Vernon)(effective Sept. 1, 1987).

192. *Id.* § 20(a).

193. *See id.* § 20(b).

194. *See* TEX. FAM. CODE ANN. § 53.045(a) (Vernon Supp. 1988); *see also* TEX. PENAL CODE ANN. §§ 19.02, .03 .04, 22.021, .03, 15.01 (Vernon 1974).

195. *See* TEX. PENAL CODE ANN. § 12.31(a) (Vernon 1974).

196. *See id.* § 8.07(d) (Vernon Supp. 1988).

197. *See* Allen v. State, 552 S.W.2d 843, 845 (Tex.Crim.App. 1977).

adult (or transferred juvenile), each is punishable by confinement for any term of years of not more than ninety-nine nor less than five, or for life.[198] In addition, a fine of up to $10,000 may be imposed.[199] Fines are not authorized for juvenile offenders.

An adult convicted of capital murder is not eligible to receive probation.[200] In any other case, the jury may grant probation if it assesses a punishment of ten years or less and the defendant has never been convicted of a felony.[201] While a judge may grant probation to a defendant who has a prior felony conviction, he may not grant probation for aggravated kidnapping or aggravated sexual assault, or if he makes a finding that the defendant used or exhibited a deadly weapon during the commission of the offense.[202]

In contrast, under this legislation, if the respondent is adjudicated delinquent for one of these six offenses, the juvenile court or jury may sentence the respondent to a term of years up to thirty years confinement.[203] Alternatively, the juvenile court or jury may grant probation.[204] If probation is granted, the initial term is set by law at one year but can be extended by the juvenile court one year at a time[205] until the respondent becomes 18 years of age, when he must be discharged from the system.[206]

Most of the proposed changes in the transfer section of the Family Code would have lowered the minimum transfer age to 13.[207] Under this legislation, however, there is no specified minimum age. Therefore, the Family Code's minimum age of 10 applies.[208] It is, thus, possible but highly unlikely for a 10 year old to receive a sentence of thirty years incarceration for the commission of one of the covered offenses.[209]

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198. *See* TEX. PENAL CODE ANN. § 12.32(a) (Vernon Supp. 1988).

199. *See id.* § 12.32(b).

200. *See* TEX. CRIM. PROC. CODE ANN. art. 42.12, §§ 3, 3g(a)(1)(A) (Vernon Supp. 1988).

201. *See id.* § 3a.

202. *See id.* § 3g(a).

203. *See* TEX. FAM. CODE ANN. § 54.04(d)(3) (Vernon Supp. 1988).

204. *See id.* § 54.04(d)(1).

205. *See id.*

206. *See id.* § 54.05(b).

207. *See supra* text accompanying notes 28-45.

208. *See* TEX. FAM. CODE ANN. § 51.02(1)(a) (Vernon 1986).

209. During the floor debate in the House on whether the House should concur in Senate amendments to House Bill 682 that substituted the determinate sentencing system for the orig-

B. *Initiating Proceedings under the Legislation*

The first requirement for initiating proceedings under the statute is that a delinquency petition must have been filed in juvenile court.[210] Ordinary Family Code standards for such a petition[211] and the requirements of notice must be observed.[212] The delinquency petition must allege at least one of the six covered offenses.[213]

Next, the prosecuting attorney in the juvenile court decides whether to pursue the case as an ordinary delinquency case or to invoke the special procedures of the legislation.[214] This decision is totally at the discretion of the prosecutor's office. If the prosecutor decides to invoke the statute, he does so by presenting the delinquency petition "to the grand jury of the county in which the court in which the petition is filed presides."[215]

The role of the grand jury is to decide, at its discretion, whether to approve the petition. The Family Code provides that "a grand jury may approve a petition submitted to it under this section by a vote of nine members of the grand jury in the same manner that the grand jury votes on the presentment of an indictment."[216] The Code of Criminal Procedure requires a vote of nine members of a grand jury

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inal proposal to lower the transfer age to 13, Representative Al Granoff argued that the House not concur in the Senate amendments:

> The bottom line is simple, and it's this, that this bill as written would allow a 10 year old to get a 30 year sentence. Now, let me repeat that. This bill would allow a 10 year old, 11 year old or 13 year old to get a 30 year sentence . . . . I don't think that's the intent of this body, and I frankly am having a hard time believing it was the intent of the Senate . . . . I don't think that we should even consider the concept that a 10 and 11 year old can get a 30 year sentence, where the first part is TYC and the next part is TDC.

Debate on Tex. H.B. 682 on the Floor of the House, 70th Leg. (May 27, 1987)(copy on file with the *St. Mary's Law Journal)*. Representative Granoff's motion to reject the Senate amendments and send the bill to a conference committee was defeated. H.J. OF TEX., 70th Leg., Reg. Sess. 3673 (1987).

210. *See* TEX. FAM. CODE ANN. §§ 53.04(a) (Vernon 1986), 53.045(a) (Vernon Supp. 1988).

211. *See id.* § 53.04(d) (Vernon 1986).

212. *See id.* §§ 53.06, .07.

213. *Id.* § 53.045(a) (Vernon Supp. 1988).

214. If the respondent was 15 or 16 years of age at the time of the alleged offense, the prosecutor has the additional alternative of filing a petition or motion seeking discretionary transfer to criminal court for prosecution as an adult. *Id.* § 54.02; *see also supra* text accompanying notes 379-89.

215. TEX. FAM. CODE ANN. § 53.045(a) (Vernon Supp. 1988).

216. *Id.* § 53.045(b).

to authorize the filing of an indictment.[217]

The Family Code specifies the grand jury's powers:

> The grand jury has all the powers to investigate the facts and circumstances relating to a petition submitted under this section as it has to investigate other criminal activity but may not issue an indictment unless the child is transferred to a criminal court as provided by Section 54.02 of this code.[218]

Under the Code of Criminal Procedure, the grand jury may subpoena witnesses to testify before it.[219] If a witness refuses to testify, without a privilege to refuse, he can be held in contempt of the district court that assembled the grand jury and fined, or confined until he is willing to testify.[220] While the grand jury can seek to question a suspect or the accused,[221] he possesses a privilege against compelled self-incrimination which, if asserted in response to questioning, would preclude his being held in contempt for refusing to answer the grand jury's questions. A suspect or the accused has no right to be present during the presentation of testimony before a grand jury, or even any right to be informed that evidence involving him is being or will be presented.[222] The grand jury has discretion whether to permit a suspect or accused to testify before it or to permit the presentation of other witnesses, evidence or information on behalf of the suspect or accused.[223] All grand jury proceedings are secret.[224]

If nine members of the grand jury do not vote to approve the petition, then the prosecuting attorney has choices to make. First, he can either proceed with the petition as an ordinary delinquency case, with the limits on the system's control that apply in such cases.[225] Second, he can present the same petition to the same grand jury or to a different grand jury to seek its approval. This option is the same the prosecutor has to re-present an indictment to a grand jury when it was not

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217. *See* TEX. CODE CRIM. PROC. ANN. art. 20.19 (Vernon 1977).

218. TEX. FAM. CODE ANN. § 53.045(c) (Vernon Supp. 1988).

219. *See* TEX. CODE CRIM. PROC. ANN. art. 20.10 (Vernon 1977).

220. *See id.* at art. 20.15.

221. *Id.* at art. 20.17.

222. *See* Moczygemba v. State, 532 S.W.2d 636, 638 (Tex. Crim App. 1976).

223. *See, e.g.*, Moczygemba v. State, 532 S.W.2d 636, 638 (Tex. Crim. App. 1976)(holding that accused had no right to appear in person, to be represented by counsel, or to confront witnesses).

224. TEX. CODE CRIM. PROC. ANN. arts. 20.02, .16 (Vernon 1977).

225. *See supra* text accompanying note 146.

approved upon initial presentation.[226] Third, if the respondent was 15 or 16 years of age at the time of the offense, he has the option of filing in the juvenile court a petition or motion for a hearing in which the juvenile court would consider discretionary transfer to criminal court.[227] The time restrictions on pretrial proceedings imposed by the Family Code would apply, including the requirement of review (every 10 days) by the juvenile court of the need for continued detention of the respondent.[228]

A grand jury is authorized to approve the return of an indictment against an adult only if it finds probable cause to believe the accused is guilty of a criminal offense.[229] The Family Code requires a grand jury that has been presented with a juvenile petition to vote on it "in the same manner that the grand jury votes on the presentment of an indictment."[230] The Family Code also provides that for purpose of transfer of an 18 year old from the Texas Youth Commission to the Texas Department of Corrections "a juvenile court petition approved by a grand jury . . . is an indictment presented by the grand jury."[231] While the Family Code does not specifically require that the grand jury find probable cause to believe that the respondent is guilty of one of the covered offenses alleged in the petition in order to approve it, the grand jury should be instructed that it may approve the petition only if it finds probable cause, since the purpose of grand jury review of the petition is to provide the respondent with all the rights he would possess as an accused in criminal court. Its finding of probable cause should be reflected in its document of approval.

If nine members of the grand jury vote to approve the petition, then

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226. Double jeopardy principles do not prevent the prosecutor from re-presenting a case to a new grand jury after a grand jury has refused to approve it because jeopardy has not yet attached to the proceedings. *See Ex parte* Myers, 618 S.W.2d 365, 368 (Tex. Crim. App. 1981)(jeopardy attaches when trial jury is assembled and sworn). Similarly, neither jeopardy nor collateral estoppel principles prevent a grand jury from returning an indictment after a magistrate has found in an examining trial there was not probable cause in the case. *Ex parte* Robinson, 641 S.W.2d 552, 556 (Tex. Crim. App. [Panel Op.] 1982).

227. *See* TEX. FAM. CODE ANN. § 54.02 (Vernon Supp. 1988).

228. *See id.* § 54.01(h) (Vernon 1986).

229. *See* Brown v. State, 475 S.W.2d 938, 946 (Tex. Crim. App. 1971)("[T]he return of a true bill by the grand jury satisfies the principal purpose and justification for such preliminary hearing—that there is probable cause to believe the accused committed the crime charged."); *see also* Russell v. State, 604 S.W.2d 914, 921 (Tex. Crim. App. [Panel Op.] 1980)(jury determines probable cause exists, then justification for examining trial ends).

230. TEX. FAM. CODE ANN. § 53.045(b) (Vernon Supp. 1988).

231. *Id.* § 53.045(d).

"the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case."[232] The grand jury's approval of the petition should be a separate document that identifies and makes reference to the petition. It should be signed by the foreman, as in the case of an indictment,[233] and returned to the district court that formed the grand jury, just as in the case of an indictment.[234] The district clerk then certifies the grand jury's action to the juvenile court in which the petition was filed. Once the certification is received and filed by the juvenile court, the special proceedings have been initiated.[235]

Is it legally permissible for the child or his attorney to waive the child's right to grand jury approval of the petition? In adult criminal proceedings, the Code of Criminal Procedure permits the accused to waive his right of grand jury consideration of whether he will be charged with a felony by indictment.[236] Waiver of the Texas constitutional right to grand jury indictment for a felony was upheld by the Texas Court of Criminal Appeals in *King v. State*.[237] As the court in *King* noted, in smaller counties in Texas grand juries are not continuously in session.[238] A person arrested for a felony who is unable to be released on bond might be required to spend several months in jail awaiting the empaneling of the next grand jury.[239] He might rationally wish to waive that right and proceed with the disposition of his case in district court.[240] Of course, the same circumstances can exist

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232. *Id.*

233. *See* TEX. CODE CRIM. PROC. ANN. art. 20.20 (Vernon 1977).

234. *See id.* art. 20.21.

235. *See* TEX. FAM. CODE ANN. § 53.045(d) (Vernon Supp. 1988). Appendix A to this article contains a suggested form for grand jury approval of a juvenile petition and for a district clerk's certification to the juvenile court of that approval.

236. TEX. CODE CRIM. PROC. ANN. art. 1.141 (Vernon 1977).

237. 473 S.W.2d 43 (Tex. Crim. App. 1971).

238. *See id.* at 51.

239. *See id.*

240. *See id.* The court in *King* stated that

> [u]nder the practice that has prevailed every experienced member of the bench and bar knows and the records before this court reflect that in our smaller populated counties an accused unable to make bail and desirous of a speedy trial must languish in jail sometimes for months awaiting the empaneling of the next grand jury. Even though an accused wanted to pay his debt to society and the trial court was available, the court was powerless to act without a grand jury indictment. Neither deterrence of crime or rehabilitation of the accused was served. Even in our more heavily populated counties, i.e., Harris County, it has been necessary to keep three or four grand juries serving concurrently in

when the accused is a juvenile whose case the prosecutor intends to refer to the grand jury for approval of the petition.

The right to grand jury scrutiny of the petition is clearly a right granted to the child for the protection and benefit of the child. Section 51.09(a) of the Family Code provides: "Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title . . . may be waived in proceedings under this title . . ." if certain formal requirements, including concurrence in the waiver by the child's attorney, are met.[241] Because the right to grand jury scrutiny of the petition is granted by section 53.045 of the Family Code, which is part of Title 3, and because there is nothing in Title 3 to indicate that the legislature intended this to be a nonwaivable right, the child and his attorney are permitted to waive grand jury consideration of the case if the requirements of section 51.09(a) are met.[242]

In adult criminal proceedings, if indictment is waived under the Code of Criminal Procedure, the prosecutor is authorized to file a felony information.[243] In juvenile proceedings, because a petition has already been filed in juvenile court, the waiver of grand jury consideration authorizes the juvenile court to proceed to the adjudication hearing without the requirement that the state file further pleadings. The executed written waiver should be filed with the petition, just as a certification of grand jury approval of the petition would have been filed.[244]

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various district courts in view of the volume of cases to be processed. And even this does not eliminate all delay.

Id.

241. TEX. FAM. CODE ANN. § 51.09(a) (Vernon 1986). This section 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.

Id.

242. The Court of Criminal Appeals has upheld a waiver of the right of a transferred juvenile to a mandatory examining trial so long as the waiver conforms to the requirements of Section 51.09(a). *See* Criss v. State, 563 S.W.2d 942, 945 (Tex. Crim. App. [Panel Op.] 1978).

243. TEX. CODE CRIM. PROC. ANN. art. 1.141 (Vernon 1977).

244. *See* TEX. FAM. CODE ANN. § 53.045(d) (Vernon Supp. 1988). Appendix B to this article contains a suggested form for waiver of grand jury approval of a delinquency petition.

C. *Adjudication Proceedings*

Adjudication proceedings should be scheduled as promptly as possible.[245] Only certain judges can conduct hearings under these special proceedings. The juvenile court referee cannot hear these cases even if everyone agrees to his doing so.[246] A county court sitting as a juvenile court does not have jurisdiction to conduct these special proceedings because many county judges are not attorneys.[247] If the grand jury has approved a petiton under the Family Code in a juvenile case presided over by a county judge, that judge should accept the certification and immediately transfer the case to the court in the county that has also been designated the juvenile court, as required by the Family Code, for adjudication proceedings.[248] A county court that has been designated as a juvenile court can continue to conduct detention hearings even after the approved petition has been certified to its court and the case transferred to another court for adjudication proceedings.[249] Any district court, criminal district court, family district court or county court-at-law that has been designated as a juvenile court may hear a case in which the petition has been approved by the grand jury.[250]

All juvenile respondents have a right to a trial by jury in adjudication hearings, which may be waived by the respondent and his attorney under the Family Code.[251] All jury verdicts must be unanimous.[252] In ordinary delinquency adjudication hearings, the size of the jury depends upon whether the court sitting as juvenile court is a district or county court. Twelve person juries are used by district courts; six person juries are use by county courts.[253] However, when a jury is hearing evidence on an approved petition, the jury must consist of twelve persons.[254] The Family Code provides:

If a provision of this title requires a jury of 12 persons, that provision

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245. *Id.* § 53.05 (Vernon 1986).

246. *See id.* § 54.10(c) (Vernon Supp. 1986).

247. *Id.* § 51.04(c). This prohibition applies to all county courts, even those presided over by judges who are lawyers. *See id.*

248. *See id.*

249. *See id.* § 51.04(f) (Vernon 1986).

250. *See id.* § 51.04(b), (c) (Vernon Supp. 1988).

251. *See id.* § 51.09(a).

252. *Id.* § 54.03(c).

253. *See In re* A.N.M., 542 S.W.2d 916, 918 (Tex. Civ. App.—Dallas 1976, no writ).

254. TEX. FAM. CODE ANN. § 54.03(b) (Vernon Supp. 1988).

> prevails over any other law that limits the number of members of a jury in a particular county court at law. The state and the defense are entitled to the same number of peremptory challenges allowed in a district court.[255]

The reason for this requirement is that a criminal defendant charged with a felony is entitled to a jury of twelve and a first principle of the legislation creating these special proceedings is to grant a juvenile respondent all the rights he would have enjoyed had he been charged with the same offense in criminal court. The reference in the code to peremptory challenges is, by the same reasoning, a reference to such challenges in criminal, not civil, trials in district courts.[256]

The same requirement of proof beyond a reasonable doubt applies as in any other adjudication hearing.[257] The same prohibitions on the use of illegally obtained evidence, requirements of corroboration of the testimony of an accomplice, apply to these hearings as well.[258]

More than one allegation can be presented to the jury if there is sufficient evidence to support a verdict for the state on each of them. The juvenile court or jury must specify in its finding or verdict which allegations in the petition are found to have been proved by the state.[259] The judge or jury must find for the state on at least one of the covered offenses that has been submitted to it in order to authorize

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255. *Id.* § 51.045.

256. In non-capital felony cases, each side has 10 strikes unless two or more defendants are being tried jointly, in which case each defendant has 6 strikes and the state has 6 for each defendant. TEX. CODE CRIM. PROC. ANN. art. 35.15(b) (Vernon 1966). The system of strikes for non-capital felony cases applies in juvenile court even when the respondent is charged with capital murder. Unlike in criminal court, there is no difference in the punishment range for capital murder and the other five covered offenses. There is, therefore, no justification for using the special, elongated jury selection procedures that are required in capital cases because of the availability of the death penalty or mandatory life imprisonment. *See id.* at arts. 35.13, .15(a), .17 (statutes establishing separate voir dire procedure in capital cases).

In *Allen v. State*, 552 S.W.2d 843, 847 (Tex. Crim. App. 1977), the court held that capital murder jury selection procedures must be employed even when the defendant is a transferred juvenile who cannot receive the death penalty. This is because he is subjected to the (for him) uniquely severe punishment of mandatory life in the event of conviction. Under determinate sentencing proceedings, a juvenile adjudicated for capital murder faces the same range of punishment as any other juvenile adjudicated under the statute—one to thirty years. Therefore, *Allen* does not apply.

In civil cases in the district court, each side receives six strikes but the trial court has the obligation to equalize the number of strikes between sides to the litigation with a common interest. *See* TEX. R. CIV. P. 233.

257. *See* TEX. FAM. CODE ANN. § 54.03(f) (Vernon 1986).

258. *See id.* § 54.03(e).

259. *See id.* § 54.03(h).

the elongated control and other features of the special proceedings. If the court or jury finds against the state on all the covered offenses but finds for the state on a lesser included offense, or on a non-covered offense alleged and submitted, the case then proceeds as a conventional delinquency case. The jury should be discharged and the court should proceed with the disposition hearing.[260] If the court or jury finds for the state on one or more of the covered offenses, then a special dispositon hearing is the next procedural step.

What if the court or jury finds for the state on both a covered offense and a non-covered offense alleged in the petition? The juvenile court should conduct disposition proceedings on the non-covered offense and should make an appropriate disposition. The court or jury, as the case may be, should make a disposition under the special proceedings. It may be, therefore, that the respondent will be committed to the Texas Youth Commission separately for two or more offenses. That presents no problem, since the longer of the two dispositions would control. That would ordinarily be the determinate sentence under the special proceedings. There is no reason to preclude the juvenile court from making the ordinary delinquency disposition in the same hearing on the same evidence presented to it or a jury regarding a determinate sentence.[261]

D. *Special Disposition Hearing*

In a conventional delinquency proceeding, there is no right to a jury at the disposition hearing.[262] Whereas, in a criminal prosecution

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260. *See id.* § 54.04(d)(2).

261. In criminal proceedings, the trial court is empowered to use evidence admitted in a criminal trial to revoke probation on a motion alleging the offense on trial as a ground for revocation. *See* Cleland v. State, 572 S.W.2d 673, 676-77 (Tex.Crim App. 1978). In effect, there are two trials proceeding simulanteously—a criminal trial in which a jury is the finder of fact and a revocation hearing in which the finder of fact is the trial court. *See, e.g.*, Herndon v. State, 679 S.W.2d 520, 522 (Tex. Crim App. 1984)(after motion to revoke probation but before revocation of probation trial court must conduct hearing).

It is, of course, possible that the jury may award probation on a covered offense but the juvenile court may commit the respondent to the Texas Youth Commission for a non-covered offense. A juvenile court disposition of probation or commitment to the TYC for a non-covered offense may be meaningful even in the face of a lengthy jury determinate sentence if on appeal reversible error reaching only the determinate sentence proceedings is declared. In that event, the disposition of the court in the conventional delinquency proceeding would be undisturbed by such an appellate court holding.

262. *See* TEX. FAM. CODE ANN. § 54.04(a) (Vernon Supp. 1988)(no right to jury at disposition hearing).

for a non-capital felony, the defendant has the option of being sentenced by the judge or jury.[263] In keeping with the principle of providing to juvenile respondents under these special proceedings the same rights given to persons prosecuted for felonies, the legislature provided the respondent with a right to jury sentencing in these determinate sentence proceedings.[264]

As in criminal cases, the determinate sentencing legislation for juveniles contemplated that the same jury that sat at the adjudication hearing would determine the sentence,[265] the jury could in deciding disposition consider evidence it heard at adjudication, as well as, additional evidence, if any, received at the disposition hearing,[266] and the disposition hearing would begin as quickly as possible after concluding the adjudication hearing. The jury at disposition is restricted to hearing the testimony of witnesses in accordance with the Texas Rules of Civil Evidence.[267] It may not, under the Family Code, be given a "social history report or social service file."[268]

The respondent has the right under the Family Code to waive his right to have a jury determine his sentence and have the court do it instead.[269] However, unless the respondent waives his right to jury sentencing, a jury must determine the sentence. That is the same rule that applies in adjudication hearings under the Family Code.[270] The respondent, then, has the following choices: to waive jury altogether and go to the court for both the adjudication and disposition phases of the case; to have a jury trial on adjudication but waive jury on disposition; or to have a jury trial on both adjudication and disposition.[271]

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263. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07(e) (Vernon 1966).

264. *See* TEX. FAM. CODE ANN. § 54.04(a) (Vernon Supp. 1988).

265. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon Supp. 1988).

266. *See, e.g.*, Brumfield v. State, 445 S.W.2d 732, 733-34 (Tex. Crim. App. 1969)(holding evidence admissible at prior proceeding could be considered at later proceeding).

267. *See* TEX. R. CIV. EVID. 101(b) provides: "Except as otherwise provided by statute, these rules govern civil proceedings in all courts of Texas other than small claims courts."

268. TEX. FAM. CODE ANN. § 54.03(d) (Vernon 1986).

269. *See id.* § 51.09(a).

270. *See id.* § 54.03(c) (Vernon Supp. 1988).

271. The fourth logical option—having the judge as the trier of fact at guilt/innocence but having a jury to fix sentence—is probably not permitted under the Code of Criminal Procedure. The Code appears to contemplate jury sentencing only by the same jury that sat at the guilt/innocence stage. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, §§ 1(b), 2(b) (Vernon Supp. 1988). However, in criminal cases, the accused can demand that the jury fix punishment but enter a plea of guilty before the jury, thus effectively waiving the guilt/innocence phase of the trial. *See, e.g.*, Montalvo v. State, 572 S.W.2d 714, 715-16 (Tex. Crim. App. 1978)(defend-

Under the Code of Criminal Procedure, the defendant must elect jury punishment "before the commencement of the voir dire examination of the jury panel" or else, by legal default, the judge will select the sentence.[272] The Family Code uses a different approach. Because it provides that the jury will sentence unless the respondent and his attorney waive jury sentencing, it does not impose a deadline for electing jury punishment. Therefore, unless jury sentencing has been waived by the beginning of jury selection, the court and attorneys should qualify the jury panel on the assumption a jury will be sentencing the respondent if he is found guilty of a covered offense. This means, primarily, they must determine that each member of the jury panel can consider the full range of disposition in the case—from probation to thirty years incarceration. Only a panel member who states he can consider the full disposition range is qualified to sit on the jury.[273]

Can the respondent and his attorney wait until after the adjudication decision has been made to decide whether to waive jury sentencing? There is nothing in the Family Code to prevent that from occurring, since the Family Code does not impose a deadline for a jury waiver. In the absence of such a waiver before jury selection, the court and attorneys should assume that jury sentencing is still a permissible option for the respondent and should qualify the jury on sentencing issues. The respondent can wait until after the adjudication decision has been made by the jury to decide whether to waive jury sentencing. If, however, a waiver of jury sentencing has been made by the respondent and his attorney that complies with the formal requirements of the Family Code[274] before jury selection has begun, that waiver should be binding on the respondent. The state should be

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ant entered plea of guilty before sentencing stage). In determinate sentence juvenile cases, there is no reason why the respondent cannot demand (fail to waive) jury sentencing yet stipulate to his guilt before the jury at the adjudication hearing, thus assuring a verdict in favor of the state on the petition and presenting a posture of contrition and amenability to rehabilitation to the jury that will sentence him.

272. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon Supp. 1988). By caselaw, if there was a pretrial hearing in the criminal case, the defendant must elect jury sentencing before the beginning of that hearing or by default the judge will sentence. *See* Postell v. State, 693 S.W.2d 462, 463-464 (Tex. Crim. App. 1985)(at pretrial hearing defendant may have to make election on who will assess punishment).

273. *See* TEX. FAM CODE ANN. § 54.04 (d)(3) (Vernon Supp. 1988).

274. *See id.* § 51.09(a) (Vernon 1986).

able to rely upon that waiver and not waste judicial and citizen time qualifying the panel on dispositional ranges.

All answers to special issues and verdicts by the jury must be unanimous, as in non-capital criminal cases.[275] In non-capital criminal cases, because the same jury that considered guilt/innocence must determine the penalty,[276] if the jury cannot agree on a penalty a mistrial as to the entire proceedings must be declared, including the verdict of guilty. Re-prosecution, if any, begins with the guilt/innocence phase of the proceedings.[277] The same rule applies in juvenile cases under the special proceedings. Re-prosecution would begin from the point when the certification of an approved petition was filed in the juvenile court.

The court or jury must make several findings and decisions in the dispositional hearing. First, the court, or, if there is one, the jury, must find that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made."[278] If the court or jury does not so find, then the court is required to "dismiss the child and enter a final judgment without any disposition."[279] The Family Code does not specify whether the finding must be based upon proof beyond a reasonable doubt or upon some other standard. The only safe course of action is to require the jury to make the finding based on the reasonable doubt standard. A special issue submitting the question to be found should be submitted to the jury.[280] Of course, the jury can consider evidence introduced in the adjudication hearing, as well as additional competent evidence introduced in the disposition hearing in making the finding.[281]

Second, the jury should be instructed that if it makes the finding that a disposition is required, it must then decide whether to grant probation to the child. The jury should be told that it is the responsibility of the court to set the conditions of probation and that the jury

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275. *See* TEX. CODE CRIM. PROC. ANN. arts. 37.04, 37.05 (Vernon 1981). The Family Code provides that "jury verdicts under this title must be unanimous." TEX. FAM. CODE ANN. § 54.03(c) (Vernon Supp. 1988).

276. *See supra* note 271.

277. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(c) (Vernon 1981).

278. TEX. FAM. CODE ANN. § 54.04(c) (Vernon Supp. 1988).

279. *Id.*

280. Under the changes effective January 1, 1988, the trial court submits questions to the jury instead of special issues. TEX. R. CIV. P. 273.

281. *See supra* text accompanying note 266.

is not to concern itself with such matters.[282]

The jury should be told that if it decides to deny probation it must then select a determinate sentence not less than one nor more than thirty years and that, if the jury elects that option, the child will be committed to the Texas Youth Commission but may at age 18, if not earlier released in the discretion of the court, be transferred by the court to the Texas Department of Corrections to serve any sentence that remains.[283] The jury should be instructed that how long the respondent will remain in the Texas Youth Commission and the decision on whether, or when, he will be transferred to the Texas Department of Corrections, will be determined by the juvenile court at a later date and the jury is not to concern itself with those matters. Further, the court should instruct the jury that if the respondent is transferred to the Texas Department of Corrections at age 18, the

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282. Under TEX. FAM. CODE ANN. § 54.04(d)(1) (Vernon Supp. 1988), the court, not the jury, determines the conditions of probation, including whether the child while on probation will reside in his home or will be placed elsewhere.

In 1987, the legislature added section 54.04(g) to the Family Code. It provides:

> If the court places the child on probation outside his home or commits the child to the Texas Youth Commission, the court shall include in its order its determination whether:
>
> (1) it is in the child's best interests to be placed outside his home; and
>
> (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to his home. Act of May 27, 3770, ch. 385, § 9, 3772 Tex. Sess. Law Serv. 104 (Vernon).

This provision, unlike Tex. Fam. Code Ann. § 54.04(c) (Vernon Supp. 1988), *see supra* text accompanying notes 278-81, does not restrict the dispositional powers of the juvenile court. A juvenile court can still place the child on probation outside his home or commit him to the TYC without making a finding that placement or commitment is in the child's best interests and that reasonable efforts were made to keep the child in his home. The purpose of this provision is to enable federal monies under Aid and Services for Needy Families with Children, 42 U.S.C. § 601-620 (1983), to be paid to the foster family, agency or institution where the child was placed or committed. Federal aid to the caretaker is not available unless the juvenile court makes affirmative findings on both of those issues, but failing to make those findings does not preclude the court from placement or commitment. It would be, therefore, inappropriate to submit the two questions to a jury in a special dispositional hearing under the determinate sentencing law. Like conditions of probation, this is a matter for the court, not the jury.

283. *See* TEX. FAM. CODE ANN. § 54.04(d)(3) (Vernon Supp. 1988). The Family Code provides:

> if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045(a) of this code [the six covered offenses] and if the petition was approved by the grand jury under Section 53.045 of this code, the court or jury may sentence the child to commitment in the Texas Youth Commission with a transfer to the Texas Department of Corrections for any term of years not to exceed 30 years.

Id.

length of time he will remain incarcerated in the Department is exclusively a matter within the jurisdiction of the Texas Board of Pardons and Paroles and the jury is not to concern itself with those matters either.

If the respondent is later transferred to the Texas Department of Corrections, then adult good conduct and parole laws govern service of his sentence.[284] The length of his incarceration will also be affected by whether a deadly weapon or a firearm was used during the delinquent conduct,[285] as in the case of adults sentenced to prison.[286] If the petition approved by the grand jury expressly alleged that the offense was committed with a deadly weapon or a firearm, then a finding by the judge or jury, as the case may be, in favor of the state at adjudication on that allegation is a factual finding that a deadly weapon or firearm was used during the offense.[287]

In the absence of such an allegation in the petition, or even with such an allegation if the question of the respondent's guilt was submitted to the jury or decided by the court on a theory of the law of parties,[288] then the jury, if there is jury sentencing, should be given a special issue at the disposition hearing whether it finds beyond a reasonable doubt that the respondent "personally used or exhibited a deadly weapon or a firearm during the commission of the conduct or during immediate flight from the commission of the conduct."[289] In

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284. The Texas Code of Criminal Procedure requires the court in the penalty phase of criminal proceedings to instruct the jury as to the possible effects of laws relating to good conduct time and parole on service of the sentence it selects. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon Supp. 1988). This provision has been held by the Texas Court of Criminal Appeals to violate the Texas constitutional guarantee of separation of powers. *See* Rose v. State, 6 Tex. Law. Crim. Digest (State Bar of Tex.) 43-3 (Tex. Crim. App. Nov. 18, 1987).

Furthermore, the instruction, even if constitutional, is inappropriate in special juvenile proceedings because it fails to include the possibility that the juvenile court may discharge the respondent or release him on parole from the TYC at any time before he becomes 18 years of age. In its current form, even if valid, the instruction is an inaccurate statement of the law, would mislead the jury and should not be given by the juvenile court.

285. *See* TEX. FAM. CODE ANN. § 54.04(g) (Vernon Supp. 1988)(if affirmatively finding deadly weapon was used, then court shall insert such finding in its order).

286. *See* TEX. CODE CRIM. PROC. ANN. arts. 42.12, §§ 3g, 8; 42.18 (Vernon Supp. 1988).

287. *See, e.g., Ex parte* Castaneda, 697 S.W.2d 617, 618 (Tex. Crim. App. 1985)(court denied defendant's writ of habeas corpus based upon jury not considering good conduct, since there was an affirmative finding that a deadly weapon was involved).

288. *See* TEX. PENAL CODE ANN. § 7.02. (Vernon 1974).

289. TEX. FAM. CODE ANN. § 54.04(g) (Vernon Supp. 1988). Under case law, the finding that the juvenile used or exhibited a deadly weapon cannot be based on the law of parties,

jury-waived sentencing, the juvenile court could make that finding in the dispositional hearing.

There must be evidence to support the finding that the respondent personally used or exhibited a deadly weapon, but it can be evidence admitted at either the adjudication or the disposition hearing.[290] If the jury is given a special issue regarding whether a deadly weapon was used or exhibited by the respondent, the Penal Code definition of that term[291] should be given to the jury, as well as, the Penal Code definitions of bodily injury[292] and serious bodily injury.[293]

If the court, in the case of jury-waived sentencing, or the jury, finds for the state on this issue, then "the court shall enter the finding in the order" of commitment to the TYC.[294] The effect of such an entry in the commitment order on the length of incarceration is discussed later in this article.

Under case law, it is necessary to allege in the petition that the respondent committed the offense with a deadly weapon to give pretrial notice that the deadly weapon issue will be litigated in the case.[295] Further, if the respondent at any time was in custody during the pendency of the case, the date he was taken into custody and the date, if any, of his release should be entered by the court on the commitment order. This information is essential to enable the Texas Department of Corrections and the Board of Pardons and Paroles to determine the inmate's parole eligibility date should he later be transferred to the TDC.[296]

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but must focus on whether the defendant personally used or exhibited a deadly weapon. *See* Reyes v. State, 6 Tex. Law. Crim. Digest (State Bar of Tex.) 41-1 (Tex. Crim. App. Nov. 4, 1987).

290. *Ex parte* Webster, 704 S.W.2d 327, 328 (Tex. Crim. App. 1986).

291. *See* TEX. PENAL CODE ANN. § 1.07(a)(11)(Vernon 1974). "Deadly weapon" is defined as

(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or

(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

292. *Id.* § 1.07(a)(7) (Vernon 1974)(physical pain, impairment of physical condition, or illness will suffice for bodily harm).

293. *See id.* § 1.07(a)(34) (injury which substantially risks death, or serious disfigurement, or actual death, is serious bodily injury). A suggested charge of the court to the jury at disposition appears as Appendix C to this article.

294. TEX. FAM. CODE ANN. § 54.04(g) (Vernon Supp. 1988).

295. *See Ex parte* Patterson, 740 S.W.2d 766, 776 (Tex. Crim. App. 1987)(held that use of deadly weapon must be pled specifically in the charging indictment).

296. *See* TEX. REV. CIV. STAT. ANN. art. 6166z12(c) (Vernon Supp. 1988).

The Family Code requires that "[t]he court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child."[297] If the disposition was selected by the jury, then a simple statement in the juvenile court order that the disposition was selected by the jury should suffice. If the disposition was selected by the court, the juvenile court must place in its order a statement of why that disposition was selected over the others available.[298]

Can a respondent receive consecutive determinate sentences if he has been found guilty of committing two or more covered offenses? Under the Code of Criminal Procedure, the trial court, not the jury, decides whether sentences assessed by a jury are to be served concurrently or consecutively.[299] The law favors concurrency and assumes in the absence of a specific statement in the judgment to the contrary that multiple sentences will run concurrently.[300] There is no authority in the Family Code for consecutive sentences. Therefore, it is highly unlikely that a juvenile court is authorized to order determinate sentences, whether fixed by the jury or the court itself, to run consecutively.

E. *Probation Revocation*

Under adult probation laws, the judge or jury must assess a penalty

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> All laws relating to good conduct time and eligibility for release on parole or mandatory supervision apply to a person transferred to the department by the youth commission as if the time the person was detained in a detention facility and the time the person served in the custody of the youth commission was time served in the custody of the department.

Id.; *see also* TEX. CODE CRIM. PROC. ANN. art. 42.03, §§ 2(a), 4 (Vernon Supp. 1988)(forms basis for this provision).

297. TEX. FAM. CODE ANN. § 54.04(f) (Vernon 1986).

298. See F.L.J. v. State, 577 S.W.2d 532, 533 (Tex. Civ. App.—Waco 1979, no pet.); J.L.E. v. State, 571 S.W.2d 556, 557 (Tex. Civ. App.—Houston [14th Dist.] 1978, no pet.); *In re T.R.W.*, 533 S.W.2d 139, 140-41 (Tex. Civ. App.—Dallas 1976, no pet.) (discussions of what is acceptable as specific statement of reasons). Further, the statement given must be supported by the evidence. *See In re* L.G., 728 S.W.2d 939, 942-43 (Tex. App.—Austin 1987, no pet.); *In re* N.S.D., 555 S.W.2d 807, 809 (Tex. Civ. App.—El Paso 1977, no pet.).

299. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08 (Vernon 1979).

300. *See, e.g.*, Ward v. State, 523 S.W.2d 681, 683 (Tex. Crim. App. 1975). In the absence of a cumulation order that meets the requirements of the Code of Criminal Procedure, two prison sentences will run concurrently, not consecutively. *See id.* The Texas Court of Criminal Appeals has strictly construed the cumulation article of the Code of Criminal Procedure to limit the power of trial courts to cumulate sentences. *See, e.g.*, Green v. State, 706 S.W.2d 653, 656 (Tex. Crim. App. 1986)(trial court cannot cumulate probation term with prison sentence).

of not more than ten years to place a defendant on probation.[301] If probation is later revoked, the probationer cannot be sentenced to a longer term than the originally assessed penalty.[302] However, under the Family Code's special proceedings, the judge or jury simply grants or denies probation.[303] If it grants probation, it does not assess a penalty. This means that if probation is later revoked, the respondent may be sentenced to any term that he could have received in the first place—from one to thirty years.[304] In that respect, this probation is like deferred adjudication probation for adults.[305]

An adult on probation facing revocation has no right to trial by jury.[306] A juvenile on conventional probation also has no right of trial by jury at revocation.[307] However, because a juvenile on special probation faces a possible period of thirty years incarceration, not the ten years faced by an adult on regular adult probation, and because no penalty was assessed in the original disposition hearing the legislature provided the extra protection of a right to a jury trial at revocation. This protection is similar to the requirement that conduct indicating a need for supervision probation cannot be revoked, but a new adjudication hearing, with a right to a jury trial, must be conducted in which the issue is whether a reasonable and lawful order of the court was violated.[308] The Family Code provides: "A child in jeopardy of a sentence for a determinate term is entitled to a jury of 12 persons on the issues of the violation of the court's orders and the sentence."[309] As in the case of the adjudication and disposition hearings, there will be trial by jury unless it is waived by the respondent and his attorney under the Family Code.[310]

To be liable for a thirty year sentence, the juvenile must have originally been adjudicated delinquent and been placed on probation under the special procedures discussed above.[311] There must be a finding that the "child violated a reasonable and lawful order of the court" to

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301. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 3, 3a (Vernon Supp. 1988).
302. *Id.* § 8(a).
303. *See* TEX. FAM. CODE ANN. § 54.04(d)(1) (Vernon Supp. 1988).
304. *Id.* § 54.04(d)(3).
305. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3d(b) (Vernon Supp. 1988).
306. *See* Rhodes v. State, 491 S.W.2d 895, 896 (Tex. Crim. App. 1973).
307. *See* TEX. FAM. CODE ANN. § 54.05(c) (Vernon 1986).
308. *See id.* at §§ 51.03(a)(2) (Vernon Supp. 1988), 54.05(d), (g) (Vernon 1986).
309. *Id.* § 54.05(h) (Vernon Supp. 1988).
310. *Id.* § 51.09(a) (Vernon 1986).
311. *See id.* § 54.05(f) (Vernon Supp. 1988).

revoke probation.[312] As in the case of the revocation of any juvenile probation, that finding must be based on proof beyond a reasonable doubt.[313] Under adult probation law, revocation can be based on only a preponderance of the evidence.[314]

The ordinary petition and notice requirements apply to the revocation of juvenile probation.[315] In revocation of ordinary juvenile probation, the juvenile court, without a jury, first decides whether the state has proved beyond a reasonable doubt that the juvenile probationer violated a reasonable and lawful condition of probation as alleged in the petition for modification. Only if the court decides that question in the affirmative may it then consider a social history report in order to aid it in exercising discretion to decide whether to revoke probation or continue the probation under the court's supervision.[316] The same procedures apply when the respondent has waived the jury in revocation of probation under the determinate sentencing statute.

If the juvenile and his attorney have not waived trial by jury, the jury decides whether probation was violated and, if so, what sentence to impose.[317] These questions should be submitted separately to the jury.[318] First, the jury should be asked whether it finds beyond a reasonable doubt that the respondent violated a reasonable and lawful order of the court as alleged in the petition to modify. If it returns a verdict in favor of the state on the first question, then the parties may present evidence concerning what should be done with the respondent. Evidence of a background nature, which would be irrelevant and prejudicial if introduced at the fact-finding portion of the hearing, may be introduced to guide the jury's discretion in making the dispostional decision.[319] However, that evidence must come from the witness stand under the Texas Rules of Civil Evidence; social history reports cannot be given to the jury.[320]

The second question arises if the jury returns a verdict for the state

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312. *Id.*

313. *See id.*

314. *See* Scamardo v. State, 517 S.W.2d 293, 298 (Tex. Crim. App. 1973)(in providing guidance and uniformity, revocation of probation can only be accomplished by preponderance of evidence).

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

316. *See id.* § 54.05(e).

317. *See id.* § 54.05(f) (Vernon Supp. 1988).

318. *See id.* § 54.05(h).

319. *See id.* § 54.04(b).

320. *See id.* § 54.03(d).

on the fact-finding portion of the hearing, after evidence is received at the dispositional part. The jury should be instructed that the available range of punishment is to place the respondent on probation or to sentence him to a determinate sentence of not less than one nor more than 30 years to be served in the Texas Youth Commission with possible later transfer to the Texas Department of Corrections for the balance of the sentence. The possibility of placing the respondent again on probation exists in ordinary delinquency proceedings[321] and in the revocation of adult probation as well.[322]

It should be noted that the legislature apparently contemplated that although the revocation hearing will be conducted in two phases, the respondent, if he waives a jury, must waive both phases. In other words, he cannot have a jury for the fact-finding phase and the court for the disposition phase at the same revocation hearing.[323]

If probation is revoked and the respondent given a determinate sentence to the TYC, the trial court should state in its commitment order the reasons for modifying disposition by revoking probation.[324] If the jury did the fact-finding and sentencing, a statement that the jury so ordered should suffice.[325] Further, if the respondent was in custody any time during the pendency of the case, the date he was taken into custody and the date, if any, of his release should be entered on the commitment order. If the respondent is later transferred to the Texas Department of Corrections, that information is essential to enable the Department and the Board of Pardons and Paroles to determine the date at which the inmate will become elgible for release on parole.[326]

All juvenile probations automatically expire when the probationer becomes 18 years of age.[327] A probation violation, to be the basis for revocation, must have occurred during the probation period.[328] Further, the motion to revoke must have been filed within the probation period.[329] However, if the motion to revoke was filed before probation expires, the revocation hearing can be held after probation ex-

321. *See id.* § 54.05(f) (Vernon Supp. 1988).
322. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 8 (Vernon Supp. 1988).
323. *See* TEX. FAM. CODE ANN. § 54.05(h) (Vernon Supp. 1988).
324. *See id.* § 54.05(i).
325. *See supra* text accompanying notes 297-98.
326. *See supra* note 296.
327. *See* TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1986).
328. *See In re* R.G., 687 S.W.2d 774, 777 (Tex.App.—Amarillo 1985, no pet.).
329. *See id.*

pires, so long as the state proceeds diligently with the hearing.[330] It is not unlikely, therefore, that there may be situations in which the probation of one who is approaching or is already 18 years of age may be revoked. In that event, if a commitment is ordered, the juvenile court will be required to conduct quickly a release/transfer hearing. The Texas Youth Commission, under its legal authority to keep committed persons to age 21,[331] is empowered to keep the person until such a hearing can be held by the juvenile court.

F. *Parole, Discharge and Transfer Hearings*

Under an ordinary delinquency commitment, the power of the juvenile court to act over the child ceases when the commitment order is entered.[332] The Texas Youth Commission has discretion to keep the child in one of its institutions until it must discharge him at age 21.[333] Or, at its discretion, it may release the child on parole at any time after receiving the child and commitment order.[334] If the child violates parole, the TYC may by notice and administrative hearing decide to revoke parole and return him to custody or continue him on parole.[335] If parole is revoked, the Commission has discretion as to whether and when to re-parole the child.[336] It may also discharge a committed child, whether he is on parole or in custody, at any time before his 21st birthday.[337]

All of this is changed when the child is committed to the TYC under a determinate sentence. The Youth Commission is prohibited from placing the child outside one of its institutions, releasing such a child on parole, or from discharging him before the full sentence has been served without the approval of the committing juvenile court.[338] If the full sentence has been served before the child's 18th birthday, the Youth Commission must, of course, administratively discharge the child upon completion of his sentence.[339] There is no provision

330. *See id.*
331. *See* TEX. HUM. RES. CODE ANN. § 61.084(c) (Vernon Supp. 1988).
332. *See In re* A.N.M., 542 S.W.2d 916, 921 (Tex. Civ. App.—Dallas 1976, no pet.).
333. *See* TEX. HUM. RES. CODE ANN. § 61.084(c) (Vernon Supp. 1988).
334. *See id.* § 61.081(a).
335. *See id.* § 61.081(f).
336. *See id.* § 61.081(a).
337. *See id.* § 61.075(5).
338. *See id.* §§ 61.081(f), 61.084(a).
339. *See id.* § 61.084(a), (b).

for reducing the sentence by credit for good conduct while in a TYC facility. Credit on the sentence is calendar time only.[340]

At any time before the child reaches the age of 17 ½, the Commission may seek the committing juvenile court's authority to release the child on parole or to place him outside a TYC institution.[341] It makes no difference how long the sentence is or how long the child has been in the custody of the Commission. Only the Commission may petition the juvenile court for release on parole; the child or his family may not do so.[342] After holding the release hearing, discussed later in this article, the juvenile court may approve of alternative placement or parole or may disapprove them and return the child to the TYC facility.[343] The Commission may make further petitions for alternative placement or parole.[344]

If a child has been released on parole with the approval of the juvenile court, he will remain on parole until it is revoked, until the total calendar time served in the institution and on parole equals his determinate sentence, until his 21st birthday, or until he is discharged by the juvenile court, whichever occurs first.[345] The Commission may seek authority to discharge a child from parole or institutional custody from the juvenile court at any time. Only the Commission may petition for discharge and only the committing juvenile court may order it.[346]

If a child is on court-ordered parole and is believed to have violated it, the Commission may initiate its normal parole revocation proceedings[347] and may, after administrative hearing, revoke parole or continue the child on parole supervision.[348] The juvenile court is not involved in the revocation decision even though the child was paroled with the court's approval. Once the Commission has re-institutionalized the child under a parole revocation order, it may at any time until the child reaches 17 ½ years of age petition the committing ju-

340. *See id.* at § 61.084(a).
341. *See id.* § 61.081(f).
342. *See* TEX. FAM. CODE ANN. § 54.11(a) (Vernon Supp. 1988).
343. *See id.* § 54.11(i).
344. *See* TEX. HUM. RES. CODE ANN. § 61.081(f) (Vernon Supp. 1988).
345. *See id.* § 61.084(a), (c).
346. *See id.* § 61.084(a).
347. *See id.* § 61.081(f).
348. *See id.*

venile court for authority to re-parole the child or to discharge him.[349]

Any child in a TYC institution under a determinate sentence at age 17 ½ must be referred by the Commission to the committing juvenile court for a release or transfer hearing.[350] Thus, if a child whose parole has been revoked is not re-paroled or discharged by the time he becomes 17 ½ years of age, the Commission is required at that time to petition the juvenile court for a release or transfer hearing. If parole was revoked after the child became 17 ½ years of age, then the Commission is required, as soon as possible after re-institutionalization, to petition the juvenile court for a release or transfer hearing. The legislative intent behind this requirement is that the child should be discharged, placed on TYC parole, or transferred to the Texas Department of Corrections as soon as possible after his 18th birthday. In any event, he should not be kept in a TYC facility for any longer than necessary after that date to complete the legal steps necessary for parole, discharge or transfer.

When the Commission petitions the juvenile court for a release or discharge hearing or notifies the juvenile court that a child under a determinate sentence has reached the age of 17 ½, the juvenile court is required "to set a time and place for a hearing."[351] If the Commission notified the juvenile court that the child was 17 ½ years of age, the hearing must be held "before 30 days before the person's 18th birthday."[352] The court is required to provide notice of the time and place of the hearing to

(1) the person to be transferred or released under supervision;
(2) the parents of the person;
(3) any legal custodian of the person, including the Texas Youth Commission;
(4) the office of the prosecuting attorney that represented the state in the juvenile delinquency proceedings;
(5) the victim of the offense that was included in the delinquent conduct that was a ground for the disposition, or a member of the victim's family; and
(6) any other person who has filed a written request with the court to be notified of a release hearing with respect to the person to be trans-

349. *See id.* § 61.081(f); TEX. FAM. CODE ANN. § 54.11(a) (Vernon Supp. 1988).
350. *See* TEX. HUM. RES. CODE ANN. § 61.079(a) (Vernon Supp. 1988).
351. TEX. FAM. CODE ANN. § 54.11(a) (Vernon Supp. 1988).
352. *Id.* § 54.11(h).

ferred or released under supervision.[353]

Although the law does not provide how notice is to be given, it is recommended that the Family Code provisions on summons and service of summons be used as guidelines.[354] Failure to give notice to anyone, except for the child and the prosecutor, does not affect the validity of a release hearing or a release determination if the record in the case reflects that the whereabouts of the persons who did not receive notice were unknown to the court and a reasonable effort was made by the court to locate those persons.[355]

At the hearing, the child is entitled to an attorney.[356] Under the Family Code, the child is entitled to appointed counsel if his parents are unable to pay for an attorney.[357] The state is represented by the local prosecutor, not by the Attorney General. The Youth Commission is not an adversarial party to the proceedings but, rather, is either a neutral custodian of the child or is in the position of recommending that the child be released or discharged from its custody.[358] There is no right to a jury at a release, discharge or transfer hearing.[359]

The Family Code authorizes written evidence in the hearing:

> At a release hearing the court may consider written reports from probation officers, professional court employees, or professional consultants, in addition to the testimony of witnesses. At least one day before the release hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court.[360]

It also provides:

> At any release hearing the person to be transferred or released under supervision is entitled . . . to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on evaluations and examinations of or relating to him that may be used in the hearing.[361]

The Family Code provides that the hearing is open to the public "un-

353. *Id.* § 54.11(b).
354. *See id.* §§ 53.06, 53.07 (Vernon 1986).
355. *See id.* § 54.11(c) (Vernon Supp. 1988).
356. *Id.* § 54.11(e).
357. *See id.* § 51.10(a), (f) (Vernon 1986).
358. *See id.* § 54.11(j).
359. *Id.* § 54.11(i) (Vernon Supp. 1988).
360. *Id.* § 54.11(d).
361. *Id.* § 54.11(e).

less the person to be transferred or released under supervision waives a public hearing with the consent of his attorney and the court."[362] It also provides:

> A release hearing must be recorded by a court reporter or by audio or video tape recording, and the record of the hearing must be retained by the court for at least two years after the date of the final determination on the release of the person by the court.[363]

The Family Code sets out statutory criteria to guide the discretion of the juvenile court in deciding whether to release the person, discharge him, or, where permissible, to transfer him to the Texas Department of Corrections:

> [T]he court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.[364]

Once the juvenile court makes its decision, it should enter an order releasing the child under supervision, discharging him from the juvenile system entirely, or transferring him to the Texas Department of Corrections.[365] If the juvenile court orders a transfer to the TDC, the Youth Commission should transport him to the Department of Corrections on or soon after his 18th birthday.

The Family Code gives the child the right to appeal an order transferring him to the Texas Department of Corrections.[366] By implication, he may not appeal an order refusing to release him under supervision or refusing to discharge him from the system. The appeal goes first to the appropriate court of appeals as a civil case and then may be reviewed as a discretionary matter by the Texas Supreme Court.[367] The state may not appeal the juvenile court's decision.[368] Further, under the Family Code, an appeal does not "suspend the

362. *Id.* § 54.11(f).
363. *Id.* § 54.11(g).
364. *Id.* § 54.11(j).
365. *See id.* § 54.11(i).
366. *See id.* § 56.01(c)(2).
367. *Id.* § 56.01(a) (Vernon 1986).
368. *See* C.L.B. v. State, 567 S.W.2d 795, 796 (Tex. 1978).

order of the juvenile court, nor does it release the child from the custody of that court or of the person, institution, or agency to whose care the child is committed, unless the juvenile court so orders."[369] That means that the child goes to the TDC on the juvenile court transfer to await the outcome of any appeal of the transfer decision.

G. *After Transfer to the Department of Corrections*

A person committed to the TYC under a determinate sentence must be at least 18 years of age to be transferred to the Texas Department of Corrections: "The Texas Department of Corrections shall accept persons 18 years old or older transferred to the department from the Texas Youth Commission."[370] Once the person is in the custody of the TDC, adult rules respecting parole eligiblity and mandatory release apply. The matter of the timing of his release from the TDC is in the hands of the Board of Pardons and Paroles, and neither the Youth Commission nor the juvenile court has any further authority over the case.[371] Further, the person is entitled to receive retroactively good conduct time and to have counted for parole eligibility any time the person was detained in a detention facility or served in the custody of the Texas Youth Commission.[372]

Parole eligibility rules were changed by the legislature in 1987. Under the new rules, if the respondent was adjudicated for capital murder, aggravated kidnapping or aggravated sexual assault, or if the court or jury made a finding that the respondent personally used or exhibited a deadly weapon during the commission of an offense or during immediate flight therefrom, he becomes eligible for parole after he has actually served one-fourth of his sentence or two calendar years, whichever is greater.[373] Good conduct credit does not advance the parole eligibility date. All other respondents become eligible for parole when their calendar time plus good conduct time equals one-fourth of the sentence.[374]

If an inmate is not released on parole, he must be released on mandatory parole supervision when his calendar time plus good con-

369. TEX. FAM. CODE ANN. § 56.01(g) (Vernon 1986).
370. TEX. REV. CIV. STAT. ANN. art. 6166z12(a) (Vernon Supp. 1988).
371. *See id.* art. 6166z12(c).
372. *Id.*
373. *See* TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8 (Vernon Supp. 1988).
374. *See id.*

duct time equals his sentence.[375] He serves the balance of his sentence under parole-type supervision.[376] In 1987, the legislature provided that inmates who were convicted of certain offenses were not eligible for mandatory parole supervision,[377] that is, they must, if not paroled, serve their entire sentence in prison. A respondent who received a determinate sentence for capital murder, murder, aggravated kidnapping, aggravated sexual assault, deadly assault on a law enforcement or corrections officer or court participant, or who was found to have used or exhibited a deadly weapon is not eligible for mandatory release under supervision.[378] Thus, only a respondent adjudicated for attempted capital murder without a deadly weapon finding is eligible for mandatory parole.

VII. Relationships between the New System and Discretionary Transfer to Criminal Court

This determinate sentencing act for juveniles was intended to fill what was perceived as a gap in the coverage of juvenile statutes: serious, violent offenses committed by persons while under the minimum transfer age of 15.[379] While it does serve that purpose, it is not restricted to children under the age of 15.

A prosecutor can decide to invoke the special proceedings instead of seeking discretionary transfer to criminal court for prosecution of one of the six covered offenses. He may conclude that despite the newness of the statute, it presents a more attractive alternative than seeking discretionary transfer.

If discretionary transfer is sought, the Family Code requires an investigation, diagnostic study and full hearing before the juvenile court.[380] Then, the juvenile court judge may or may not decide to transfer the respondent to criminal court for prosecution as an adult. If the judge decides to transfer, then full criminal proceedings including (under the 1987 amendments)[381] a possible examining trial, presentation of the case to a grand jury for an indictment and possible jury trial with jury sentencing in district court follow. The prosecutor

375. *See id.* § 8(c).
376. *See id.*
377. *Id.*
378. *See id.*
379. *See supra* text accompanying notes 17-24.
380. *See* TEX. FAM. CODE ANN. § 54.02(c)-.02(d) (Vernon 1986).
381. *See id.* § 54.02 (b) (Vernon Supp. 1988).

may experience difficulties convincing a jury to award a substantial prison sentence to a 15 or 16 year old when the jury knows that any sentence it awards must be served from its beginning in the Texas Department of Corrections. Further, during the time the transferred case is pending before the district court, the prosecutor may have to defend the transfer proceedings in the court of appeals if the respondent has exercised his right to take an immediate appeal under the Family Code.[382] If the transfer is reversed, then any criminal conviction is set aside and the case is returned to juvenile court to start over again.

If one of the six covered offenses is involved, the net effect of the prosecutor's invoking of the special proceedings instead of seeking transfer is to substitute the proceedings before the grand jury for the transfer hearing, possible examining trial and presentation to the grand jury that is required to bring the respondent to trial in adult court. He also avoids the possible need to defend an appeal while the case is still in the trial courts. Balanced against this is the possible need to defend against a Youth Commission recommendation at a later date of release on supervision in a release hearing before the juvenile court.[383] The prosecutor may be required to also participate in a transfer hearing when the respondent becomes 17 ½ years of age if he has not served his sentence or been released on supervision earlier.[384]

Additionally, special proceedings can be invoked in cases in which the prosecutor has attempted unsuccessfully to persuade the juvenile court to transfer the respondent to adult court for criminal prosecution. An unsuccessful transfer attempt does not diminish the right of the prosecutor, at his discretion, to refer the petition to the grand jury for its approval.[385] Further, if there has been a transfer but the case has been returned to the juvenile court by the district court or the court of appeals, the special proceedings could then be invoked. The only timing requirement is that they be invoked by grand jury approval of the petition before the beginning of the adjudication hearing in the juvenile court and before the juvenile becomes 18 years of

382. *See id.* § 56.01(c)(1)(A).

383. *See id.* § 54.11.

384. *See id.*

385. *See supra* note 226.

age.[386]

Further, there will be situations in which a covered offense is committed by several juveniles, some of whom are under the minimum transfer age and some who are not. The prosecutor could elect to seek transfer to criminal court for some of the respondents and invoke the determinate sentencing procedures for others. But, he may sensibly conclude that such a step unnecessarily multiplies the effort and complicates the litigation. He may decide, therefore, to invoke the statute as to all respondents, even though some could be transferred to criminal court.

Finally, the availability of these special proceedings must be a factor weighed by the juvenile court judge in any transfer hearing in which the respondent is charged with one or more of the six covered offenses. The Family Code requires the juvenile court to consider "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."[387] The fact that the juvenile system, before the 1985 amendments to the Family Code and Human Resources Code,[388] could only control the child until he reached age 18 was a powerful factor in favor of transfer. The impact of this factor was reduced somewhat by the 1985 amendments extending, in theory, control for youth commission residents to age 21.[389] Now, if the respondent in a transfer hearing is charged with a covered offense, the juvenile court judge must consider the availability of special proceedings in juvenile court with a possible sentence of thirty years as an alternative to discretionary transfer to criminal court.

386. *See* TEX. FAM CODE ANN. § 51.02(1) (Vernon 1986).

387. *Id.* § 54.02(f)(6).

388. Act of Apr. 25, 1985, ch. 45, 1985 Tex. Gen. Laws 435.

389. *See* TEX. FAM. CODE ANN. § 54.05(b) (Vernon 1988); TEX. HUM. RES. CODE ANN. §§ 61.001(5), 61.084(c) (Vernon Supp. 1988).

APPENDIX A: GRAND JURY APPROVAL AND CERTIFICATION

GRAND JURY APPROVAL OF JUVENILE COURT PETITION

The Grand Jury, for the County of _____, State of Texas, duly selected, empaneled, sworn, charged and organized as such at the _____ Term, 19____ of the _____ Judicial District Court for that county, upon their oaths, as authorized by Section 53.045 of the Texas Family Code, do present to that Court at that Term that, by a vote of at least nine of its members, it finds probable cause to believe that [name of respondent] has engaged in delinquent conduct by committing the offense of _____, as alleged in the juvenile petition previously filed in Cause Number _____ in _____ Court of _____ County, Texas, sitting as a Juvenile Court, which was referred to this Grand Jury and considered by it, and that it approves of the juvenile petition.

_____
Foreperson of the Grand Jury

CERTIFICATION TO JUVENILE COURT

I, [name], District Clerk of _____ County, Texas do hereby certify to the _____ Court of _____ County, Texas, sitting as a Juvenile Court, that the Grand Jury of _____County, Texas has found probable cause to believe that [name] engaged in delinquent conduct by committing the offense of _____, as alleged in the juvenile court petition previously filed in Cause Number _____ and has presented its approval of that petition to the _____ Judicial District Court of _____County, Texas.

_____
District Clerk
Date: _____

APPENDIX B: WAIVER OF GRAND JURY APPROVAL OF PETITION

In the Matter of _____
_____
_____

No. _____
In the _____ Court
of _____ County, Texas
Sitting as a Juvenile Court

WAIVER OF GRAND JURY APPROVAL OF PETITION

I, _____, respondent in Cause Number ____, now pending before the juvenile court of _____ County, Texas on a petition alleging delinquent conduct by committing the offense of _____, and I, _____, attorney for the respondent, are informed of and understand that the prosecuting authority for _____ County, Texas may refer the petition in Cause Number ____ to the Grand Jury for _____ County, Texas for its approval under Section 53.045 of the Texas Family Code. Each of us understands that the Grand Jury may or may not give its approval to the petition. Each of us understands that if the Grand Jury does not approve the petition, respondent, if adjudicated to have engaged in delinquent conduct, can be placed on probation or committed to the Texas Youth Commission to be held at the discretion of the Texas Youth Commission until he becomes 21 years of age. Each of us further understands that if the Grand Jury approves of the petition, respondent can be proceeded against in juvenile court on that approved petition and that as a consequence, if adjudicated, he can be placed on probation or can receive a determinate sentence for any term of years not to exceed thirty years. Finally, each of us understands that if a determinate sentence is imposed, respondent will be committed to the Texas Youth Commission to be detained until released in the discretion of the juvenile court of _____ County, Texas and that in the discretion of the juvenile court of _____ County, Texas he may be tranferred to the Texas Department of Corrections at age 18 to serve the balance of the determinate sentence.

Fully understanding the right to require the Grand Jury of _____ County, Texas to find probable cause and to give its approval to the petition under Section 53.045 of the Texas Family Code and fully understanding the consequences of waiving that right, each of us does intelligents, knowingly and voluntarily waive the right to have the grand jury consider and approve or disapprove of the petition in this case and consent to juvenile court adjudication proceedings on this petition as though the petition had been referred to the Grand Jury, considered by it and the Grand Jury had found probable cause and approved it.

_____
Respondent

_____
Attorney for Respondent

APPENDIX C: CHARGE OF THE COURT ON DISPOSITION

In the Matter of _____
_____
_____

No. _____
In the _____ Court
of _____ County, Texas
Sitting as a Juvenile Court

CHARGE OF THE COURT ON DISPOSITION

Members of the Jury:

You have found that the Juvenile-Respondent, [name], has engaged in delinquent conduct in that he committed the offense of [name of offense], as alleged in the Petition. It is now your duty to determine whether there should be a disposition in this case and, if so, what that disposition should be. Your findings on special issues and your verdicts must all be unanimous.

Under our law, you may sentence the Juvenile-Respondent to commitment in the Texas Youth Commission with a transfer at age 18 to the Texas Department of Corrections for any term of years not to exceed 30 years. Or, you may place the Juvenile-Respondent on probation.

If you place the Juvenile-Respondent on probation, the terms and conditions of probation will be determined by this Court. You are not to concern yourselves with the conditions of probation that will be set by this Court in the event you place the Juvenile-Respondent on probation.

If you sentence the Juvenile-Respondent to commitment for a term of years not to exceed 30 years, the length of time the Juvenile-Respondent will remain in the custody of the Texas Youth Commission and whether he will be transferred to the Texas Department of Corrections at age 18 will be determined by this Court at a later date. If the Juvenile-Respondent is transferred by this Court to the Texas Department of Corrections at age 18, the length of time he will remain in the Texas Department of Corrections will be determined, within the law's limits, by the Texas Board of Pardons and Paroles. You are not to concern yourselves with these matters in the event you sentence the Juvenile-Respondent to a term of years.

Before you arrive at your disposition verdict in this case, you must answer 2 Special Issues based upon the evidence you have heard and seen in this courtroom in the adjudication and disposition hearings in this case.

SPECIAL ISSUE #1

Do you find from the evidence beyond a reasonable doubt that the Juvenile-Respondent, [name], is in need of rehabilitation or that the protection of the public or of the Juvenile-Respondent requires that a disposition be made in this case?

Answer "We Do" or "We Do Not."

Answer: _____

You are instructed that under our law a "deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury, or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

You are further instructed that under our law "serious bodily injury" means

bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Finally, you are instructed that under our law "bodily injury" means physical pain, illness, or any impairment of physical condition.

SPECIAL ISSUE #2

Do you find from the evidence beyond a reasonable doubt that the Juvenile-Respondent, [name], personally used or exhibited a deadly weapon, as hereinbefore defined, during his commission of the delinquent conduct or during immediate flight from his commission of the delinquent conduct?

Answer "We Do" or "We Do Not."

Answer: _____

In arriving at your verdict as to disposition, it will not be proper to fix your verdict by lot, chance or any other method than by a full, fair and free exercise of the opinion of the individual jurors, under the evidence admitted before you at the adjudication and disposition hearings in this case.

After you have arrived at your verdict as to disposition, you may use one of the forms attached hereto by having your foreperson sign his or her name to the particular form that conforms to your verdict, but in no event shall he or she sign more than one of such forms.

_____
Judge Presiding

CERTIFICATE

We, the Jury, have answered the above Special Issues as herein indicated, and herewith return the same into Court.

_____
Foreperson

In the Matter of _____
_____
_____

No. _____
In the _____ Court
of _____ County, Texas
Sitting as a Juvenile Court

VERDICT OF THE JURY

We, the jury, having found that the Juvenile-Respondent, [name], engaged in delinquent conduct, as alleged in the Petition, to wit: [name of offense], sentence him to commitment to the Texas Youth Commission for _____ years (any term of years not to exceed 30 years).

_____
Foreperson

In the Matter of _____
_____
_____

No. _____
In the _____ Court
of _____ County, Texas
Sitting as a Juvenile Court

VERDICT OF THE JURY

We, the jury, having found that the Juvenile-Respondent, [name], engaged in delinquent conduct, as alleged in the Petition, to wit: [name of offense], place him on probation.

_____
Foreperson