ORAL ARGUMENT — 9/8/98
98-0198 & 98-0308
IN THE MATTER OF C.O.S. & D.I.B.

CONNOLLY: What we have before the court is an issue involving a 14-year old boy who is emotionally disturbed, who is suffering from severe oppositional defiant disorder, who is learning disabled - borderline retarded. You add to that the component that he was before the court with the possibility of punishment for many years with neither his mother or his father present.

BAKER: He did have a lawyer at all times though didn't he?

CONNOLLY: Yes, he did have counsel.

BAKER: Does that make any difference to your argument you are about to make?

CONNOLLY: No, because the statute requires, and the case law that follows the statute requires the trial judge to explain to the juvenile...

BAKER: Are you moving toward a point that this particular juvenile was incompetent to stand any kind of trial as opposed to the issue that we have before us, "What is the nature of the admonishments and is it fundamental error not to give them?"

CONNOLLY: The point that I am trying to make and illuminate is this. Article 26.13 of the Code of Criminal Procedure uses the specific language "admonish." Article 54.03, or §54.03 of the Family Code uses the word "explain." And I think the specific facts and circumstances of this trial illuminates the question of why we treat juveniles differently, children differently when they are charged with crimes than adults.

HECHT: The CA focused on two particular omissions?

CONNOLLY: True.

HECHT: Your argument is broader than that?

CONNOLLY: It is much broader than that and was broader than that in the CA.

HECHT: Do you join also in their position that those two missing pieces are significant to and have to be talked about? You don't seem to make that argument that just them alone missing is bad, is that your position?

CONNOLLY: Both arguments that the omission of certain requirements and certain explanations, and there's a real habit even in the case law to call these admonishments, but the absence obviously is important, but also the absence completely in this record of explanations is of equal importance.

ENOCH: Do you agree that hasn't this statute been amended to permit a harmless error resolution of this now?

CONNOLLY: I don't know that it's been amended to permit harmless error analysis. What has been amended to do is to put a burden, and the question of whether or not this is constitutional or whether or not there's a conflict, because 54.03(a) says: You cannot have a juvenile adjudication without these explanations. It lists the explanations that have to be given and then it says, "oh by the way, under this new section (i) it's up to the respondent to raise the absence of these explanations." So you've shifted. The legislature has shifted the burden. But for future cases, the argument certainly can be made that the policy of the legislature in 1997 is now different than it was when this case was tried in 1995.

ENOCH: But in 1995, weren't the CA somewhat split on how they dealt with this?

CONNOLLY: No. It was almost uniformly fundamental error, no harm analysis. I think there was one case out of Corpus Christi, *O.L.*, that talked about doing a harmless error analysis and then it's subsequent to the actual decisions that the legislature came out and imposed 54.03(i). There is a split of authority and I think it's 7 to 1 or 7 to 2 at this point in favor of saying it's fundamental error.

HANKINSON: Is there any specific legislative history to whether or not the legislature intended "shall" to be mandatory or directive in this particular statute?

CONNOLLY: I'm not aware of any legislative history and didn't research and bring to the court legislative history on the issue of whether or not the "shall" is mandatory or directory.

HANKINSON: Wouldn't that be the starting point of interpreting this statute, and doesn't that make a difference?

CONNOLLY: It could and if the court would permit a supplemental brief to check supplemental history and legislative history on the original intent of the legislature, I would be happy to do that. What we have presented in this case, however, is even in the CA in *T.F.* addressed the specific issue of harmless error analysis when applied to these mandatory statutes.

HECHT: Confining yourself to the 2 omissions found by the CA, and apart from your argument that a fuller explanation is always required, was there harm?

CONNOLLY: It's impossible to tell from this record.

HECHT: What harm could there have been?

CONNOLLY: A lot of different decisions could have been made. For example: I've recently done a case in which we entered into a plea agreement and there was no disposition necessary, the same type of offense - sexual abuse of a child. For a variety of circumstances evidentiary and other reasons, we entered into an agreement where there is no disposition, which had a dramatically different result, including no sex offender registration requirements from a 1995 case.

OWEN: Can you tie the two abnomitions at issue here: the failure to talk about the right to confront witnesses, and the admissibility and subsequent criminal procedures. What different decisions could have been made?

CONNOLLY: Lots of different decisions could be made in terms of strategy. The problem is the record doesn't tell us.

OWEN: I'm just asking you to share with us what different decisions could have been made in strategy, witnesses were confronted?

CONNOLLY: What witnesses to put on. Now in terms of confrontation, what questions to ask could be different. I don't know, I wasn't the trial lawyer. So I can't answer the question with specifics in terms of strategy.

OWEN: But he did in fact confront witnesses?

CONNOLLY: He did in fact confront witnesses.

OWEN: Putting that one aside what about the admissibility, the outcome of the juvenile proceeding in future criminal proceedings? What different decisions could be made?

CONNOLLY: A decision concerning whether or not to go to trial, whether or not to go to a jury trial, whether or not to put your own client on the stand.

OWEN: Was there an offer to plead to a lesser offense in this case?

CONNOLLY: Not that I am aware of because it's not in the record.

OWEN: Was there a motion for new trial filed in this case?

CONNOLLY: Yes.

OWEN: And did it raise these issues?

CONNOLLY: I don't believe that the motion for new trial raised these issues.

OWEN: Why shouldn't we require those to at least be raised in some sort of post-judgment or motion for new trial before it gets to a CA?

CONNOLLY: As a general practice, I would do that. I wasn't the trial lawyer and didn't perfect the appeal.

OWEN: Why shouldn't we require that?

CONNOLLY: Under the amended rules 33.1 it is required on post-1997 cases. So it should probably be required. Should it be required in this case? No. Should it be set retroactively? No, I don't believe that that should be because this child didn't have the opportunity then. It goes also to the question of whether or not we're going to just totally disregard and trash fundamental error in these kinds of cases.

BAKER: What about the state's argument that this is a procedural thing and would apply now to your case even though it wasn't passed until 1997?

CONNOLLY: In the case of *TF* they addressed it. That's the Houston case that they disregarded. 877 S.W.2d 81, that a harm analysis should not be applied to violations of mandatory statutes when the appellate court record will not reveal any concrete data from which an appellate court can meaningfully gage or quantify the effect. In response to your question, a procedural statute should have within its operation when you apply it an ability for this child in some circumstance to have performed it at the time.

BAKER: 52a existed in 1995 anyway at the time for purposes of appeal.

CONNOLLY: It has been greatly expanded is my interpretation to include all matters, including not just evidentiary matters, but this was a mandatory admonishment from the TC, an explanation from the TC that was not given. And so it's more than procedural. It goes to the very core of why we treat juveniles different.

BAKER: So you disagree with their viewpoint that this new section is procedural, it's a substantive thing?

CONNOLLY: Right. Because it goes to the very core issue: Does the child understand? Can this child make a voluntary intelligent knowing decision about how to proceed with his case, with his counsel? Can he make those choices by knowing what was going on in the trial?

ABBOTT: Why is that not ludicrous? How can an 8 year old child comprehend all of these admonishments? How can in the facts of your case that child understand those admonishments?

CONNOLLY: It goes to the very essence of Justice Hecht's question. It's a broader question. There has to be by definition if he used the word "explain" and it means something, shall has to mean something. The TC has got to engage with this child to find out some basis of understanding, because if they don't, the words don't mean anything.

ABBOTT: And what if the child does not understand?

CONNOLLY: Then you have a competency question, which the court under §55 can raise on its own motion. You have an ability to raise those issues, but if you're going to treat children differently, then for God's sake let's interpret this statute in the language of the statute in such a way that the words do have the meaning.

BAKER: How do you define fundamental error?

CONNOLLY: I define it the same way that case law defines it. It's either a jurisdictional issue or it affects the public interest directly as that interest is expressed in the statute. And that's the *Pirtle v. Gregory* case from this court in 1982. And this child's effect, he was clearly affected by the lack of admonishments, and he's clearly affected by the failure of the TC to do that which the legislature mandated in 1995 be done.

BAKER: You started off distinguishing between admonishments under art. 26.13 and explained under §54.03. But you've now been using admonishment and explain interchangeably?

CONNOLLY: Because all of the case law do, and I did not intend to do it. Explanations is the word very clearly that I want to use.

HANKINSON: You filed a motion to accelerate in this appeal. What is the status of the matter now regarding the juvenile with respect to that motion?

CONNOLLY: He was transferred. I believe he has roughly 1 year left on his sentence, but he was transferred in August.

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LAWYER: In *D.I.V.*, the appeals court reversed to the TC judgment of juvenile delinquency and it did it on the basis of a failure to admonish with respect to two atoms(?) of admonishment. One was the admissibility of the adjudication hearing in a future criminal

proceeding. And the other was, the court's failure to properly admonish with regard to the court's right to grant probation. Having engaged in that discussion of the nature of the case with the child, the appeals court said was required to do so correctly.

OWEN: What's the harm in having a jury as opposed to a judge pass on a probation issue?

LAWYER: That would be a judgment call I think in most cases. And the child and the child's attorney was deprived of being able to make that strategy call.

HECHT: If the judge could grant probation, you might try it at the bench?

LAWYER: That's right. Absolutely. And I think that by virtue of that, we have harm. And with regard to at least that admonishment in this case we could prevail on a harm analysis. I'm not certain that we could prevail on a harm analysis with regard to the failure to advise of the admissibility of the juvenile proceeding in a future criminal case unless it would impact on not just the trial strategy of the defense attorney in this particular case, but on the total case strategy. If the total case strategy was taken into consideration, then if that admonishment was given and if perhaps the guardian or the parent that is required by the statute to be present engaged in case strategy with the attorney a decision might be made to attempt plea bargain so that a plea could be entered to a lesser offense which would have a lesser impact at some future proceeding.

HECHT: Is there anything else you can think of that would enter into the harm analysis with respect to that particular explanation about the use of the record in later proceedings?

LAWYER: No.

SPECTOR: What is the purpose of having a parent or a guardian ad litem present? Is the admonishment and explanation directed to them as well as you just indicated?

LAWYER: I think that there is some public policy involved in that. It certainly engenders confidence in the system generally. But also it allows the parent or guardian to stand in the stead of the juvenile to some extent in the decision-making process about where to go.

OWEN: Let me ask you the same question about the motion for new trial. Why shouldn't we require this to be raised in a motion for a new trial?

LAWYER: If it's not fundamental error perhaps you should. If it's fundamental error, that can be raised at any point. I think that what we have here is a clash between the amendment that was mentioned earlier to 53.04, that is amendment (i) that allows or requires in fact the attorney to perfect the appeal at the TC level. If these cases are decided on fundamental error, then perhaps that

amendment becomes unconstitutional, because I don't think that that amendment can change the fact that fundamental error can be raised at any point. And so we've got that conflict that exist that this court has to solve.

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RESPONDENT

CAMERON: I represent the State of Texas in the matter of *C.O.S.*. It's the state's contention that if there is any sort of defects with respect to §54.03(b), any defects in those admonishments does not constitute fundamental error. An objection at trial is required under rule 52(a), now 33.1, and that the harmless error doctrine is applicable. And in this case, the CA did find that the error to be harmless and we are asking this court to affirm the decision by the CA.

HANKINSON: How should we interpret the word "shall" in the statute?

CAMERON: It should be interpreted as being directory and not mandatory.

HANKINSON: Are you aware of any specific legislative history that shows the legislature's intent that it be directory in this instance?

CAMERON: No. But the legislature's intent is demonstrated by the amendment on 54.03(i), which basically said, "you have to raise that issue and object at trial." And they specifically expressly made rule 52(a) applicable. Probably in looking at the legislative history on 54.03(i), the language in the various forms of the bills remain the same. And it apparently is just an effort to rectify the conflict developed by the CAs in these type situations. So I think the legislature has spoken and demonstrated that "shall" is merely directory and not mandatory.

HANKINSON: All that the amendment requires is that an objection be made to preserve error.

CAMERON: Correct.

HANKINSON: It does not address the question of then whether or not the error must be harmful?

CAMERON: That's correct. But it demonstrates that it certainly is not fundamental error. Effective Sept. 1, 1997, this fundamental error automatically disappears? I mean it demonstrates that the legislature never intended for the failure or defects and admonishments to be fundamental error. If they wanted to correct it, that's the avenue by which they did it, that's the vehicle by which they did it. 52(a) was applicable. It has been since 1987. There's no reason why the CAs haven't been applying that. It's applicable. It should have been applied in this case.

HECHT: There is some reason to explain that the record could be used in a later proceeding, or they wouldn't put it in a statute I assume?

CAMERON: That's correct.

HECHT: Perhaps that reason is, because the child if he knew that could try to plead to a lesser offense, is that true?

CAMERON: That's possible. That determinative sentencing came long after rule 52(a).

HECHT: How can you tell whether that occurred or not in this case, in *C.O.S.*? Assuming that the child did not know that the record could be used later, he had no reason to make a record of what he would have done if he had of known that.

CAMERON: Right. But the petitioner in this case has not demonstrated - first of all he hasn't demonstrated he didn't know that that adjudication of delinquency could be used against him in a future criminal proceeding when he becomes an adult, or he is an adult today. There's no evidence at all in this case - he certainly had an opportunity. He filed a motion for new trial. He had an opportunity to present that evidence. He fell to do so. You can think hypothetically all day long and come up with circumstances of perhaps he could have been harmed. But in this case there is no evidence that he was harmed.

HECHT: But you wouldn't have any reason to put that evidence on until you learned that the admonishment was supposed to have been given and wasn't, which might be when somebody is writing the appellate brief.

CAMERON: And you're assuming that his counsel didn't know, and you're assuming his counsel didn't advise him of that, and you're assuming his appellate counsel didn't know. I mean that's a lot of assumptions and I don't think they need to be made in this case.

GONZALEZ: This was a criminal case?

CAMERON: It's quasi civil criminal.

GONZALEZ: Let's just assume that we are dealing with an adult. Wouldn't the burden be on the state to show that the admonishments were given?

CAMERON: Under 26.13 there is pleas of guilty for an adult defendant. There is a procedural law that you are supposed to admonish as to a, b, and c.

GONZALEZ: And there are consequences if you do not do that?

CAMERON: That's correct.

GONZALEZ: And there are consequences if you do not do that?

CAMERON: That's correct.

GONZALEZ: And the defendant can stand mute and say nothing and perfect nothing, correct?

CAMERON: Right.

GONZALEZ: Now why should we not treat it if this was quasi civil and quasi criminal particularly when we have the words "shall be given" the same?

CAMERON: For two reasons. One is, the legislature has demonstrated its intent that 54.03(b), the rule 52(a) is applicable, and that is not fundamental error by that amendment. And two, if you look at art. 26.13 of the Code of Criminal Procedure, across the hall the CCA has held that the failure to admonish under 26.13 is harmless. It doesn't look at how you classify the error unless it's a structural error. And this is merely a procedural rule. Unless it's a structural error harm analysis is applicable. In *Cain*, 1997, even under those circumstances the failure to admonish can be harmless even in an adult. So I think those two reasons demonstrate why - rule 52(a) should be applicable. Rule 81(b)(1) should be applicable.

HANKINSON: How do you square your argument within the language of §54.03(a). It talks about the fact that a juvenile can only be found to have engaged in delinquent conduct only after an adjudication hearing conducted in accordance with the provisions of this section. How do you square your argument with the "only" language?

CAMERON: Once again, it's a procedural mechanism. The statute is basically: The TC please tell the juvenile about A, B, C, D, and E, whatever the constitutional rights and information. And if the court doesn't do so, then the petitioner, the child still needs to object.

HANKINSON: This says, "A child may be found to have engaged in delinquent conduct for conduct indicating a need for supervision only after an adjudication hearing conducted in accordance with the provisions of this section." And that includes this section, subpart (b) that includes the admonitions and explanations. So what does "only" mean? Doesn't that seem to imply the legislature intended that you could not make a delinquency finding against a juvenile unless you had complied with §b?

CAMERON: Yes. And it's the state's contention that there was substantial compliance. The TC did explain the allegations.

HANKINSON: So in order to reconcile (a) and (b), we have to interpret "apply a substantial compliance standard" to this particular provision of the statute?

CAMERON: I think the court needs to recognize that the legislature has said, "Under these circumstances, the TC should tell the juvenile and their parent or guardian about certain rights and information," and if there is any defects in that. This is not a total failure to admonish or explain, and I think that is an important difference.

BAKER: But it is a total failure in respect to two parts. There was no explanation of either one of those two, isn't that correct?

CAMERON: There was an explanation to the nature and possible consequences of the proceedings. I don't believe that there was any sort of an explanation of the law relating to the admissibility of the record of the juvenile _____ adjudication in a criminal proceeding. And I don't believe according to the record there was a explanation as to the right to confront witnesses. But I think you have to take that into consideration of the fact that the appellant obviously knew he had the right to confront witnesses. I mean, he did confront witnesses.

BAKER: Well that works if you make it subject to a harm analysis?

CAMERON: That's correct. But I think you have to realize just because there's a defect in admonishment does not render the plea. I mean if he has a problem with the plea raise involuntariness to the plea. He didn't do so. He's not saying his plea was involuntary.

BAKER: But he made a plea of not guilty. So she certainly can't raise a involuntariness of a plea when you plead not guilty. That just doesn't work.

CAMERON: That's true, but that would be his position: "I pled not guilty because I didn't realize that I had a right to confront witnesses. I pled not guilty. I did not realize that this adjudication could be used in a criminal court when I become an adult."

OWEN: What about the possibility that he could have pled to a lesser offense?

CAMERON: He could have, but there's no evidence to that. "I admitted sexual assault of a child of two juveniles."

OWEN: If we say there's not a harm analysis required, isn't it true that the failure to admonish the adverse outcome can be used against you in criminal proceedings might lead the child to conclude, "Well I'm going to be found guilty either way. I would rather be found guilty of a lesser offense."

CAMERON: But there's no evidence of that. I mean he also might be found not guilty, too.

OWEN: If we assume it's fundamental error, you don't need evidence?

CAMERON: If you find fundamental error then he can't waive any of these rights. I mean that makes no sense at all. Under 51.09 or any general voluntary intentional waiver that would say, "the TC has to do A, B, C, D, E and F. I think there is 6 provisions. No ifs, ands, buts about it. If you don't cross every T, dot every I, it goes back to a plea.

OWEN: The CA drew some distinctions. It said some of these are probably fundamental error and some or not. Isn't that one option that we can say that some of these if the TC fails to do them, they are fundamental error, others it's not?

CAMERON: Sure this court can do that.

OWEN: Right to trial by jury, for example?

CAMERON: Right. And he's waived it. Why would you ever find fundamental error in that?

OWEN: He's not been admonished that he has the right to...

CAMERON: He has a written waiver. He waived it. In essence, he's been admonished of that. He's been told that. If you waive something, you necessarily know you have it. If you exercise a right, you necessarily know you have it. You can't get around that. In order to find fundamental error in this case, you have to say, "It doesn't matter what happened to this defendant in this case." The court has to do all those above or _____. And that just doesn't make sense especially in light of the hypothetical _____. Suppose a juvenile does know A, B, C, D, E, and F. He does know all those rights. He does know all those admonishments. He does know his constitutional rights. He exercises them and you still reverse? That makes absolutely no sense whatsoever.

BAKER: Early in your argument you referred to a CA case in 1997, *Cain*, and what is the cite on that?

CAMERON: 947 262.

GONZALEZ: Let me ask you a hypothetical question. Assuming the court decides to reverse this case, what would then be the status of the case? How old is the child now?

CAMERON: The child will be 18 on Sept. 17, of this year.

GONZALEZ: He could not be retried as a juvenile?

CAMERON: That, I don't know the answer to.

GONZALEZ: He would have to be tried as an adult?

CAMERON: I don't know. My first reaction is, I think he walks. But I don't know for sure. In the sense that he can't be certified, 14. I don't know. But I think that that's something that is taken consideration.

ENOCH: The difficulty I have, there's a logic to a plea of guilty that gives up certain rights that the defendant has. And so there seems to be some logic to saying, "Well if you didn't have an adequate explanation, then what you gave up you really didn't know what you were giving up." It doesn't seem to me that logic applies to this case or the *D.I.B.* case. The defendant gave up none of those rights that they are arguing they should have been told about. But the juvenile statute isn't based on giving up any rights. It's before anything gets decided they have to be advised. It seems to me that's the difficulty in this case. The statute isn't written in terms of we want to give them this information to assure that they know what they are doing when they give them up. It looks like even if they have a trial by jury, and there is no plea bargain involved, nothing is offered, they are facing the big end of this deal and they've got a lawyer and they go through the whole deal, it seems to me this statute says, "but there's still a problem if you don't admonish them about all of these other things out here. How do we deal with that? It seems to be inconsistent with the notion of harmless error that in fact is predicated on a notion I am giving something up and therefore we want to make sure you understand what you're giving up. They give up nothing here, yet the statute says you've still got to admonish them.

CAMERON: And that makes it evident how and why it's not fundamental error. Just because the TC doesn't explain certain information to them doesn't - if the defendant himself or the petitioner in this case, the juvenile hasn't demonstrated that he would have changed his plea, he would have pled guilty to a lesser or that there was a lesser, it seems to me that to find fundamental error simply does not follow in light of the legislature's intent. I mean this court promulgated the rules. They promulgated it in 52(a). Did the CA apply it? No. And it seems to me the court should and you shouldn't just assume just because the state has seen fit to provide a state procedure - this is not the denial of due process and that he was denied a complete hearing or he's denied full admonishments. This is merely a defect in one or two of the admonishments at best for the petitioner. And in light of the circumstances in this case, and in all cases, it doesn't constitute the noncompliance or the defects and compliance with the state procedure rule simply should not rise to the level of fundamental error just because it's a juvenile. I mean that's all. You immediately look. It's a juvenile. There's a statute that says, only if, and then you get fundamental error? I don't believe so.

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HECHT: Do you agree that the judge can give probation or not?

TURNER: Based on the current statutes, I read them, I don't know. I think it's extremely nebulous at best. I think if - the way it stands, I think now each court is going to be required to make an interpretation of the juvenile law and the criminal procedure law and see how they mesh and decide on their own without any kind of guidance at this point. I think there are good arguments on both sides and I think they are good arguments on both sides. I think the TC in this case, I think he followed the rules which he understood and that is under 42.12 of the Code of Criminal Procedure 3g that these offenses a judge cannot give probation for. And my guess is some of the reasoning that the legislature took that away to get some kind of community input into those cases of whether or not there should be probation. I think that same thing would apply to juveniles in that they should also - the community should also have input in those cases where juveniles are involved.

OWEN: Can you think of instances where even though the family code does not expressly reach out and say, "Okay, chapter 38 or whatever of the Code of Criminal Procedures apply here," where the statute is silent, where the courts have said, "Nevertheless, the code of criminal procedure applies?"

TURNER: No, I can't. I know where they changed it and that's with evidentiary matters that the rules of evidence in a criminal procedure. They changed it a few years ago. But where they've said that, no, I don't know of a specific provision.

OWEN: Where courts have said, "nevertheless we're going to pick up the code of criminal procedure and overlay it on the family code even though the family code doesn't expressly tell us to do that?"

TURNER: I am not aware of any specific instance they said that. But that being said, if there is no law on it anywhere, then I think that would seem to be the appropriate and proper thing to do, to see where there is law that touches on that point.

I know a couple of questions have been asked about legislative history, and I in fact made an effort to find legislative history on the point about that particular statute. The only thing I could find in my research, it is limited somewhat, is an article in St. Mary's Law Journal. I got a copy of the article because I couldn't find anything in it that specifically referred to it. I didn't bring that article with me. I will be glad to provide that information to the court. But it's a thorough discussion about particular legislation on determinant sentencing.

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REBUTTAL

CONNOLLY: *C.O.S. and D.I.D.* are asking the court to say that "shall" means "shall." To say that "mention" does not equal "explanation." That explanation has a specific meaning in that it encompasses a give and take. It encompasses an idea or dialogue between the judge and a child, that the child understands what's going on and what they are faced with.

ENOCH: I understand that the legislature says, "these admonishments will occur regardless of what happens." When this gets ready to go to trial and we're trying the case, we're in the plea bargain, there is a jury in the box and they are getting ready to go, does the judge have to look at the attorney and the child and say, "You have the right to confront a witness as the trial progresses?" If the judge fails to do so, even if they confront the witness, is that reversible error?

CONNOLLY: It's fundamental according to all of the cases up to this point. Almost all of the cases except for *C.O.S.* and *O.L.* and there is a couple of unpublished opinions. I believe yes because this child and his parent or guardian they need to understand the legislature has said by intent, by language that they need to understand that.

ENOCH: So if the juvenile is there, the judge calls the jury and the lawyers are sitting in the chair, if the judge fails to tell them, "You have the right to have this issue tried by a jury," the jury is still sitting there in the box, the decision must be reversed?

CONNOLLY: Procedurally I've had it done both ways. I've had it done before the jury gets there. I've had it done in front of a jury. So you could do it prior to the commencement of bringing the jury in and paneling the jury on voir dire and go through all of this explanation so that the child can make those informed intelligent decisions with counsel and parent prior to the commencement of the case.

ENOCH: If the jury can award probation in trying this case, but I failed to tell the juvenile that I, as the judge, could award it if they waived a jury and they don't waive that jury, is the child giving up some sort of right to have the judge try the case?

CONNOLLY: Absolutely. There is no question statute 54.04 and 54.05 says, "The court or jury can award probation in these types of cases."

ENOCH: But does the juvenile have the right to demand a trial by the judge or does the juvenile have the right to demand a trial by a jury, which they could waive if they chose to do so?

CONNOLLY: A juvenile has the right to demand a jury - actually it's presumed to be a jury case under the statute unless waived. And a juvenile can absolutely waive any right under 51.09.

ENOCH: But is waiver of it the same difference as a right to not go to a jury?

CONNOLLY: I have the right to elect. In order to elect not to go to the jury with counsel and with parent or guardian, I have to waive that specifically under 51.09. That's the statutory mandate of the juvenile justice code. In order to do that, I have to make an intelligent voluntary knowing decision. And in order to do that, I have to know what a jury trial is. It has to be explained to me.

ENOCH: And if the waiver isn't adequate, if there is some defect in the waiver, if there is some admonishment, your solution is to get a jury trial?

CONNOLLY: Your solution would be to invoke that right - well actually the statutory mandate is that you get that right. And it would be error to deprive the child of the right if you have a defective admonishment, or a defective explanation.

GONZALEZ: If the court were to reverse this case, your client would walk?

CONNOLLY: No. There is specific provision under 54.03, or it might be in one of the preceding statutes, that as long as the prosecution or the juvenile adjudication proceeding commenced prior to the child's 18th birthday it could be concluded even though the child has surpassed the age of 18 by the time this gets done. He is not quite 18. And I believe the upward cap on the prosecution may be 19 in the statute. As I understand the statutes and the case law today, if you reversed it today, it could go back to trial in the juvenile court.

SPECTOR: If he is found guilty, would he be placed in a juvenile facility?

CONNOLLY: The Texas Youth Commission is a facility that holds children up to the age of 21. So, yes, he could be placed in - although he was at the time he could not be certified because at the time that the law existed 14 year olds could not be certified. He could be reprosecuted under the determinative sentencing statute and a lot of these issues could be addressed and he would either be at risk again to going to TYC to at least 21 or to prison. That option would be available.