

**POLICE INTERACTIONS WITH JUVENILES**

**WAIVER OF RIGHTS,  
SEARCH AND SEIZURE,  
ARREST,  
PROCESSING OFFICES,  
CONFESSIONS**

Pat Garza  
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386TH District Court  
Bexar County, Texas  
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**POLICE INTERACTIONS WITH JUVENILES**

**The Written Materials**

**I. ARREST**

**II. CONFESSIONS**

**III. WAIVER OF RIGHTS**

**IV. SEARCH AND SEIZURE**

Appendix A: LAW ENFORCEMENT GUIDE FOR TAKING A  
JUVENILE'S WRITTEN STATEMENT

Appendix B: SAMPLE MOTION TO SUPPRESS

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**WAIVER OF RIGHTS**

**Texas Family Code § 51.09**

**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 (emphasis added):

- (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.

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**Contrary Intent  
Truancy Court**

**Sec. 65.008. WAIVER OF RIGHTS.** A right granted to a child by this chapter or by the constitution or laws of this state or the United States is waived in proceedings under this chapter if:

- (1) the right is one that may be waived;
- (2) the child and the child's parent or guardian are informed of the right, understand the right, understand the possible consequences of waiving the right, and understand that waiver of the right is not required;
- (3) the child signs the waiver;
- (4) the child's parent or guardian signs the waiver; and
- (5) the child's attorney signs the waiver, if the child is represented by counsel.

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**Contrary Intent  
Consent To A Breath Specimen**

**TFC 52.02(d):**

a child may submit to or refuse the taking of a breath specimen without the concurrence of an attorney, but only if the request and response are videotaped; and the video is maintained and made available to the child's attorney. Failure to comply with this provision would make the breath test inadmissible.

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**Consent To A Blood Specimen  
(No Contrary Intent Provision)**

**There is no contrary intent provision excluding a lawyer for a child submitting to or refusing the taking of a blood specimen.**

**As a result, it would appear under TFC 51.09, a lawyer's consent would be necessary for a child to be able to submit to or refuse the taking of a blood specimen.**

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**DRIVING UNDER THE INFLUENCE  
BY A MINOR**

**TABC § 106.041**

(a) A minor commits an offense if the minor operates a motor vehicle in a public place while having any detectable amount of alcohol in the minor's system.

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**MANDATORY BLOOD DRAW**

Texas Transportation Code § 724.012(b) provides:

A peace officer shall require the taking of a specimen of the person's breath or blood if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle and any individual has died or will die; or an individual other than the person has suffered serious bodily injury; and the person refuses the officer's request to submit to the taking of a specimen voluntarily. (*emphasis added*)

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**SEARCH WARRANT FOR BLOOD**

The Texas Code of Criminal Procedure Art. 18.01(j) provides:

(j) Any magistrate who is an attorney licensed by this state may issue a search warrant under Article 18.02(10) to collect a blood specimen from a person who:

- (1) is arrested for an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code; and
- (2) refuses to submit to a breath or blood alcohol test.

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**OBTAINING A SPECIMEN FROM A JUVENILE**  
**Review**

1. Can a child consent to the giving of a breath specimen?  
*Consent and refuse, without an attorney, but the consent or refusal must be video taped.*
2. Can a child consent to the giving of a blood specimen?  
*Consent and refuse, but it would appear that an attorney would need to agree to the consent or refusal.*
3. Do the mandatory provisions of the Transportation Code regarding blood test apply to juveniles?  
*Yes, if the proper procedures are followed.*

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**SEARCH AS A CONDITION OF PROBATION**



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**CONDITIONS OF PROBATION**

A judge may impose any reasonable condition of probation if it is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. But the court's discretion is limited. When it comes to infringing on Fourth Amendment rights, a probationer's expectations of privacy may be diminished only to the extent necessary for his reformation and rehabilitation.

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**U.S. v. Sealed Juvenile**  
**U.S. 5th Cir., 2015**

**IN A SEXUAL CONTACT ADJUDICATION, A CONDITION OF PROBATION WHICH REQUIRED THE JUVENILE TO REQUEST PERMISSION EVERY TIME HE NEEDED TO USE A COMPUTER, OR EVERY TIME HE NEEDED TO ACCESS THE INTERNET, WAS DEEMED UNREASONABLY RESTRICTIVE.**

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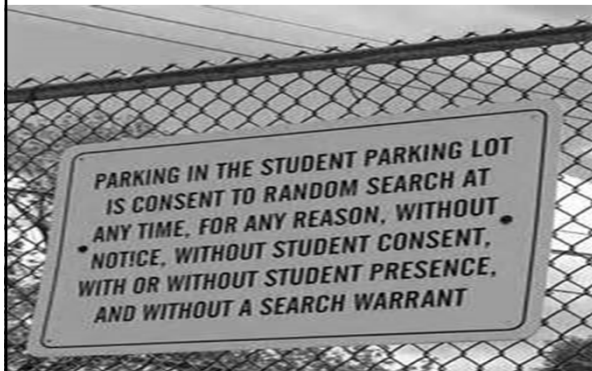
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**SCHOOL SEARCH AND SIEZURE**



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***NEW JERSEY v. T.L.O.***

- **Fourth Amendment applies to students in public schools, but in a diminished capacity.**
- **The Court created a balancing test utilizing...  
*“reasonableness, under all the circumstances of the search.”***

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**REASONABLENESS  
TWO PART TEST**

- 1. Justified at its inception.**  
(Why are you searching now?)
- 2. Reasonably related in scope.**  
(Why are you searching there?)

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**LOCKER SEARCHES**  
Expected Right of Privacy?

Students do have an expected right of privacy in lockers that they lock and where they keep personal belongings...

However, schools can take specific steps to eliminate or reduce that expected right of privacy.

Written policies which notify the students that the school owns and controls the lockers and that they are subject to search at any time reduces a student's expected right of privacy in the lockers?

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**DOG SEARCHES**

- 1. Sniffs of Children: A sniff of a child's person by a dog is a search, and the reasonable suspicion standard applies.**
- 2. Sniffs of Property: A person's reasonable expectation of privacy does not extend to the airspace surrounding that person's property.**

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## REASONABLE GROUNDS

### Fact Situation

An administrator receives an anonymous tip that little Johnny has a plastic bag containing marihuana in his underwear. Johnny is escorted to the office of the Principal where he denies having marihuana. The Principal has him lift up his shirt and extend the elastic on his shorts and observes a plastic bag of marijuana in Johnny's waistline.

Legal search?

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## NO

An anonymous tip regarding the presence of marijuana on a student, does not tip the balance far enough for the search in this case to be deemed justified at its inception. An uncorroborated anonymous tip does not rise to the requisite level of reasonable suspicion for a marijuana search.

*In re K.C.B.*

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## CELL PHONES



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**Riley v. California**  
U.S. Supreme Court, 2014

**WITH A FEW EXCEPTIONS, THE POLICE MAY NOT, WITHOUT A WARRANT, SEARCH DIGITAL INFORMATION ON A CELL PHONE SEIZED FROM AN INDIVIDUAL WHO HAS BEEN ARRESTED, SIMPLY BECAUSE HE HAS BEEN ARRESTED.**

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**G.C. v. Owensboro Public Schools**  
U.S. 6th Cir., 2013

**USING A CELL PHONE ON SCHOOL GROUNDS DOES NOT AUTOMATICALLY TRIGGER AN ESSENTIALLY UNLIMITED RIGHT ENABLING A SCHOOL OFFICIAL TO SEARCH ANY CONTENT STORED ON THE PHONE.**

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**CELL PHONE**  
Texas Case  
**Fact Situation**

A student is arrested at his high school for a misdemeanor and booked into jail. All of his belongings, including his cell phone, are taken from him and placed in the jail's property room (phone is in police custody). Three hours after his arrest, an officer with probable cause that evidence connected to another, unrelated offense, may be in the phone goes into the property room and looks through the student's phone.

Legal search?

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**NO**

**In this case, the court found the search unreasonable because, while there was probable cause to believe evidence of a criminal offense may have been on the phone, the officer could have secured a warrant.\***

*State v. Granville*

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**Amarillo Court of Appeals**

...The power button (of a cell phone) can be likened to the front door of a house. When on, the door is open and some things become readily visible. When off, the door is closed, thereby preventing others from seeing anything inside. And though some cell phones may require the input of a password before it can be used, no evidence suggests that Granville's was of that type. So, the officer's ability to venture into the phone's informational recesses by merely pressing the power button does not suggest that Granville's interest in assuring the privacy of his information was minimal. Whether the phone was locked or not via a password, a closed door is sufficient to illustrate an expectation of privacy.

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**ARREST**



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**ADMISSABILITY OF EVIDENCE OBTAINED AFTER ARREST**

**Four Step Process**

**Step 1**

Was there a legal arrest?

**Step 2**

Was the juvenile handled properly after arrest?

**Step 3**

Was the JPO option utilized and if so was there compliance with the JPO provisions?

**Step 4**

If there was a violation in the arrest or handling of the juvenile, is there a Causal Connection between the violation(s) and any of the evidence obtained?

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**JUVENILE ARRESTS**

**TFC §52.01(a)**

(1) pursuant to an order of the juvenile court;

(2) pursuant to the laws of arrest;

(3) by a law enforcement or school district peace officer, if there is probable cause to believe that the child has engaged in:

(A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or

(B) delinquent conduct or conduct indicating a need for supervision;

(C) conduct that violates a condition of probation;

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**Taking a Child Into Custody**

**Cont'd**

(4) by a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court; or

(5) pursuant to a directive to apprehend; or

(6) by a probation officer if there is probable cause to believe that the child has violated a condition of release imposed by the juvenile court or referee under section 54.01.

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**CHILD IN CUSTODY  
POSSESSION AND RELEASE  
TFC § 52.02(a)**

Except as provided by Subsection (c), a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following: \*

- (1) release the child to a parent;
- (2) bring the child before the office or official designated by the juvenile court;
- (3) bring the child to a detention facility designated by the juvenile court;
- (4) bring the child to a secure detention facility as provided by Section 51.12(j);
- (5) bring the child to a medical facility; or
- (6) dispose of the case under a first offenders program.
- (7) if school is in session and the child is a student, bring the child to the school campus to which the child is assigned if the principal, the principal's designee, or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day.

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**ADULT INTOXILYZER ROOM**

**TFC § 52.02(c)**

If the child is operating a motor vehicle and the officer detects any amount of alcohol in the child's system he can take the child to the adult intoxilyzer room.

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**NOTIFYING THE PARENTS  
TFC § 52.02(b)**

A person taking a child into custody shall promptly give notice of his action and a statement of the reason for taking the child into custody, to:

- (1) the child's parent, guardian, or custodian; and
- (2) the office or official designated by the juvenile court.

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**JUVENILE PROCESSING OFFICE (JPO)**

**TFC § 52.025**

(b) A child may be detained in a juvenile processing office only for the following:

- (1) the return of the child to the custody of a parent;
- (2) the completion of essential forms and records;
- (3) the photographing and fingerprinting of the child;

\* (4) the issuance of warnings to the child; or

\* (5) the receipt of a statement by the child.

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**JPO RULE:**

**THE CHILD HAS A RIGHT TO HAVE A PARENT PRESENT**

**TFC § 52.025(c)**

(c) A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney.

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**JPO RULE:**

**PARENT HAS A RIGHT TO BE PRESENT WITH THE CHILD**

**TFC § 61.103**

(a) The parent of a child taken into custody... ...has the right to communicate in person privately with the child for reasonable periods of time while the child is in:

(1) a juvenile processing office;

(b) The time, place, and conditions of the private, in-person communication may be regulated to prevent disruption of scheduled activities and to maintain the safety and security of the facility.

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**PARENT'S RIGHTS CAN'T BE USED BY THE CHILD**  
**TFC §61.106**

The failure or inability of a person to perform an act or to provide a right or service listed under this subchapter (Parental Rights) may not be used by the child or any party as a ground for:

- (1) appeal;
- (2) an application for a post-adjudication writ of habeas corpus; or
- (3) exclusion of evidence against the child in any proceeding or forum.

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**JPO RULE:**  
**The Six Hour Rule**

TFC §52.025(d)

*A child may not be detained in a juvenile processing office for longer than six hours.*

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**CAUSAL CONNECTION**

In Gonzales v. State, police failed to notify the child's parents of his custody as required by §52.02(b). The Court of Appeals disallowed the confession, but the Court of Criminal Appeals, reversed and remanded for consideration of a causal connection between the failure to notify the parent (upon taking a child into custody) and the receipt of the confession.

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## JUVENILE CONFESSIONS



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## IT STARTED WITH GAULT

The Supreme Court in discussing the dangers of a child's statement, stated in *In re Gault*:

"the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

*In re Gault*  
1967

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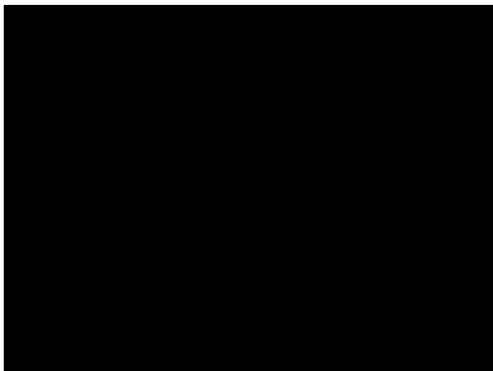
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## THE BALLAD OF JERRY GAULT



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**GERALD GAULT**



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**EVERY CONFESSION MUST BE VOLUNTARY**

**Factors:**

1. The child's age, intelligence, maturity level, and experience in the system;\*
2. The length of time left alone with the police;
3. The absence of a showing that the child was asked whether he wished to assert any of his rights;
4. The isolation from his family and friendly adult advice;
5. The failure to warn the appellant in Spanish;
6. The length of time before he was taken before a magistrate and warned.

**PROSECUTORS: IF THE CHILD WAS TAKEN TO A MAGISTRATE, THE VOLUNTARINESS ISSUE HAS ALREADY BEEN DETERMINED.**

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**DOES THE STATEMENT COMPLY WITH**  
**Texas Family Code §51.095**

To invoke §51.095 of the Texas Family Code  
you must establish:

**Custodial Interrogation!**

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## CUSTODY

Being the focus of an investigation and having a person's freedom of movement restricted, will not be considered custody, unless the freedom of movement is restricted to the degree associated with formal arrest.

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### **Reasonable Person Standard for Custody** *Must now include Age*

So long as the child's age is known to the officer, or can be objectively made apparent to the "reasonable officer," including age in the custody analysis is consistent with the *Miranda* test's objective nature. This does not mean that a child's age will be the determinative, or even a significant, factor in every case, but it is a reality that courts can not ignore.

*J.D.B. v. North Carolina*  
U.S. Supreme Court

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## INTERROGATION

Interrogation refers not only to express questioning, but also to any words or actions on the part of the police (other than those *normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

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**INTERROGATION  
“QUESTIONING BY SCHOOL PRINCIPAL”**

*Fact Situation*

A juvenile hid a gun in a friend's backpack going to school and retrieved it upon arrival. The friend told a police officer at the school that the juvenile had a weapon. The officer and the hall monitor escorted the juvenile to speak to an assistant principal. The officer left the room while the assistant principal questioned the juvenile. The juvenile initially denied knowing anything about a weapon, and asked to speak to a lawyer, but later admitted bringing the weapon to school.

Is this Custodial Interrogation?

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**NO**

The court held that while the assistant principal was a representative of the State, he was not a law enforcement officer, and his questioning of the juvenile was not a “custodial interrogation” by such an officer. Because the juvenile was not in official custody when he was questioned by the assistant principal, he did not have the right to remain silent or to speak to a lawyer.

*In the Matter of V.P.*

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**TEXAS FAMILY CODE §51.095**

**Requirements**

1. The child must receive the traditional Miranda warnings from a magistrate.
2. [Follow up Procedure for Written Statement]  
The statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child.

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### MAGISTRATE'S RESPONSIBILITIES

1. must be fully convinced and certify that the child understands the nature and contents of the statement and that the child is signing the same voluntarily. \*
2. must be fully convinced and certify that the child knowingly, intelligently, and voluntarily waives his rights before and during the making of the statement.
3. Child must sign in his presence.

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### Recorded Custodial Statements

(A) the child is given the warnings by a magistrate, the warnings are a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warnings;\*

(B) the device operates properly, the operator of the device is competent to use the device, the recording is accurate, and the recording has not been altered;

(C) each voice on the recording is identified; and

(D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy.

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### WRITTEN VS. RECORDED STATEMENTS

"Independent Requirements"

#### *Fact Situation*

A juvenile gives an audio-recorded statement which is reduced to writing. The audio-recorded statement does not contain the statutory warning on the audio as required by the statute. The magistrate testifies that she gave the required statutory warning to the juvenile before he gave his oral statement. And his written statement reflects that the magistrate informed him of his statutory rights.

Which statement or statements, if any, should be suppressed?

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A written statement that is taken in compliance with the requirements for its admissibility will not be rendered inadmissible on the basis that it was derived from an oral recorded statement that is inadmissible due to statutory noncompliance. Here, the juvenile's audio recorded statement is inadmissible because it did not comply with Section 51.095's provisions governing the admissibility of oral recorded statements. However, Section 51.095 has separate provisions governing the admissibility of written statements. Since the juvenile's written statement was taken in compliance with those provisions, it is admissible.

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IN THE MATTER OF: \_\_\_\_\_ NO. \_\_\_\_\_

\_\_\_\_\_ \* IN THE 386TH JUDICIAL

\* DISTRICT COURT

\* OF BEXAR COUNTY, TEXAS

1. Respondent has been charged with the offense of \_\_\_\_\_
2. The actions of \_\_\_\_\_ violated the constitutional and statutory rights of the Respondent under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, Article 38.23 of the Texas Constitution of Criminal Procedure, and Sections 51.09, 51.17 and 54.03 of the Texas Family Code.
3. Respondent was detained and arrested without a lawful warrant, directive to detain, probable cause, reasonable grounds, or other lawful authority in violation of the Respondent's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, Articles 14 and 15 of the Texas Code of Criminal Procedure, and Section 52.01 of the Texas Family Code.
4. Any statements given by the Respondent, were involuntary and illegally obtained, in violation of the Respondent's Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and in violation of Section 51.09, 51.05, 52.01, 52.02, and 52.05 of the Texas Family Code.
5. Any tangible evidence seized in connection with this case, including but not limited to \_\_\_\_\_, was seized without a warrant, probable cause or other lawful authority in violation of the Respondent's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and Sections 51.09, 51.17, and 54.03 of the Texas Family Code.
6. Any tangible evidence seized in connection with this case, including but not limited to \_\_\_\_\_, was the result of an involuntary and/or unlawful investigation of the Respondent's Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and in violation of Sections 51.09, 51.05, 52.01, 52.02, and 52.05 of the Texas Family Code.

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**JUVENILE LAW:  
POLICE INTERACTIONS  
WITH JUVENILES  
Arrest, Confessions, Waiver of Rights  
and Search & Seizure**

**30th ANNUAL JUVENILE LAW CONFERENCE  
February 27-March 1, 2017  
Sponsored by the Juvenile Law Section  
Of the State Bar of Texas  
Horseshoe Bay, Texas**

**Pat Garza  
Associate Judge/Referee  
386<sup>TH</sup> District Court  
Bexar County, Texas  
(210)335-1154**

**PAT GARZA**  
Associate Judge  
386<sup>th</sup> District Court  
600 Mission Rd.  
San Antonio, Texas 78210

### **EDUCATION**

Board Certified – Juvenile Law – by the Texas Board of Legal Specialization

1980: Admitted to the Texas Bar.

1977 - 1980: Jurist Doctor, South Texas College of Law, Houston, Texas.

1977: B.A., University of Texas at Austin, Texas.

### **PROFESSIONAL**

2009 – Present: Texas Board of Legal Specialization Juvenile Law Exam Commissioner

Fellow of the Texas Bar Foundation

Editor – State Bar Juvenile Law Section Report.

2007 Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.

2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.

1999 - Present, Juvenile Court Associate Judge/Referee, 386<sup>th</sup> Judicial District Court.

1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.

1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.

Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

In his 27 years as an Associate Judge and Referee Judge Garza has presided over 57,000 juvenile hearings. He has been published 27 times and this will be his 99th juvenile law presentation.

### **SPEECHES AND PRESENTATIONS**

- Juvenile Law: Caselaw Update; Fifth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, December, 2016.
- Caselaw Update; Juvenile Delinquency Advanced Topics Seminar, Presented by the DBA Juvenile Justice Committee, Dallas, Texas, October 6, 2016.
- Caselaw Update; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Arrest, Confessions, and Search and Seizure; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Juvenile Law; 2016 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2016.
- Caselaw Updates; 29<sup>th</sup> Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.
- Juvenile Law: Caselaw Update; Fourth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2015.
- Juvenile Law Update: Caselaw Update, Legislation, and other Things; 52<sup>nd</sup> Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2015.
- Caselaw Updates; 28<sup>th</sup> Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Ft. Worth, Texas, February, 2015.
- Juvenile Law: Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2014.

- Caselaw Update; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
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**POLICE INTERACTIONS WITH JUVENILES**  
**Arrest, Confessions, Waiver of Rights, & Search and Seizure**  
By Pat Garza

**I. ARREST**

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution impose restrictions on when a person may be taken into custody for a criminal offense. Probable cause is required for an arrest of a person or for taking a person into custody, while reasonable suspicion is sufficient for a temporary stop for investigation. These constitutional safeguards are applicable to juvenile offenders.<sup>1</sup>

**A. VALIDITY OF ARREST**

Texas Family Code Section 52.01(b) provides:

This language makes it clear that juveniles are entitled to constitutional and other protections that apply to the arrests of adults for criminal offenses even though under the Family Code the terminology “taking into custody” is employed instead of “arrest.”

**B. CUSTODY DEFINED**

Section 51.095(d) defines a child “in custody” as follows:

- (1) while the child is in a detention facility or other place of confinement;**
- (2) while the child is in the custody of an officer; or**
- (3) during or after the interrogation of the child by an officer if the child is in the possession of the Department of Protective and Regulatory Services and is suspected to have engaged in conduct that violates a penal law of this state.**

**C. TAKING A CHILD INTO CUSTODY**

**1. Texas Family Code §52.01**

**§52.01. Taking into Custody**

**(a) A child may be taken into custody:**

- (1) pursuant to an order of the juvenile court under the provisions of this subtitle;**
- (2) pursuant to the laws of arrest;**
- (3) by a law enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe that the child has engaged in:**
  - (A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or**
  - (B) delinquent conduct or conduct indicating a need for supervision;**
  - (C) conduct that violates a condition of probation imposed by the juvenile court;**
- (4) by a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court; or**
- (5) pursuant to a directive to apprehend issued as provided by Section 52.015; or**

**(6) by a probation officer if there is probable cause to believe that the child has violated a condition of release imposed by the juvenile court or referee under section 54.01.**

**1. Pursuant to an order of the juvenile court under the provisions of this subtitle:**

- (a) The juvenile court may require that a child be taken into custody when an adjudication or transfer petition and summons is served on him.
- (b) The juvenile court may take a child into custody if he has violated a condition of release from detention, which required the child to appear before the juvenile court at a later date.
- (c) The juvenile court may issue an order to take the juvenile into custody to answer a motion to modify probation under Section 54.05.

**2. Pursuant to the laws of arrest**

The Texas Code of Criminal Procedure, Article 14 (arrest without a warrant), and article 15 (arrest with a warrant), applies to juveniles. In any situation that an adult can be taken into custody, a child can also be taken into custody.

**3. By a law-enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe the child has engaged in:**

- (A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or**
- (B) delinquent conduct or conduct indicating a need for supervision;**
- (C) conduct that violate a condition of probation imposed by the juvenile court.**

The statute requires “Probable Cause” but does not require a warrant under this section. The rule favoring arrest with a warrant is not constitutionally mandated, but is a product of legislative action. Article I, Section 9 of the Texas Constitution merely requires that an arrest conducted pursuant to a warrant be based upon probable cause.<sup>2</sup>

**4. By a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court; or**

A probation officer can arrest a child, without a warrant, upon probable cause to believe that the child has violated his probation.

**5. Pursuant to a directive to apprehend issued as provided by Section 52.015**

This section is the equivalent to the arrest warrant for adults.

- (a) On the request of a law-enforcement or probation officer, a juvenile court may issue a directive to apprehend a child if the court finds there is probable cause to believe the child committed an offense or violated his probation.<sup>3</sup>
- (b) A juvenile may be arrested as a witness in a case. Section 53.07 provides that a witness may be subpoenaed in accordance with the Texas Code of Criminal Procedure. Article 24.12 of the

Texas Code of Criminal Procedure authorizes the issuance by the court of an attachment for the witness.

**6. By a probation officer if there is probable cause to believe that the child has violated a condition of release imposed by the juvenile court or referee under section 54.01 (New Legislation - 2005).**

If a probation officer has probable cause to believe that the child has violated a condition of release from detention they are authorized to place the child into custody and take them to the detention center. Under the Family Code, the only conditions allowed are those reasonably necessary to insure the child's appearance at later proceedings or to attend a juvenile justice alternative education program. Conditions of release should not be used as conditions of probation.

**2. Bench Warrant**

**Sec. 52.0151. Bench Warrant; attachment of witness in custody.**

**(a) if a witness is in a placement in the custody of the Texas Youth Commission, a juvenile secure detention facility, or a juvenile secure correctional facility, the court may issue a bench warrant or direct that an attachment issue to require a peace officer or probation officer to secure custody of the person at the placement and produce the person in court. Once the person is no longer needed as a witness, the court shall order the peace officer or probation officer to return the person to the placement from which the person was released.**

**(b) the court may order that the person who is the witness be detained in a certified juvenile detention facility if the person is younger than 17 years of age. If the person is at least 17 years of age, the court may order that the person be detained without bond in an appropriate county facility for the detention of adults accused of criminal offenses.**

This section authorizes a court to issue a bench warrant or direct that an attachment issue to require a peace officer or probation officer to secure custody of a youth witness (in juvenile or adult court) who is in TYC or another secure juvenile detention or correctional facility.<sup>4</sup> When a youth is brought back to be a witness, the youth may be held in the county juvenile detention facility or if the youth is 17 or older, in the county jail.<sup>5</sup>

**3. Human Resources Code §61.093**

**HRC §61.093. Escape and Apprehension**

**(a) If a child who has been committed to the commission and placed by it in any institution or facility has escaped or has been released under supervision and broken the conditions of release:**

**(1) a sheriff, deputy sheriff, constable, or police officer may, without a warrant, arrest the child; or**

**(2) a parole officer or other commission employee designated by the executive director may, without a warrant or other order, take the child into the custody of the commission.**

**(b) A child who is arrested or taken into custody under Subsection (a) may be detained in any suitable place, including an adult jail facility if the person is 17 years of age or older, until the child is returned to the custody of the commission or transported to a commission facility.**

**(c) If a child is younger than 17, and is detained under this provision, detention hearings are required as in any other juvenile case.<sup>6</sup>**

#### **D. POLICE RELEASE AND DETENTION DECISIONS**

Once a law enforcement officer has taken a child into custody, failure to properly handle and transport that child may render his confession inadmissible, even if the officer has fully complied with § 51.095 (confession statute) of the Juvenile Code. The proper handling and delivery of the child during custody (and in compliance with the code) may be key in establishing that the confession is voluntary.

##### **1. Texas Family Code §52.02**

###### **52.02. Release or Delivery to Court**

**(a) Except as provided by Subsection (c), a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:**

- (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;**
- (2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court;**
- (3) bring the child to a detention facility designated by the juvenile court;**
- (4) bring the child to a secure detention facility as provided by Section 51.12(j);**
- (5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or**
- (6) dispose of the case under Section 52.03.**
- (7) if school is in session and the child is a student, bring the child to the school campus to which the child is assigned if the principal, the principal's designee, or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day.**

This statute is an expression of the legislative's intent to restrict involvement of law enforcement officers to the initial seizure and prompt release or commitment of the juvenile offender. It mandates that an officer (after taking a child into custody) must "without unnecessary delay, and without first taking the child to any place other than a juvenile processing office" take the child to any one of six enumerated places. It is not merely a question of whether the officer does one of the seven enumerated options without unnecessary delay, but also whether he takes the juvenile to any other place first.<sup>7</sup>

## 2. Comer v. State

Comer was arrested and taken to a magistrate for the Section 51.095 warnings. He was then questioned at the police station for almost two hours, where he confessed to murder. Upon return to the magistrate, he signed the written confession. The Court of Appeals upheld the admission of the written confession into evidence in the criminal trial on the grounds that compliance with Section 51.095 was all that was required. The Court of Criminal Appeals however, reversed, rejecting the argument that full compliance with §51.09(b) [now §51.095] would trump any §52.02 violation.<sup>8</sup> At the time that *Comer* was decided, §52.025 (juvenile processing office exception) did not exist.

At the time that *Comer* was heard, Section 52.025 was not in existence. The Court of Criminal Appeals reversed, rejecting the argument that the enactment of Section 51.09(b) [now Section 51.095] should be read as creating an exception to the requirement of Section 52.02.

In 1991 Section 52.025 was enacted to authorize each juvenile court to designate a “juvenile processing offices” for the warning, interrogation and other handling of juveniles. Section 52.02 was also amended to authorize police to take an arrested juvenile to a “juvenile processing office” designated under Section 52.025 of the Family Code. The statute was enacted to give law enforcement more options after *Comer*.

## 3. John Baptist Vie Le v. State

Ten years after *Comer*, the Court of Criminal Appeals decided *John Baptist Vie Le v. The State of Texas*, 993 S.W.2d 650 (Tex. Crim. App.—1999), the second significant decision pertaining to violations of §52.02.

The court again examined §52.02(a)(2), & (3), and §52.05(a) & (b) of the Texas Family Code and concluded that appellant's statement was taken in violation of the Family Code. It reversed and remanded the case for the appeals court to consider whether admission of the improper statement had harmed appellant. The Court stated that the Legislature envisioned the “juvenile processing office” as little more than a temporary stop for completing necessary paperwork pursuant to the arrest.<sup>9</sup>

In *Le* the detective took the child to a city magistrate, which, according to testimony presented at the hearing, had been designated by the juvenile court as a “juvenile processing office.” He then took *Le* to the homicide division of the Houston police department to obtain a statement. The homicide division was not one of the five options listed in §52.02(a), and as a result violated the Family Code. The Court stated that the detective could have obtained the statement at the processing office, but was not required to. The detective did not error by obtaining the statement at the homicide division. His mistake was in not complying with the statute and “without unnecessary delay,” taking *Le* to a juvenile officer or detention facility. A juvenile officer could have, at that point, referred the case back to the detective for the purpose of obtaining a statement.

#### 4. Unnecessary Delay

In *Roquemore v. State*, a Court of Criminal Appeals opinion, the officer instead of taking the respondent directly to a juvenile processing office, at the respondent's request took him to the place where he had said stolen property was hidden.<sup>10</sup>

In *In re G.A.T.*, it was an unnecessary delay for the officer, after taking four juveniles into custody, to take them back to the scene of the crime for identification rather than taking them directly to a designated juvenile processing office.<sup>11</sup>

#### 5. Necessary Delay

This section of the Family Code "by its very terms contemplates that 'necessary' delay is permissible." Whether the delay is necessary is "determined on a case by case basis."

In *Contreras v. State*, a Court of Criminal Appeals opinion, it was a "necessary delay" to hold a child in a patrol car at the scene of an offense for 50 minutes before bringing her to the juvenile processing office to obtain a statement. The court accepted the state's argument that the delay was necessary because police were attending to the victim and interviewing witnesses to the offense.<sup>12</sup> The delay was considered de minimus.

#### 6. Notice to Parents

Section 52.02(b) states:

**52.02(b). A person taking a child into custody shall promptly give notice of his action and a statement of the reason for taking the child into custody, to:**

- (1) the child's parent, guardian, or custodian; and**
- (2) the office or official designated by the juvenile court.**

In *Pham v. State*, a two-hour delay in notification of parents by officers who took the child to a processing office to take statement invalidated the confession.<sup>13</sup>

In *Gonzales v. State*, the court held that section 52.02(b)(1) was not satisfied where the evidence at the hearing on the juvenile's motion to suppress did not show that the juvenile's parents had been notified at all.<sup>14</sup>

In *State v. Simpson*, the Tyler Court of Appeals affirmed the trial court's suppression of a juvenile's confession pursuant to section 52.02(b) when the juvenile's mother was not notified until the Sunday evening following his arrest at 11:00 a.m. on the preceding Friday.<sup>15</sup>

In *Vann v. State*, notice of arrest was allowed to be made to the respondent's adult cousin as his custodian. The appellant's cousin was the principal adult in the home where he often resided and the cousin's mother (appellant's aunt) had raised him since he was two weeks old. Appellant had his own bedroom at the house and kept belongings there. At the time police took appellant into custody, he was still "in and out" of the cousin's home, although he was supposed to be

living with his mother. The appellant's written statement confirmed that he lived with his mother but sometimes spent the night at his aunt's house.<sup>16</sup>

## 7. DWI and the Intoxilyzer Room

When an officer has reasonable grounds to believe a child who is operating a motor vehicle has a detectable amount of alcohol in his system the officer can take a statutory detour to an intoxilyzer room. The officer does not have to have probable cause to believe a child is DWI to take that child to a place to obtain a breath sample. If the child is operating a motor vehicle and the officer detects *any amount of alcohol* in the child's system, he can take the child to the adult intoxilyzer room.<sup>17</sup>

The Family Code does not dispense with the strict requirements of § 52.02(a) because a child is taken to an adult intoxilyzer room. In order to obtain a confession from a child in this situation, the officer would still need to comply with TFC §§ 52.02 and 51.095. Section 52.02(c) simply allows a procedure for the collection of a breath or blood specimen prior to compliance with §52.02(a).<sup>18</sup>

Subsection (d) of 52.02, allows for a child to submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped.<sup>19</sup> An officer who follows the procedure for taking the breath test for an adult may not get it right. The statute requires that the request by the officer and the consent or refusal by the child must be on the videotape. If it is not on the videotape, the officer must have the concurrence of an attorney regarding the child's consent to the test.

## E. JUVENILE PROCESSING OFFICE

The processing office is a temporary location that allows an officer to do certain specific things. The options in §52.02(a) are permanent options, while the juvenile processing office is a temporary option (no longer than six hours). If the officer decides to take the child to a juvenile processing office, he must eventually take the child to one of the options in §52.02(a). One office cannot be both a juvenile processing office and one of options listed in §52.02(a).<sup>20</sup>

### **52.025. Designation of Juvenile Processing Office**

**(a) The juvenile court may designate an office or a room, which may be located in a police facility or sheriff's offices, as the juvenile processing office for the temporary detention of a child taken into custody under Section 52.01 of this code. The office may not be a cell or holding facility used for detentions other than detentions under this section. The juvenile court by written order may prescribe the conditions of the designation and limit the activities that may occur in the office during the temporary detention.**

**(b) A child may be detained in a juvenile processing office only for:**

- (1) the return of the child to the custody of a person under Section 52.02(a)(1);**
- (2) the completion of essential forms and records required by the juvenile court or this title;**

- (3) the photographing and fingerprinting of the child if otherwise authorized at the time of temporary detention by this title;**
- (4) the issuance of warnings to the child as required or permitted by this title; or**
- (5) the receipt of a statement by the child under Section 51.095(a)(1), (2), (3), or (5).**

There is no mandatory requirement that a child be taken to a juvenile processing office. It is only an option (to do certain specified tasks) before control of the child is permanently relinquished to another by the officer. The juvenile processing office is the only temporary option (other than a DUI suspect) an officer has before utilizing the seven permanent options presented in §52.02(a).<sup>21</sup>

In *the Matter of D.J.C. (2009)*, the officer took appellant into custody and interrogated him in an interview room used to interrogate both adult and juvenile subjects. The Court concluded that the evidence showed that the State violated sections 52.02(a) and 52.025(a) by not taking appellant's custodial statement in a designated juvenile processing office.<sup>22</sup>

In *Anthony v. State (1997)*, the 4<sup>th</sup> Court in San Antonio ruled that a statement was illegally obtained and could not be admitted to support a criminal conviction because the officers did not contact the juvenile officer or take the required step of processing defendant in an area specifically utilized for juveniles.<sup>23</sup>

## 1. Juvenile Court Designation

Under §52.025, the juvenile board has the responsibility for designating the juvenile processing office. Whether such a designation has been made and, if so, whether the police have remained within the bounds of the designation, can determine the admissibility of any statements obtained. If the juvenile board has not designated a juvenile processing office or an office or official under §52.02(a)(2), the police, unless they immediately release the child to parents, must bring the child directly to the designated detention facility and may not take him or her to the police station for any purpose. The juvenile board has the responsibility to specify the conditions of police custody and length of time a child may be held before release or delivery to the designated place of detention. However, under §52.025 the maximum length of detention in a juvenile processing office is six hours. If a child is taken to a police facility that has not been designated as a juvenile processing office, or if the terms of the designation are not observed, the detention becomes illegal and any statement or confession given by the child while so detained may be excluded from evidence.

A general designation such as “the police station” or “the sheriffs’ office” located at 111 Main, is insufficient. Section 52.025(a) refers to ***an office or room*** which may be located in a police facility or sheriffs’ office. Courts have held that a designation of the entire police station was unlawful and not in compliance with the statute.<sup>24</sup>

## 2. Right of Child to Have Parent Present

Section 52.025(c) states:

**(c) A child may not be left unattended in a juvenile processing office and is *entitled to be accompanied by the child's parent, guardian, or other custodian* or by the child's attorney [emphasis added].**

In *In re D.C.G.*, the court found that the State violated section 52.025(c)'s requirement that a child in custody in a juvenile processing center "is entitled to be accompanied by the child's parent, guardian, or the child's attorney," when the record showed that appellant's grandmother, who was his legal guardian, accompanied appellant to the police station and asked to be present with appellant and her request was denied and she was excluded from the interview room.<sup>25</sup>

In *In The Matter of C.R.*, the court held that by requiring the arresting authority to give notice of the arrest to a parent, the legislature gave the choice of whether or not to be present to the parent. The court further stated that the legislature may well have concluded that juveniles are more susceptible to pressure from officers and investigators and that, as a result, justice demands they have available to them the advice and counsel of an adult who is on their side and acting in their interest.<sup>26</sup> It would appear that this section codifies that reasoning.

### 3. Right of Parent to Be Present

#### **Texas Family Code §61.103. Right of Access to Child.**

**(a) The parent of a child taken into custody for delinquent conduct, conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court has the right to communicate in person privately with the child for reasonable periods of time while the child is in:**

- (1) a juvenile processing office;**
- (2) a secure detention facility;**
- (3) a secure correctional facility;**
- (4) a court-ordered placement facility; or**
- (5) the custody of the Texas Youth Commission.**

**(b) The time, place, and conditions of the private, in-person communication may be regulated to prevent disruption of scheduled activities and to maintain the safety and security of the facility.<sup>27</sup>**

The provision clearly gives the parent the right to be with and speak with his or her child, in private, after he has been taken into custody and while he is in the juvenile processing office (where confessions are taken from a child in custody). Law enforcement may, however, limit the parent's right of access based on the reasonable time, place and conditions restrictions.<sup>28</sup> While a statement need not be taken at a juvenile processing office, if it is, the requirements of §52.025 and §61.103 should be complied with.

However, a child's statement cannot be suppressed for a violation of a parent's right of access to their child.

#### **Texas Family Code § 61.106. Appeal or Collateral Challenge**

**The failure or inability of a person to perform an act or to provide a right or service listed under this subchapter may not be used by the child or any party as a ground**

**for:(1) appeal;(2) an application for a post-adjudication writ of habeas corpus; or (3) exclusion of evidence against the child in any proceeding or forum.**

Section 61.106, specifically forbids the child or any party the right to use the failure to provide a parental right as a defense in the trial, appeal or collateral attack in the child's case.<sup>29</sup> The rights provided by this subchapter belong to the parent, not the child, and as a result, violations of said rights cannot be used by the child in a motion to suppress a confession or an appeal.

#### 4. The Six Hour Rule

**Texas Family Code §52.025(d):**

**A child may not be detained in a juvenile processing office for longer than six hours.**

A violation of the six-hour rule does not necessarily invalidate a confession, if the confession was completed within the required time.<sup>30</sup>

## F. CAUSAL CONNECTION AND TAIN TENUATION ANALYSIS

### 1. Causal Connection

In *Gonzales v. State (2002)*,<sup>31</sup> police complied with all the requirements of §51.095 [requirement for admissibility of confessions] and §52.02(a) [restrictions for law enforcement officer to the initial seizure and prompt release or commitment of the juvenile offender], but failed to notify the child's parents of his custody as required by §52.02(b). The Court of Appeals disallowed the confession for failure to promptly notify the parents of the child's arrest as required. The Court of Criminal Appeals, however, reversed and remanded for consideration of a causal connection between the failure to notify the parent (upon taking a child into custody) and the receipt of the confession.<sup>32</sup>

In *Grant v. State (2010)*, Grant argued that the trial court erred in denying his motion to suppress his written statement because his mother was not notified that he was taken into custody in violation of Texas Family Code Section 52.02(b) and because his mother was denied access to him before he gave his statement. The Waco Court of Appeals held that to suppress a juvenile's statement because of a violation of section 52.02(b), there must be some exclusionary mechanism. If evidence is to be excluded because of a section 52.02(b) violation, it must be excluded through the operation of Article 38.23(a). Before a juvenile's written statement can be excluded due to a violation of section 52.02(b), there must be a causal connection between the Family Code violation and the making of the statement. Grant had the burden of proving a causal connection between the alleged violation of section 52.02(b) and his statement. No evidence of a causal connection was presented at the motion for new trial hearing. Accordingly, the trial court did not err in denying Grant's motion to suppress.<sup>33</sup>

In *In the Matter of C.M. (2012)*, to establish causal connection, C.M.'s guardians testified that if they had been able to speak with C.M. they would have advised him not to make any statements prior to him speaking with an attorney. One guardian opined that C.M. would have

heeded his advice because the guardian had been in trouble with the law previously. However, when later recalled as a witness, the guardian stated that he was unsure whether C.M. would have listened to his advice or not. C.M. never requested the presence of his guardians. The Waco Court of Appeals found that C.M. did not establish a causal connection between the alleged violation and his (third) statement.<sup>34</sup>

## 2. Taint Attenuation Analysis

Along with the causal connection analysis a court should also conduct a separate taint attenuation analysis before excluding a confession because of a §52.02 violation. The causal connection analysis precedes the attenuation-of-the-taint analysis.

## 3. The Burdens of Proof

### **Juvenile's Burden – Raise and establish non-compliance**

### **State's Burden – Establish compliance**

### **Juvenile's Burden – Establish causal connection**

### **State's Burden – Disprove causal connection or attenuates the taint**

In *Limon v. State* (2010), a Court of Appeals case out of Corpus Christi, an illegal entry and search of a residence barred the admission of a later confession, where no attenuation from the taint of the illegal entry and search was shown by the state at trial.<sup>35</sup>

## **II. CONFESSIONS**

Confessions can take on a unique form in juvenile court because of the requirements of a voluntary and intelligent waiver of rights. Juveniles because of their age and maturity level may not understand the meaning of their rights and may not be competent to waive them. For these reasons, the provisions of the Family Code go to great lengths to protect juveniles throughout the arrest and confession process. A complete and accurate adherence to these provisions by law enforcement greatly reduces the possibility of an involuntary or illegal confession.

### **A. CONFESSIONS GENERALLY**

#### **1. Must be a Child**

The requirements of the §51.095 of the Texas Family Code apply only to the admissibility of a statement given by a child. The term “child” is defined by §51.02(2) of the Texas Family Code and provides:

A child under this section is any person who is under 17 years of age while being questioned. If the person being questioned is 17 years old, but is being investigated for an

offense committed while younger than 17, the person is still a child and Section 51.095 applies. If the person was 17 years old when questioned and is being questioned about an offense committed while 17, the person is not considered a child and Section 51.095 does not apply, but Article 38.22 of the Code of Criminal Procedure does.<sup>36</sup>

Once a juvenile is certified to adult court, the requirements of the Family Code no longer apply and the juvenile can be treated as an adult for the purposes of obtaining a confession.

In *Dominguez v. State* (2012), a 16-year-old juvenile was arrested under the juvenile justice code. He was taken before a magistrate to be admonished before giving a confession. A lawyer asked that he not be spoken to by law enforcement and he himself refused to give a confession. Later, the juvenile, while being represented by a juvenile attorney, had a certification and transfer hearing and at the conclusion of the hearing was ordered transferred to an adult detention facility. That evening law enforcement officers who were told he was no longer represented by his juvenile attorney picked him up from the jail, read him his Miranda warnings, and received his confession.<sup>37</sup>

In upholding the confession, the Corpus Christi Court of Criminal Appeals utilized the language of TFC §54.02 (h), which states:

**[o]n transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure.... a transfer of custody is an arrest.**<sup>38</sup>

The “defendant” who was given his Miranda warnings as required of “an adult offender” and never requested an attorney properly gave up rights.

## 2. Must Be Voluntary

All statements which the State attempts to use against a child (whether in custody or not, whether written or not) must be voluntary. If the circumstances indicate that the juvenile defendant was threatened, coerced, or promised something in exchange for his confession, or if he was incapable of understanding his rights and warnings, the trial court must exclude the confession as involuntary.<sup>39</sup> A statement is also not voluntary if there was "official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker."<sup>40</sup> In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances.<sup>41</sup>

In *In the Matter of B.S.P.* (2014), threats by the mother of a sexual assault victim while she held a baseball bat and promising to not call police, then calling them, did not make the juvenile’s statement regarding the sexual assault involuntary.<sup>42</sup>

In *Paolilla v. State* (2011), appellant's statements were not considered to be induced, either from the medications she had received or from the effects of her withdrawal symptoms. The Houston Court of Appeals found that, as a result, she had voluntarily waived her rights before giving her statement.<sup>43</sup>

A child with learning disabilities or a reading or oral comprehension level far below their current grade level may be a factor in assessing that child's ability to comprehend the confession process and his rights. Teachers and educators may be useful as witnesses when a child's understanding and voluntariness regarding their conduct during a confession comes into question.

a. Totality of the Circumstances

The Supreme Court in *Fare v. Michael C. (1979)*, noted that the courts are required to look at the totality of the circumstances to determine whether the government has met its burden regarding the voluntariness of a confession.<sup>44</sup>

b. Factors

The factors mentioned in *Fare*, are not the only factors that should be examined to determine whether a confession by a juvenile is voluntary. There are many factors that can be considered.

The circumstances that should be addressed by the child's attorney should include but not be limited by the following:

1. The child's age, intelligence, maturity level, and experience in the system;
2. The length of time left alone with the police;
3. The absence of a showing that the child was asked whether he wished to assert any of his rights;
4. The isolation from his family and friendly adult advice;
5. The failure to warn the appellant in Spanish;
6. The length of time before he was taken before a magistrate and warned.<sup>45</sup>

## B. CUSTODIAL INTERROGATION

Section 51.095(b),

**(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:**

**(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or<sup>46</sup>**

Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. "A custodial interrogation occurs when a defendant is in custody and is exposed 'to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response'" *Roquemore v. State*, 60 S.W.3d at 868 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90, 64 L.Ed.2d 297 (1980)). A child is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted.<sup>47</sup>

"Custody" is the switch that lights up the provisions of §51.095. Without custody you have no §51.095 requirements, no magistrate requirements, no Miranda requirements, and no juvenile processing office requirements.

## 1. Custody

To determine whether there was a formal arrest or restraint of movement to the degree associated with an arrest all of the circumstances surrounding the interrogation must be examined. This determination focuses on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being questioned. The restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention.<sup>48</sup>

The Court of Criminal Appeals has recognized four factors relevant to determining whether a person is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant.<sup>49</sup> The United States Supreme Court has held that a child's age is also considered a factor in determining custody.<sup>50</sup>

Being the focus of an investigation does not amount to being in custody. Station house questioning does not, in and of itself, constitute custody. "Words or actions by the police that normally attend an arrest and custody, such as informing a defendant of his Miranda rights, do not constitute a custodial interrogation." When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time.<sup>51</sup> A trial court does not abuse its discretion in admitting a video recording of a statement by a defendant where a reasonable person would have believed he was at liberty to terminate the interrogation and leave.<sup>52</sup>

The mere fact that an interrogation begins as non-custodial does not prevent custody from arising later. Police conduct during an encounter (such as a suspect being pressed by a questioning officer for a truthful statement) may cause a consensual inquiry to escalate into custodial interrogation.<sup>53</sup>

Four general situations may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, or (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.<sup>54</sup>

### a. By Law Enforcement

In *In the Matter of S.A.R.*, the Court held that a juvenile was in police custody at the time she gave her written statement when she was taken by four police officers in a marked police car to a ten-by-ten office at the police station, informed that she was a suspect for an attempted capital murder and a capital murder and was photographed and fingerprinted while there. The Court held that a reasonable person would believe their freedom of movement had been significantly curtailed.<sup>55</sup>

The willingness of police to permit the juvenile to return home is substantial evidence he or she was not in police custody.

Being told he is not free to leave does not automatically create custody with respect to this provision. In *In the Matter of J.W.*, a school security officer while questioning a child, told the child that he was not free to leave. The Dallas Court of Appeals held that under the totality of the circumstances, appellant was not in custody during questioning. The child was free to leave and did leave after being questioned by the officer.<sup>56</sup>

b. By School Administrator

In *J.D.B. v. North Carolina*, police show up at a school to question a 13-year-old special education student about a string of neighborhood burglaries. The boy was escorted to a school conference room, where he was interrogated in the presence of school officials. The student's parents were not contacted, and he was not given any Miranda warnings before he confessed to the crimes. In a motion to have his confession suppressed he argued that because he was effectively in police custody when he incriminated himself, he was entitled to Miranda protections. The Supreme Court of the United States was asked to allow a child's age to be taken into consideration when determining whether a "reasonable person" was considered to be in custody.<sup>57</sup>

The Supreme Court of the United States held that so long as the child's age is known to the officer, or is objectively apparent to a reasonable officer; including age in the custody analysis is consistent with the Miranda test's objective nature. This does not mean that a child's age will be a determinative, or even a significant factor in every case, but it is a reality that courts cannot ignore.<sup>58</sup> The case was sent back to the lower court to take into consideration the age of the child in the reasonable person analysis.

In *In The Matter of V.P.*, the appellant hid a gun in a friend's backpack going to school and retrieved it upon arrival. The friend told a police officer at the school that the appellant had a weapon. The officer and the hall monitor escorted the appellant to speak to an assistant principal. The officer left the room while the assistant principal interrogated the appellant. The appellant initially denied knowing anything about a weapon, and asked to speak to a lawyer, but later admitted bringing the weapon to school. The court held that while the assistant principal was a representative of the State, he was not a law enforcement officer, and his questioning of appellant was not a custodial interrogation by such an officer. Because the appellant was not in official custody when he was questioned by the assistant principal, he did not have the right to remain silent or to speak to a lawyer.<sup>59</sup> The court held that the child's interrogation by the assistant principal did not invoke his Miranda rights, and the statutory procedures for taking a juvenile into custody did not apply until appellant was actually arrested by the law enforcement officer.<sup>60</sup>

Schools have used this case to write guidelines for their student handbook like the following:

#### QUESTIONING STUDENTS

Administrators, teachers, and other professional personnel may question a student

regarding the student's own conduct or the conduct of other students. In the context of school discipline, students have no claim to the right not to incriminate themselves. Students are expected to provide any information about their conduct or that of other students. Administrators are not required to contact parents/guardians prior to interviewing students.<sup>61</sup>

## 2. Interrogation

### a. By Law Enforcement

The United States Supreme Court defined custodial interrogation in ***Rhode Island v. Innis***. The court stated that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those ***normally attendant to arrest and custody***) that the police should know are reasonably likely to elicit an incriminating response from the suspect. ... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.<sup>62</sup>

In ***McCreary v. State***, the unrecorded statement by juvenile "you got a chrome .45, man, that's nice" to detective after arrest and during processing, without prompting was considered spontaneous and not the product of custodial interrogation.<sup>63</sup>

### b. By Probation Officer

In ***Rushing v. State***, a Juvenile Probation Officer, was assigned to Rushing at the McLennan County Juvenile Detention Center where Rushing was being held. Part of the PO's regular duties was to visit with the juveniles on his case load, almost on a daily basis, to inform them of the status of their cases such as upcoming court proceedings, and to deal with any disciplinary or other problems the juveniles might be having. The PO testified at trial that during some of his conversations with Rushing, the juvenile volunteered highly incriminating statements describing the crime and Rushing's role in it. The issue under common law or the Texas statutes was whether Rushing was being "interrogated" by the Probation Officer when Rushing incriminated himself. The court found that the record reflected that the questions the PO may have asked Rushing concerned routine custodial matters such as how Rushing was getting along in detention, or whether Rushing had any questions about the status of his case amounted to questions, "***normally attendant to arrest and custody***," and was not "interrogation."<sup>64</sup>

### c. By Psychologist

A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if the defendant's statements may be used against the defendant at a criminal proceeding. Unless they are preceded by a *Miranda* warning, the statements to the psychiatrist will be inadmissible when offered against the defendant to prove the defendant's future dangerousness.<sup>65</sup>

Requiring participation in sex offender treatment as a condition of probation does not necessarily compel participation in a polygraph examination.<sup>66</sup> However, requiring a probationer to submit to a polygraph examination does not in itself subject the person to custodial interrogation.<sup>67</sup> As a result, it would appear that the probationer need not be given *Miranda* warnings before administering a polygraph examination.<sup>68</sup>

d. By Texas Department of Family and Protective Services

If a Texas Department of Family and Protective Services representative questions a child on behalf of, or along with, a law enforcement officer, the questioning will be considered interrogation.<sup>69</sup>

## C. WRITTEN CONFESSIONS

### **§51.095. Admissibility of a Statement of a Child**

**(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:**

**(1) the statement is made in writing under a circumstance described by Subsection (d) and:**

**(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:**

**(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;**

**(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;**

**(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and**

**(iv) the child has the right to terminate the interview at any time;**

**(B) and:**

**(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and**

**(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;**

**(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and**

**(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to**

**ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;**

1. Attorney May Be Waived (Even if currently represents child)

The statute appears to allow the taking of a statement of a child even when he is represented by an attorney. While §51.09 (Waiver of Rights) requires that a child cannot waive a right without the agreement of his attorney, §51.095 begins... **“Notwithstanding Section 51.09...”** As a result, a child can waive his right to counsel both before and after he is being represented by counsel.

In *In the Matter of H.V.*, a juvenile’s request to have his mother contact an attorney was considered an unambiguous request for counsel during the magistrate’s admonishments. He was a sixteen-year-old junior in high school from Bosnia. During the ten minutes that he received warnings from the magistrate, he specifically asked to talk with his mother and said he wanted her to ask for an attorney. When the magistrate tried to explain to H.V. that he himself could ask for an attorney, he said, "But I am only sixteen," clearly indicating that he did not understand how a sixteen-year-old person could ask for and go about contacting an attorney. The court held that by looking at the totality of the circumstances surrounding the interrogation, H.V. was requesting an attorney. As a result, the child’s statement was inadmissible.<sup>70</sup>

2. The Magistrate

a. Magistrate Defined

The confession statute requires that warnings be given to the child by a magistrate. Magistrate is defined in Article 2.09 of the Texas Code of Criminal Procedure.

b. Referee as Magistrate

The Juvenile Referee is not a magistrate as defined by Article 2.09 of the Texas Code of Criminal Procedure. However, section 51.095(e), allows referees to perform the duties of the magistrate if approved by the juvenile board in the county where the statement is being taken.<sup>71</sup>

c. The Warnings

Under §51.095(a)(1)(A) the magistrate must give the child warnings.

These are similar warnings as are required by the United States Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The difference for a child is that these warnings must be given by a magistrate, whereas, for an adult the warnings can be given by either a magistrate or a law enforcement officer. The statute does not require the absence of the police when the statutory warnings are given by the magistrate to the juvenile.<sup>72</sup>

The magistrate must be sure that he gives the proper warnings.<sup>73</sup>

#### d. Signing the Statement

The statement must be signed in the presence of the magistrate and it must be signed with no law enforcement officer or prosecuting attorney present. A bailiff may be allowed, but he may not carry a weapon in the presence of the child. Should the child sign the statement outside the presence of the magistrate, the error may be corrected if the magistrate follows the proper procedure and has the child re-sign the statement in his presence.<sup>74</sup>

This provision requires the law enforcement officers to be outside the presence of the juvenile and the judge when the statement is reviewed by the judge with the juvenile and when the juvenile actually signs the statement. It, however, does not require the absence of the police when the statutory warnings are given by the magistrate to the juvenile.<sup>75</sup>

If the statement was electronically recorded, the statute allows the magistrate the option to request that the videotape be brought to him, along with the child.<sup>76</sup> Since, in most of these incidents there will not be a written statement, it is advisable that the magistrate views the recording along with the child and has the child sign a statement that he has viewed the recording and that it is his statement. The magistrate could then, on the same document, sign, and state (if he so feels) that the statement is being voluntarily given.

#### e. Findings of the Magistrate

Once the statement has been reduced to writing, it is the Magistrate, through his discussions with the child (outside the presence of the officer) who must be convinced that the child understands the nature and content of the statement. He must be convinced that the child is voluntarily given up his rights as he himself has explained them to him. The magistrate would then have the child sign the statement in his presence. The magistrate then certifies that he has examined the child independent of any law enforcement officer or prosecuting attorney, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights.<sup>77</sup>

It is not enough for the magistrate to sign the proper forms. It is incumbent upon the magistrate to determine whether or not the child understands the nature and content of his statement by discussing the statement with the child.<sup>78</sup> Further, it is not the magistrate's role or responsibility under the Family Code to find out whether an accused wishes to "give a statement." It is a magistrate's responsibility to ascertain if an accused juvenile wishes to waive his constitutional rights.<sup>79</sup>

### 3. Parental Presence

There is no requirement that the Magistrate notify the juvenile's parent of his interrogation when the juvenile does not request the parent's presence.<sup>80</sup>

## D. ORAL CONFESSIONS

The confession statute also provides for the admission of oral statements.

### **§51.095. Admissibility of a Statement of a Child**

- (a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:**
- (2) the statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;**
  - (3) the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;**
  - (4) the statement is made:**
    - (A) in open court at the child's adjudication hearing;**
    - (B) before a grand jury considering a petition, under Section 53.045, that the child engaged in delinquent conduct; or**
    - (C) at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing under Section 54.01; or**

1. Facts or Circumstances that are Found to be True

Section 51.095(a)(2) allows for the admission of an oral statement if the statement is of facts or circumstances that are found to be true and tend to establish the child's guilt. This most commonly occurs when the child, while giving a statement to an officer, directs the officer to some inculpatory, physical evidence. It may be a weapon, or contraband, or any item that incriminates the child.<sup>81</sup> Miranda warnings are required before an oral confession leading to other evidence of the crime is admissible.<sup>82</sup>

2. Res Gestae Statements

Section 51.095(a)(3) allows for the admission of statements which are res gestae of the offense or arrest. Res gestae statements are statements that are made during or very near in time to the commission of the offense or the arrest. The theory is that the statements should be admitted into evidence because they are particularly reliable, since they were made without thought or reflection by the person making the statement, but instead were made because of the excitement of the moment. Courts sometimes speak of res gestae statements as excited utterances.

3. Judicial Confession

Section 51.095(a)(4) allows for the admission of statement given by a child in open court at the child's adjudication hearing or before a grand jury considering a petition, under Section 53.045 (determinate sentence) or at a preliminary hearing held in compliance with this code (other than at a detention hearing<sup>83</sup>).

4. Used For Impeachment

Section 51.095(b)(2) provides:

- (b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:**

**(2) Without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is voluntary and has a bearing on the credibility of the child as a witness.**

Section 51.095(b)(2) allows for the admission of a statement, whether or not it stems from custodial interrogation, if it is voluntary and has a bearing on the credibility of the child as a witness.<sup>84</sup>

## E. RECORDED CUSTODIAL STATEMENTS

A juvenile's oral statement made as a result of custodial interrogation without the benefit of a magistrate warning is inadmissible at trial.<sup>85</sup>

### 1. Warning Same as Written Statement

Section 51.095 (a)(5) provides for the admissibility of an oral statement when the child is in a detention facility or other place of confinement or in the custody of an officer and the statement is recorded. The procedures for obtaining a recorded statement from a juvenile are similar to those applicable to obtaining a written statement. They are similar in the respect that subpart (a)(5)(A) requires a magistrate to give the juvenile the same warnings set out in subpart (a)(1)(A) for written statements, but for the recorded statement, the warnings must appear ***on the recording***, and it must appear that the child knowingly, intelligently, and voluntarily waives each right stated in the warning.<sup>86</sup>

### 2. Law Enforcement Presence

The statute for recorded statements provides a different follow-up procedure than what is required for written statements.<sup>87</sup> The applicable follow-up procedure for a recorded statement is set out in subsection (f):

**A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.**<sup>88</sup>

As reflected above, the follow-up procedure set out in subsection (f) for recorded statements is discretionary and does not contain the weapon prohibition found in subpart (a)(1)(B)(i) for written statements. As a result, the requirement that a statement must be signed by the child with no law enforcement officer or prosecuting attorney present, does not apply to video statements.<sup>89</sup>

### 3. Copy of Recording to Attorney

The attorney representing the child must be given a complete and accurate copy of each recording not later than the 20th day before the date of the proceeding.<sup>90</sup>

### 4. Written Statement Admissible where Recorded Statement was not

In *Gentry v. State*, a written statement was taken in conjunction with a video recorded statement. The video recorded statement did not contain the magistrate's admonishments (warnings) on the recording as required by TFC Section 51.095(a)(5) and as a result was inadmissible. The written statement taken at the same time was taken in compliance with TFC Section 51.095(a)(1) (written statement requirements), and as a result was admissible.<sup>91</sup>

## F. OUT OF STATE CONFESSIONS

Section 51.095 of the family code provides that a juvenile's statement to officers during a custodial interrogation is admissible only if it complies with a laundry list of safeguards.<sup>92</sup> However, section 51.095(b)(2)(B)(i) provides that a statement may otherwise be admissible if it was recorded by an electronic recording device in another state in compliance with that state's or this state's laws:

**(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:**

**(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or**

**(2) without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is:**

**(A) voluntary and has a bearing on the credibility of the child as a witness; or**

**(B) recorded by an electronic recording device, including a device that records images, and is obtained:**

**(i) in another state in compliance with the laws of that state or this state; or**

**(ii) by a federal law enforcement officer in this state or another state in compliance with the laws of the United States.<sup>93</sup>**

### 1. Burden on Juvenile

It is settled law that the burden is initially on the juvenile to raise an issue regarding the exclusion of proffered evidence by producing evidence of a statutory violation, which then shifts to the State to prove compliance.<sup>94</sup>

### 2. Causal Connection

The juvenile not only has the burden of producing evidence of a violation of another state's law, but as discussed previously, also has the burden of proving that there is a causal connection between any violation of section 51.095(a) and the statement.<sup>95</sup>

### III. WAIVER OF RIGHTS

#### A. TEXAS FAMILY CODE § 51.09

In order for a child give up or waive any right granted to it by the constitution or laws of this state or of the United States, other than a confession, the waiver must be made in compliance with Section 51.09 of the Family Code. Section 51.09 provides:

**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 (emphasis added);**
- (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.**

Subsection (1) requires that in order for a child to waive a constitutional right, the waiver must be made by the child and the attorney. Under this provision, either one, by themselves, cannot waive the child's rights. The confession statute (§51.095) is specifically excluded from the requirements of this provision. However, for a child to waive other rights, such as his right to remain silent, to have a trial (with or without a jury), and to confront witnesses, all must be agreed to by the child and the child's attorney. The waiver must still be voluntary and the child and the attorney must both be apprised of the possible consequences of waiving the rights and they must do so in writing or in open court. The provision appears to give the attorney (not the parent) the power and authority to refuse to give up a right belonging to the child, even if the child's desire is to give up that right himself. How would you reconcile this provision when a child wishes to consent to a search?

Most juvenile consent situations occur while the child is interacting with a law enforcement officer or school official prior to any legal proceedings have commenced. The child will not only not have an attorney present to assist him, but in most cases wouldn't know who to call if he wanted one. Can a juvenile, validly waive his rights, and consent to a warrant less search of his property or premises without complying with Sec. 51.09, or more specifically, without an attorney?

The first question asked is whether or not the provisions of the Family Code apply to pre-judicial consent or waiver? Section 51.09 [formally §51.09(a)] refers to "proceedings under this title". Do actions that occur prior the initiation of juvenile proceedings have to comply with the provisions of the Family Code? The 1<sup>st</sup> Court of Civil Appeals addressed the question in 1974 stating that Title III (Juvenile Justice Code) does not limit "proceedings" to those conducted after formal accusations have been made, but provides for Proceedings Before and Including Referral to Juvenile Court (Chapter 52) and Proceedings Prior to Judicial Proceedings (Chapter 53).<sup>96</sup> The Code does apply to pre-judicial consent or waiver.

Do the provisions of Section 51.09(1) apply if the child is not represented by an attorney at the time of the request for consent or waiver?

In 1973, Section 51.09 provided that a juvenile could waive his legal rights if the waiver was concurred in by the attorney for the child. There was no separate provision at that time that covered confessions. The interpretation was that confessions could not be taken of juveniles without the concurrence of an attorney (whether or not the child had an attorney at the time). In 1975, the legislature re-examined the problem of juvenile waivers as it applied in the context of confessions and decided that the position it had enacted in 1973, requiring the concurrence of an attorney, was too stringent. As in most searches, most confessions are taken before legal proceedings have commenced or before the child has felt the need to obtain an attorney. It, therefore, enacted what is now Section 51.095, to permit a juvenile to waive his rights and give a confession without the concurrence of an attorney. The stringent requirement that an attorney concur before a juvenile could give a confession was changed. Left intact, however, was the requirement of concurrence by an attorney in all other waiver situations (Section 51.09).<sup>97</sup>

The right against unreasonable search and seizure under both the Fourth Amendment and Article I Section 9, applies to juveniles. Consent to a search or seizure, is a waiver of the child's right against unreasonable search and seizure. According to Section 51.09 of the Family Code, in order for a child to consent to a search, or in effect, waive his Fourth Amendment and Article I Section 9 right against unreasonable search and seizure, he or she must do so (in writing or in open court) with the concurrence of an attorney.

## B. CONSENT

### 1. Consent Generally

An individual giving an officer consent to search without a warrant is one of the few limited exceptions to the general rule that a search conducted without a warrant and without probable cause is unreasonable.<sup>98</sup>

#### a. Must be Voluntary

To establish a valid consent, the government must show that the consent was voluntarily given, and not the result of duress or coercion, express or implied. In determining whether consent is voluntarily offered the court will utilize the "totality of circumstances" test.<sup>99</sup>

Consent was not considered voluntary when after a routine traffic stop the juvenile, having first refused to consent, later consented to a search of his vehicle, after being told by the officer that he would call out the canine to sniff around the vehicle and if the dog "hit" on any scent coming from the vehicle, he would have probable cause to search.<sup>100</sup>

#### b. Search Must Not Exceed Scope of Consent

The scope of a consensual search will be limited by the terms of its authorization.<sup>101</sup>

c. Third Party Consent

A third party may properly consent to a search when he has control over and authority to use the premises being searched.<sup>102</sup> The third party may consent even if that person has equal authority over and control of the premises or effects.<sup>103</sup>

2. Consent by Children

a. Competent to Consent

A child can be too young to consent. In a 9<sup>th</sup> Circuit case, two fifth graders were considered too young to give proper consent. The Court stated: "There remains a serious question of validity of the claimed uncounseled waiver by these children of their rights against a search without probable cause."<sup>104</sup>

b. Coercive Atmosphere (Schools)

Consent given by a student may be considered "coercive" depending on the situation.

Children, accustomed to receiving orders and obeying instructions from school officials, were incapable of exercising unconstrained free will when asked to open their pockets and open their vehicles to be searched. Moreover, plaintiffs were told repeatedly that if they refused to cooperate with the search, their mothers would be called and a warrant procured from the police if necessary. These threats aggravated the coercive atmosphere in which the searches were conducted.<sup>105</sup> The court held that the consent was given in a "coercive atmosphere". These were not elementary or middle school students, these were high school students giving consent.

c. Authorized to Consent

Consent to enter and search property can be given either by the individual whose property is searched or by a third party who possesses common authority over the premises. Whether or not a child has authority to consent to the entry into a home will be based on the officer's reasonable subjective belief.<sup>106</sup>

In *Limon v. State* (2011), a fourteen year old who opened the front door in response to officer's knock at 2:00 am, had the apparent authority to consent to officer's warrantless entry into residence. In this case the Court of Criminal Appeals held that the Fourth Amendment does not prohibit a minor child from consenting to entry into a home when the record shows the officer's belief in the child's authority to consent is reasonable under the facts known to the officer.<sup>107</sup>

3. A Child's Consent to Search

The following factors are among those that are relevant in determining whether consent is voluntary: (1) the youth of the accused; (2) the education of the accused; (3) the intelligence of the accused; (4) the constitutional advice given to the accused; (5) the length of the detention; (6) the repetitiveness of the questioning; and (7) the use of physical punishment. Additionally, testimony by law enforcement officers that no coercion was involved in obtaining the consent is evidence of the consent's voluntary nature. A police officer's failure to inform the accused that

consent can be refused is also a factor to consider. The absence of such information does not automatically render the consent involuntary. However, the fact that such a warning was given has evidentiary value. Moreover, consent is not rendered involuntary merely because the accused has been detained.<sup>108</sup>

In *In the Matter of R.S.W.*, a request by a law enforcement officer that a juvenile, who had been temporarily detained and patted down, to remove items from his pockets was considered consensual and not an acquiescence to official authority.<sup>109</sup>

However, in *In the Matter of R.J.*, consent was not voluntary where a juvenile consented to the search of his car after being written a traffic citation. The juvenile initially refused to allow the search, then changed his mind when the officer told him that a canine officer was being called to the location and if there was a “hit” the car would be searched anyway.<sup>110</sup>

Compare with *Illinois v. Caballes*, where the Supreme Court held that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. The Court held that conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy (causes undue delay).<sup>111</sup>

The right against unreasonable search and seizure under both the Fourth Amendment and Article I Section 9, applies to juveniles.<sup>112</sup> Consent to a search or seizure, is a waiver of the child's right against unreasonable search and seizure. According to Section 51.09 of the Family Code, in order for a child to consent to a search, or in effect, waive his Fourth Amendment and Article I Section 9 right against unreasonable search and seizure, he or she must do so, in writing or in open court, and with the concurrence of an attorney.<sup>113</sup>

#### 4. Breath and Blood Test

**The Texas Alcohol and Beverage Code §106.041. provides:**

**(a) A minor commits an offense if the minor operates a motor vehicle in a public place while having any detectable amount of alcohol in the minor's system.**

**The Texas Family Code §52.02(c) provides:**

**A person who takes a child into custody and who has reasonable grounds to believe that the child has been operating a motor vehicle in a public place while having any detectable amount of alcohol in the child's system may, before complying with Subsection (a): (1) take the child to a place to obtain a specimen of the child's breath or blood as provided by Chapter 724, Transportation Code; and (2) perform intoxilyzer processing and videotaping of the child in an adult processing office of a law enforcement agency.**

a. Breath Specimen

Under the Family Code, a child may submit to or refuse the taking of a breath specimen without the concurrence of an attorney (despite TFC 51.09), but only if the request and response are videotaped; and the video is maintained and made available to the child's attorney. Failure to comply with this provision would make the breath test inadmissible.<sup>114</sup>

Note: The submission or refusal without the concurrence of an attorney in this provision only applies to breath test.

b. Blood Specimen

(1) Voluntary Blood Draw

The Family Code, by creating an exception to TFC 51.09 (acquiescence of a lawyer for a minor to consent to waive a right) for the submission of giving a breath sample, infers that a lawyer's acquiescence is necessary for a child's consent to the submission of any specimen sample other than breath. As a result, a child probably cannot voluntarily consent to giving of a blood sample without the concurrence of an attorney.

(2) Mandatory Blood Draw

Texas' implied consent laws do apply to children accused of DWI, BWI, and DUI-Minor.<sup>115</sup> Under the mandatory provision of Transportation Code §724.012(b), a blood draw can be mandatory when "the person refuses the officer's request to submit to the taking of a specimen voluntarily."<sup>116</sup> If the officer's request is of a breath sample, and the child refused, and the request and refusal complies with TFC 52.02(c)(1) (videotaped), then second part of 724.012(b) would kick in and a mandatory blood draw would appear to be legal.

A child can legally refuse a breath test if the request and refusal are recorded, then, under the Transportation Code, he has "refused to submit to the taking of a specimen," and a mandatory blood draw is now permissible.

## IV. SEARCH AND SEIZURE

### A. CONSTITUTIONAL PROTECTIONS

1. The Fourth Amendment, United States Constitution

**"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized."**

2. Article I, Section 9, Texas Constitution

**"The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."**

As you can see nowhere in the 4<sup>th</sup> Amendment or Article I, Section 9, does it specifically include "a child" or "a minor." Nor does it specifically exclude them. Both provisions talk of "the people." Whether or not a child or a minor is part of "the people" had been the subject of many a debate, especially if you were talking about a child or a minor while they were in school.

While both the 4th Amendment and Article I, Section 9, clearly state that probable cause is a search and seizure requirement for adults, that standard has not been automatically attached to children or minors. Texas courts have long held that minors have the same constitutional rights to be secure in their persons from unreasonable seizures, just as adults, and that the Fourteenth Amendment and the Bill of Rights protects minors as well as adults.<sup>117</sup> The real key to this debate, when it comes to children or minors, is in the interpretation of "reasonable" and "unreasonable". What is "reasonable" and what is "unreasonable" could mean different things to different people. And so, it has been left to the courts to pave the path of reasonableness when it comes to search and seizure for children and minors. To the courts what is "unreasonable" to an adult, may not be "unreasonable" to a child, especially in a school environment.

## **B. THE EXCLUSIONARY RULES**

Exclusionary rules are legal principles which hold that evidence collected or analyzed in violation of constitutional rights is inadmissible for a criminal prosecution. They are designed to provide a remedy and disincentive, short of criminal prosecution, in response to prosecutors and police who illegally gather evidence in violation of the Fourth Amendment, by conducting unreasonable searches and seizure. Different exclusionary rules apply differently in different situations.

### **1. The Federal Exclusionary Rule**

The Supreme Court established the Federal Exclusionary rule in *Weeks v. United States*<sup>118</sup> (1914), in which the Court held that evidence obtained in violation of the Fourth Amendment is inadmissible. *Mapp v. Ohio*<sup>119</sup> (1961), applied the Exclusionary rule to the states: "Courts which sit under our Constitution cannot and will not be made a party to the lawless invasions of the Constitutional rights of citizens by permitting use of the fruits of such invasions." As a result of these decisions, evidence obtained by the government in violation of the United States Constitution is inadmissible and excluded.

Does the Federal Exclusionary Rule apply to juveniles or school searches?

The Supreme Court in *New Jersey v. T.L.O.*, refused to decide the issue.

**In holding that the search of T. L. O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries:**

**whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.**<sup>120</sup>

2. The Texas Exclusionary Rule

Texas codified the exclusionary rule for criminal prosecution in Article 38.23 of the Code of Criminal Procedure. Article 38 of the Code of Criminal Procedure applies to juvenile proceeding under the Texas Family Code §51.17(c). TCCP Art. 38.23 provides:

**"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."**<sup>121</sup>

3. The Family Code Exclusionary Rule

The Family Code also provides its own exclusionary rule. Section. 54.03(e) provides:

**"Evidence illegally seized or obtained is inadmissible in an adjudication hearing."**<sup>122</sup>

Notice that the inadmissibility applies to an adjudication hearing only. This appears to allow illegally seized or obtained evidence to be admissible in detention, disposition and certification and transfer hearings. This may be a great advantage to you if you are a prosecutor.

The Family Code also mentions the rights of juveniles in its Purpose and Interpretation provision. When arguing about a search and seizure question you should make it a point to point out that the very purpose of the Juvenile Justice Code is to ensure that the child's constitutional and other legal rights are recognized and protected. Section 51.01(6) states:

**"to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced."**<sup>123</sup> (emphasis added)

Note: Violating the purposes section of the Juvenile Justice Code has been found to create a viable ground for appellate review.<sup>124</sup>

## C. GOVERNMENTAL ACTION

Normally, the federal Exclusionary rule protects against governmental interference and does not apply to searches or seizures made by private individuals not acting as agents of the government.<sup>125</sup> However, the Fourth Amendment will apply to evidence obtained by a private party if government agents were sufficiently involved in the acquisition of the evidence.<sup>126</sup>

The Texas Exclusionary Rule, Art. 38.23(a), V.A.C.C.P., applies to both private citizen and government agent actions and provides greater protections than its federal counterpart. Article 38.23(a) provides that no evidence obtained by "an officer or other person" in violation of the law is admissible against an accused in a criminal trial.

Like the Texas Exclusionary Rule, the Family Code Exclusionary Rule, also applies to both private citizens and government agent actions.

#### D. INVESTIGATIVE DETENTION

In order for a law enforcement officer to conduct an investigative detention of a juvenile he must first have reasonable suspicion that the juvenile is involved in criminal activity. Like probable cause, the concept of reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules."<sup>127</sup> Reasonable suspicion is established if the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the police officer's intrusion into the suspect's constitutionally protected interests. It is the totality of the circumstances that must be considered when evaluating the validity of an investigative detention.<sup>128</sup> The "totality of the circumstances" analysis requires the courts to respect the common-sense, reasonable judgments of law enforcement officers, as informed by all surrounding facts and circumstances and the rational inferences and deductions officers may draw from them based on their experience and familiarity and the areas they serve.<sup>129</sup>

In *In the Matter of E.O.E.*, a police officer's investigative stop was held proper where the officer's suspicion was not based on any single factor or mere hunch, but a collective assessment of the scene as he observed it and the information he received when he encountered the juvenile. The officer identified numerous objective facts that could have led him to reasonably conclude that E.O.E. had engaged in criminal activity. Collectively, these circumstances included: (1) the juvenile's continuous behavior of reaching toward his back pocket; (2) the time of night (it was past the City's 11 p.m. curfew for juveniles); (3) the location where he encountered E.O.E. and its proximity to the location where the fight with weapons occurred; (4) E.O.E.'s juvenile companions who fled the scene as soon as he approached them in his vehicle; (5) and E.O.E.'s response that he had just come from the direction of the fight.<sup>130</sup>

#### E. BREATH AND BLOOD TEST

When it comes to driving while intoxicated, a law enforcement officer can take a child into custody under the same laws and circumstances as an adult.<sup>131</sup> The same elements that must be proved to convict an adult in adult court would be required to adjudicate a juvenile in juvenile court. But for a law enforcement officer, how he obtains his evidence may be quite different than that for an adult. In the usual child custody situation, the Family Code establishes strict restrictions on law enforcement interactions with children.<sup>132</sup> It delineates exactly what an officer can do with a child once he is in custody, where he can be taken, the amount of time he can spend with a him, as well as, who must be notified and when.<sup>133</sup> But, the Code also contains certain special provision just for children involved in operating a motor vehicle under the influence. These special provisions don't do away with the strict Family Code requirements of juvenile arrest; they only postpone them.

The Texas Alcoholic Beverage Code §106.041 provides:

**(a) A minor commits an offense if the minor operates a motor vehicle in a public place, or a watercraft, while having any detectable amount of alcohol in the minor's system.<sup>134</sup>**

This is not a DWI or a DWI related offense. This offense is committed by a minor who operates a motor vehicle in a public place while having “*any detectable amount of alcohol*” in his or her system. Thus, all the elements are identical to a DWI offense except that any detectable amount of alcohol constitutes an offense rather than having the alcohol consumption rising to the level of intoxication.

The Texas Transportation Code § 724.012(a) authorizes the taking of a person's breath or blood if they are arrested for operating a motor vehicle while intoxicated or if a minor operates a motor vehicle with any detectable amount of alcohol in their system.<sup>135</sup>

#### 1. Authorization for a Child’s Breath or Blood Specimen

The Texas Family Code § 52.02(c) provides:

**A person who takes a child into custody and who has reasonable grounds to believe that the child has been operating a motor vehicle in a public place while having any detectable amount of alcohol in the child's system may, before complying with Subsection (a):**

- (1) take the child to a place to obtain a specimen of the child's breath or blood as provided by Chapter 724, Transportation Code; and**
- (2) perform intoxilyzer processing and videotaping of the child in an adult processing office of a law enforcement agency.**

This provision provides directions to an officer as to where he can take a child when there has been a determination that the child has been operating a motor vehicle in a public place with “any detectable amount of alcohol” in his system (which would also include a DWI). This provision authorizes a child to be taken to a place to obtain a specimen of the child’s breath or blood as provided by Chapter 724, Transportation Code, and that the child may be videotaped in an adult processing office as opposed to a juvenile processing office.

This provision does not dispense with the strict requirements of § 52.02(a). To take a statement from a child, the officer would still need to comply with TFC §§ 52.02 and 51.095. Section 52.02(c) simply allows a procedure for the collection of a breath or blood specimen prior to compliance with §52.02(a).<sup>136</sup>

#### 2. Consent to Breath Specimen

The Transportation Code § 724.013 states:

**Except as provided by Section 724.012(b), a specimen may not be taken if a person refuses to submit to the taking of a specimen designated by a peace officer.<sup>137</sup>**

The Texas Family Code addresses a child's consent to a specimen in § 52.02(d) which states:

**(d) Notwithstanding Section 51.09(a), a child taken into custody as provided by Subsection (c) may submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped. A videotape made under this subsection must be maintained until the disposition of any proceeding against the child relating to the arrest is final and be made available to an attorney representing the child during that period.<sup>138</sup>**

The first phrase of this provision "Notwithstanding Section 51.09(a)," creates a special exception to the strict lawyer requirement as set out in Section 51.09(a).<sup>139</sup> As a result, the provision allows a child to submit to the taking of a breath specimen or refuse to the taking of a breath specimen without an attorney if the request and response is videotaped. While the provision clearly makes an exception to the attorney requirement for a breath specimen, no such exception in the statute is made for a blood specimen.

### 3. Consent to a Blood Specimen

Clearly without a similar provision creating an exception to the strict requirement of §51.09(a), the requirements of §51.09(a) must be met. Which would mean that before a child could voluntarily submit to a blood specimen the child and his attorney would have to agree to give up the child's rights.<sup>140</sup>

We can then conclude that a child can submit or refuse to submit to the taking of breath test without an attorney [under the requirements of TFC § 52.02(d)] and that a child can submit to a blood specimen only with the acquiescence of an attorney [under the requirements of TFC § 51.09(a)].

### 4. Mandatory Specimen

The mandatory blood specimen provision is contained in the Texas Transportation Code § 724.012(b).<sup>141</sup> The first part of section (b) sets out the base requirements for the statute.

**(b) A peace officer shall require the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily:<sup>142</sup>**

Only individuals who have been arrested for an offense under Chapter 49, of the Penal Code can be forced to submit to a blood specimen under this provision. The remainder of the provision and its list of additional factors apply to juvenile just as it would apply to adults.

However, it is important to remember that a child who has been arrested under Section 106.041, of the Alcoholic Beverage Code (any detectable amount of alcohol in his system) cannot be required to submit to a blood specimen under this provision.<sup>143</sup> As a result, which statute a law enforcement officer has taken a child into custody for becomes important when considering a mandatory specimen.

Section (b) also has a requirement that before a mandatory specimen can be obtained the person has had to have refused the officer's request to submit to the taking of a specimen voluntarily.<sup>144</sup> As stated above, for a child to voluntarily refuse a breath test the officer must comply with TFC § 52.02(d) (the request and the refusal have been videotaped)<sup>145</sup> and for a child to voluntarily refuse a blood test the officer must comply with TFC § 51.09(a) (the child consult with an attorney before consenting or refusing).<sup>146</sup>

The most likely mandatory blood draw of a child would be where the officer arrests a child for DWI (or its related offenses), the officer video tapes the request and the refusal by the child to take a breath specimen, and one of the factors contained in 724.012(b)(1)-(3) exist.

## 5. Search Warrant

The Texas Code of Criminal Procedure Art. 18.02 (10) provides:

**A search warrant may be issued to search for and seize:**

**(10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;<sup>147</sup>**

The Texas Code of Criminal Procedure Art. 18.01(j) provides:

**(j) Any magistrate who is an attorney licensed by this state may issue a search warrant under Article 18.02(10) to collect a blood specimen from a person who:**

**(1) is arrested for an offense under Section 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, Penal Code; and**

**(2) refuses to submit to a breath or blood alcohol test.<sup>148</sup>**

A search warrant for a blood draw of a child is valid if the child is arrested for DWI or its related offenses under Section 49 of the Penal Code and the child has validly refused the taking of a breath (videotaped) or blood test (acquiescence of attorney) as provided by the Family Code and as discussed above.

## F. AS A CONDITION OF PROBATION

Texas law gives trial courts "broad discretion" in creating community supervision conditions. Specifically, "[t]he judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant."<sup>149</sup> But the court's discretion is limited. When it comes to infringing on Fourth Amendment rights, a probationer's "expectations of privacy may be diminished only to the extent necessary for his reformation and rehabilitation").<sup>150</sup> If a trial court imposes an invalid condition, an appellate court may delete it from the trial court's judgment.<sup>151</sup>

A condition of probation is invalid if it has all three of the following characteristics:

- (1) it has no relationship to the crime;
- (2) it relates to conduct that is not in itself criminal; and
- (3) it forbids or requires conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of probation.<sup>152</sup>

### 1. Random Searches

#### a. Adults

In *Tamez v. State*, the Court of Criminal Appeals held that a probation condition which required the defendant to submit his person, residence and vehicle to search by any peace officer at any time, day or night, was too broad and infringed upon the defendant's rights under the United States Constitution and the State Constitution and was not reasonable in light of the statute allowing probation. The court stated that the condition imposed would literally permit searches, without probable cause or even suspicion, of the probationer's person, vehicle or home at any time, day or night, by any peace officer, which could not possibly serve the ends of probation. For example, an intimidating and harassing search to serve law enforcement ends totally unrelated to either his prior conviction or his rehabilitation is authorized by the probationary condition. A probationer, like a parolee, has the right to enjoy a significant degree of privacy.<sup>153</sup>

The United States Supreme Court addressed the issue in *U.S. v. Knights (2001)*,<sup>154</sup> and held that a state's operation of its probation system presented a "special need" for the exercise of supervision to assure that probation restrictions are in fact observed.

In *Knights*, a California court sentenced respondent Mark James Knights to summary probation for a drug offense. The probation order included the following condition: that Knights would "**submit his ... person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.**" Knights signed the probation order, which stated immediately above his signature that "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." Subsequently, a sheriff's detective, with *reasonable suspicion*, searched Knights' apartment. Based in part on items recovered, a federal grand jury indicted Knights for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition.

In upholding the search, the Supreme Court stated that probation, like incarceration, is a form of criminal sanction imposed by a court. The Court found that probation diminishes a probationer's reasonable expectation of privacy -- so that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only reasonable grounds (not probable cause) to believe that contraband is present. Several Texas cases have had the same result, holding that the condition of random searches without probable cause or reasonable suspicion did not violate the 4<sup>th</sup> Amendment of the United States Constitution, but finding in each case that there was reasonable suspicion for the search in question.<sup>155</sup>

**Note:** The conditions of probation did not mention “reasonable grounds.” The Supreme Court’s ruling did, giving weight to some individualized suspicion.

b. Juveniles

In *State of Utah in the Interest of A.C.C. (2002)*, the juvenile court's probation order mandated that the juvenile "submit to search and seizure from law enforcement for detection of drugs, weapons or other illegally possessed items."<sup>156</sup>

A.C.C.’s probation officer searched his backpack without a warrant or probable cause, and seized drug paraphernalia. The officer filed a delinquency charge against the minor, who moved to suppress the evidence. The Juvenile Court, denied the motion and the Utah Court of Appeals reversed. Petitioner-State, sought certiorari review.

In determining whether a suspicionless search is justified, the Court has balanced two factors against each other: (1) the individual's privacy interest and (2) the government's interest in effectively operating its institutions. The Court stated that society was not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell. The Court weighed the privacy interests of the prisoner against the legitimate interests of the government. After balancing these interests, the Court reasoned that privacy rights for prisoners simply [could not] be reconciled with the concept of incarceration and the needs and objectives of the penal institution.

The Utah Supreme Court concluded that the minor had no reasonable expectation of privacy regarding the drug paraphernalia seized by the probation officer. The minor lacked such an expectation of privacy because the express terms of his probation permitted random searches and invalidating such terms would be inconsistent with the fundamental objective of Utah's juvenile probation system. Additionally, the juvenile court's greater power to place the minor in secure confinement and negate his right to privacy included the lesser power to release him into society subject to a probation condition authorizing his belongings to be searched randomly.

The reasoning of the court seemed to be that (1) by notifying the juvenile that he was subject to search at any time, his reasonable expectation of privacy would be diminished, and (2) since the juvenile court could have committed him, where he would have been subject to search at any time (while in lockup), the court, could order a less restrictive

disposition, but include a condition the court could have ordered had the restriction been greater. Interesting!

## 2. Internet Restrictions

In *U.S. v. Sealed Juvenile* (2015), the 5<sup>th</sup> Circuit held that in a sexual contact adjudication, a condition of probation which required the juvenile to request permission every time he needed to use a computer, or every time he needs to access the internet, was deemed unreasonably restrictive.<sup>157</sup>

## 3. DNA Testing

In *In the Matter of D.L.C.* (2003), a Texas Court of Appeals decision, appellant juvenile was adjudicated for indecency with a child and aggravated sexual assault of a child. The juvenile was required to register in the sex offender registration program.<sup>158</sup>

Citing two United States Supreme Court decisions, *Ferguson v. City of Charleston* (2001), and *City of Indianapolis v. Edmond* (2000), the Texas court viewed the traditional evaluation of reasonableness of a search or seizure as it applied to classic Fourth Amendment "balancing" analysis as flexible.<sup>159</sup>

In both these cases the Supreme Court began with the premise that warrantless searches or seizures not based upon an individualized suspicion of wrongdoing violate the Fourth Amendment. The Court recognized that it had, however, in limited circumstances upheld the constitutionality of certain regimes of warrantless, suspicionless searches where the program compelling the search or seizure was designed to serve "special needs, beyond the normal need for law enforcement." Concluding that the programs had as their primary purpose the discovery of evidence against particular individuals suspected of committing a specific crime--an ordinary or normal law enforcement function--the Supreme Court declared the searches and seizures in both *Ferguson* and *Edmond* unreasonable under the Fourth Amendment.<sup>160</sup>

The Texas court held that the Texas DNA statute is not designed to discover and produce evidence of a specific individual's criminal wrongdoing. The purposes of the Texas DNA statute serve "special needs," not "normal" or "ordinary" purposes of law enforcement. The physical intrusion of providing a blood sample for DNA testing is minimal. Additionally, a juvenile's expectation of privacy is significantly diminished by the fact that he or she has been adjudicated delinquent for committing a sexual offense. The court balanced the fairly minimal intrusiveness of the sampling and a juvenile's reduced privacy expectations against the public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit sex offenses and conclude that the governmental interest promoted by the DNA statute rightfully outweighs its corresponding minimal physical intrusion and encroachment upon a juvenile's privacy. Consequently, under either existing federal case law in Texas applying the traditional balancing analysis or under the *Ferguson* and *Edmond* special needs analysis, we hold that the search and seizure occasioned by the DNA statute does not violate the Fourth Amendment to the United States Constitution. In their facial Fourth Amendment challenge, Appellants have failed to establish that the Texas DNA statute operates unconstitutionally. The Appellate Court overruled Appellants' issue.<sup>161</sup>

#### 4. Raise Objection When Conditions Imposed

While some courts have allowed arguments to be made to conditions of probation on appeal, the trend is to not allow an objection to a condition of probation unless objections were set out when imposed.

In *Speth v. State*, appellant did not raise his complaint to the conditions of probation at the hearing below and there is no indication that he objected to the condition at the time they were imposed. A defendant must complain at trial to the conditions of community supervision if he finds them objectionable; conditions that are not objected to when imposed are deemed accepted.<sup>162</sup> A defendant cannot challenge a condition of community supervision for the first time on appeal.<sup>163</sup>

### G. SCHOOL SEARCHES

When minor children are entrusted by parents to a school, the parents delegate to the school certain responsibilities for their children, and the school has certain liabilities. In effect, the school and the teachers take some of the responsibility and some of the authority of the parents. The young child must obey the teacher, and the teacher may use the methods expected and tolerated in the community to control the child's behavior. Furthermore, the child's physical safety is entrusted to the school and to the teacher, who thus become legally liable for the child's safety, insofar as negligence can be proved against them.<sup>164</sup>

When it comes to searches, a main issue is the “expectation of privacy” by the individual being searched or whose property is being searched. Years ago, when parents place their minor children in school, the teachers and administrators of those schools stood *in loco parentis* over the children entrusted to them. The traditional *in loco parentis Doctrine*, granted school officials quasi-parental status with regard to searches. The theory allowed school officials to act as if in the place of the parents when dealing with students, and thus the students' expectations of privacy were diminished. School officials had a virtual *carte blanche* when it came to searches at school.

The In Loco Parentis Doctrine granted school officials quasi-parental status with regard to searches. The theory allowed school officials to act as if in the place of the parents when dealing with students, and thus the students' expectations of privacy are diminished.

#### 1. The Less Than Probable Cause Standard

Perhaps the most significant tool that educational leaders rely on to stem the flow of weapons and drugs in schools is searches of students, their lockers, and property. But what about the student's privacy interest? A student doesn't relinquish all his rights when he enters a school campus. It is, as a result, balance between the responsibility of the school to maintain discipline, health, and safety against the privacy interests of the student. The Supreme Court has held that the Fourth Amendment is applicable to school officials, but has lowered the standard to less-than-probable cause (see *T.L.O.* discussed below).

*A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See T. L. O., supra, at 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").*<sup>165</sup>

## 2. School Officials v. Law Enforcement Officers

Generally, as long as searches are directed by school officials, they do not require the higher law enforcement standard of probable cause. However, the lower standard was not created to allow police to circumvent probable cause requirements in their investigation of criminal activity simply because the activity occurred on a school campus. Law enforcement officers, however, can participate in searches based on reasonable suspicion as long as the direction to search comes from school officials. When law enforcement officers act independently of school officials they are required to follow a probable cause standard.

Probable cause was necessary for searching the car of a man arrested for possession of beer on school property when police opened the door to check for more beer and smelled marijuana smoke in the car.<sup>166</sup>

The search of a high school student by school district police officer, in which officer asked student to empty his pockets after taking the student from physical education field to school administrator's office, was reasonable from its inception. It was also reasonably related in scope to circumstances which justified interference in the first instance. Here, the officer initially acted upon a report that the student was carrying a weapon. The truancy aspect of the officer's investigation had developed later, and, once contraband was discovered, no further searching resulted and the police were summoned.<sup>167</sup>

The following facts occur on a regular basis in most schools.

In *Salazar v. Luty*, the school district hired off-duty police officers to function as campus security officers. After Salazar was named by another student as the seller of drugs found in the student's locker, he was removed from class and questioned by an assistant principal, the off-duty officer, and a police officer.

The court held that since the matter was handled within the school's discipline program and not as a criminal matter, the officer's status was the same as any district employee and the extent to which he was allowed to be involved was contingent upon the general rule that the school act reasonably.<sup>168</sup>

## H. NEW JERSEY V. T.L.O.

*New Jersey v. T.L.O.*, 105 S.Ct. 733, 469 U.S. 325, 83 L.Ed.2d 720 (1985).

In the landmark case of *New Jersey v. T.L.O.*, the Supreme Court addressed the application of the Fourth Amendment to school searches. Their analysis in *T.L.O.* has become the guide for all courts in deciding school search cases.

In *T.L.O.*, the Supreme Court rejected the *In Loco Parentis Doctrine* and ruled that the Fourth Amendment prohibition against unreasonable searches and seizures applies to pupils in the public schools. The court concluded that while the Fourth Amendment applies to students, it applies in a diminished capacity. It created a balancing test to determine whether the search of a student was reasonable under the circumstances. The Court held that, in balancing the governmental and private interests, the search of a student in such cases does not require a warrant or a showing of probable cause. "Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."

The Court articulated a two-part test in determining the reasonableness in the search of a student.

1. The search must be justified at its inception. Reasonable grounds must show that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.
2. It must be reasonably related in scope to the circumstances at hand. Why do you believe the item or items you are looking for will be found where you are looking?

Factors to be considered included:

- (a) Student's age, history, and school record;
- (b) Prevalence and seriousness of the problem in the school to which the search is directed;
- (c) Necessity for making the search without delay; and,
- (d) Probative value and reliability of the information used as justification for the search.

The requirement that a search of a student be "justified at its inception" does not mean that a school administrator has the right to search a student who merely acts in a way that creates a reasonable suspicion that the student has violated some regulation or law but, rather, the search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of that violation.<sup>169</sup> *T.L.O.*, also held that lack of individual suspicion does not *ipso facto* render a search unreasonable.<sup>170</sup>

*T.L.O.*'s entire premise was to grant school officials flexibility and permit them to use their common sense in enforcing school discipline. The Court stated:

***"This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard***

*should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.*"<sup>171</sup>

In *Safford Unified School District v. Redding* (2009), an administrative assistant and a nurse, had a thirteen-year-old remove her outer clothing, had her pull her bra out and shake it, and pull out the elastic on her underpants, exposing her breasts and pelvic area in a search for prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. The United States Supreme Court, held that the strip search violated the student's Fourth Amendment rights, stating that the content of the suspicion failed to match the degree of intrusion. When facts must support a strip search, the petitioners' general belief that students hide contraband in their clothing falls short; a reasonable search that extensive calls for suspicion that it will succeed. Nondangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school.<sup>172</sup>

#### 1. Special Needs

The less than probable cause standard as set out by *T.L.O.* has been categorized as a "special needs exception" and applies to searches made by school authorities without the inducement or involvement of police.

Generally, public officials can justify warrantless searches with reference to a "special need" [if] "divorced from the State's general interest in law enforcement."<sup>173</sup> For juveniles, "special needs" can also occur, with respect to a probation officer's warrant less search of a probationer's home<sup>174</sup>; a schools' random drug testing of student athletes,<sup>175</sup> and drug testing of all public school students participating in extracurricular activities.<sup>176</sup> However, the special needs standard does not validate searches simply because a special need exists. Instead, what is required is a fact-specific balancing of the intrusion against the promotion of legitimate governmental interests. This is simply an application of the overarching principle that the test of reasonableness under the Fourth Amendment requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.<sup>177</sup> In all these cases, the Courts judged the search's lawfulness not by "probable cause" or "reasonable suspicion" but by "the standard of reasonableness under all of the circumstances."<sup>178</sup>

The Supreme Court did recognize limits on the "special needs" exception in *Chandler v. Miller* (1997).<sup>179</sup> *Chandler* involved a Georgia statute which required candidates for state office to submit to urine testing for drugs. There was, however, no showing of any drug problem among Georgia state officials.<sup>180</sup> The Court found that the statute was only symbolic and served no need. "However well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action."<sup>181</sup>

*Chandler* restrained the growth of "special needs" because the Court looked to the asserted "special need" of the State and found it wanting. The State argued that the Tenth Amendment gave it sovereign power to set qualifications for candidates, but the Court held that "in setting such conditions of candidacy for state office, but in setting such conditions, they may not disregard basic constitutional protections."<sup>182</sup> There, thus, was judicial review of the legislative choices of special needs.

In *Roe v. Strickland* (2002), the 5<sup>th</sup> Circuit emphasized the importance of strict restrictions in “special need” cases.

***“Where the ‘special need’ is not ‘divorced from the state’s general interest in law enforcement,’ the Court should not recognize it. ...The Court views entanglements with law enforcement suspiciously and ...other societal objectives cannot justify a program that would systematically collect information for the police.”*<sup>183</sup>**

## 2. Individualized Suspicion

Before *T.L.O.* was decided, it had been held that individualized reasonable suspicion was required for a school search.<sup>184</sup> *T.L.O.*, however, left open the question of whether individualized reasonable suspicion is required under the Fourth Amendment.

**“We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although ‘some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] ... the Fourth Amendment imposes no irreducible requirement of such suspicion.’ .... Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where ‘other safeguards’ are available ‘to assure that the individual’s reasonable expectation of privacy is ‘not subject to the discretion of the official in the field.’”**<sup>185</sup>

*T.L.O.*, through this dictum tells us that individualized suspicion is not required by the Fourth Amendment and could be appropriate where the privacy interests are minimal and where other safeguards can assure the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field. It is this language that opens the door to generalized suspicion that is used for random searches of groups (i.e. student athletes, students involved in extra-curricular activities).

In *DesRoches v. Caprio*, (4<sup>th</sup> Cir. 1998), a teacher and principal determined that a search was necessary of all students who had been in a classroom from which a student’s shoes had disappeared during the lunch break. Each of the students consented to the search except DesRoches. After searching the students who consented and discovering nothing, the principal took DesRoches to the office, where he again refused to consent to the search. DesRoches was suspended for his refusal. The search of DesRoches was to be conducted only after all other students in the room consented to a search, and nothing had been found. Utilizing *T.L.O.*, the court held that the search must be judged by whether it was reasonable at its inception, in that search of DesRoches was reasonable because it began after all of the other students had been searched.<sup>186</sup>

## 3. School Officials v. Law Enforcement Officers

Generally, as long as searches are directed by school officials, they do not require the higher law enforcement standard of probable cause. However, the lower standard was not created to allow police to circumvent probable cause requirements in their investigation of criminal activity

simply because the activity occurred on a school campus. Most cases that address the issue of police involvement in a search apply the more customary probable cause test rather than the *T.L.O.* reasonable suspicion standard.<sup>187</sup> When law enforcement officers act independently of school officials they are required to follow a probable cause standard. Law enforcement officers, however, can participate in searches based on reasonable suspicion as long as the direction to search comes from school officials.<sup>188</sup>

Probable cause was necessary for searching the car of a man arrested for possession of beer on school property when police opened the door to check for more beer and smelled marijuana smoke in the car.<sup>189</sup>

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The following facts occur on a regular basis in most schools.

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The court held that since the matter was handled within the school's discipline program and not as a criminal matter, the officer's status was the same as any district employee and the extent to which he was allowed to be involved was contingent upon the general rule that the school act reasonably.<sup>191</sup>

#### 4. Public Schools v. Private Schools

The obstacles erected by the U. S. Constitution's Fourth and Fifth Amendments are exclusive to the nation's public schools. In Texas, cases prior to *T.L.O.* had upheld searches by public school officials on the ground they were searches by private persons and were not, therefore, subject to Fourth Amendment standards.<sup>192</sup> The United States Supreme Court in its opinion in *T.L.O.* rejected the rationale of those and similar cases that a public school official is not governed by Fourth Amendment standards in conducting a search of a student.

Because a private school is not a government entity, and its teachers and administrators not governmental officials, its students have no constitutional protection against unreasonable searches by those teachers and administrators. As a result, it would appear that private school personnel may search a student's person, his or her belongings, or locker without reasonable suspicion.

However, be aware that under the "public function" doctrine, the Supreme Court has identified certain functions which it regards as the sole province of government, and it has treated ostensibly private parties performing such functions as state actors.<sup>193</sup>

A private entity may be classed as a state actor "when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control.'"<sup>194</sup> In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the defendant was a non-profit association that set and enforced standards for athletic competition among schools both private and public. At issue was the association's enforcement of recruitment rules alleged by a member school to violate the First and Fourteenth Amendments.<sup>195</sup>

A closely divided Supreme Court applied the state action label to the association. The opinion stressed two points: that the membership of the association was comprised overwhelmingly (84 percent) of "public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling" and that in substance the association (replacing previous state school board regulation) set binding athletic standards for state schools, including the recruiting standards at issue in the case.<sup>196</sup>

#### 5. Texas Adoption of *T.L.O.*

*Coronado v. State*, 835 S.W.2d 636 (Tex.Crim.App. 1992) [Texas Juvenile Law 163 (3rd Ed. 1992)].

The leading Texas case which adopts *T.L.O.* is *Coronado v. State*. It is reflective of a typical school official pupil interaction.

Appellant was a high school student who informed the assistant principal's secretary that he was leaving campus to attend his grandfather's funeral. The school had received a complaint a week before that the appellant was attempting to sell drugs on campus. When the assistant principal saw appellant at a pay phone outside the building, he asked him to come inside and also asked a deputy sheriff permanently assigned to the school to accompany appellant into the principal's office. The assistant principal telephoned appellant's mother, who stated that appellant's grandfather had not died. Appellant also denied driving a car to school, but when the assistant principal searched his person he discovered car keys. At the request of the assistant principal the appellant unlocked his car and permitted the Assistant Principal to search it. The deputy sheriff conducted the search and discovered controlled substances and a weighing scale in the trunk of appellant's automobile. Appellant was convicted of possession of a controlled substance and he appealed, claiming that the search that led to the discovery of the controlled substance was illegal. The Court of Appeals affirmed the conviction, finding the search was lawful under *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The Court of Criminal Appeals granted appellant's petition for discretionary review. The Texas Court of Criminal Appeals reversed and remanded the case to the trial court.

In utilizing the *T.L.O.* two prong test, the Texas Court of Criminal Appeals found that the assistant principal had reasonable grounds to suspect that appellant was violating school rules by skipping class. Therefore, he had reasonable grounds to investigate why appellant was attempting to leave school and was justified in "patting down" appellant for safety reasons.

However, the Court of Criminal Appeals concluded that the subsequent searches violated the second prong of *T.L.O.* and were not reasonably related in scope to the circumstances which initially justified [the assistant principal's] interference with appellant, i.e., [his] suspicion this appellant was skipping school. Nor were the searches reasonably related to any discovery from the initial pat-down. Rather, the post pat-down searches of appellant's clothing, person, locker, and vehicle were excessively intrusive in light of the infraction of attempting to skip school.

## I. DRUG TESTING AND T.L.O.

Mandatory urinalysis as part of a physical examination for all students constitutes a "search" within the meaning of the Fourth Amendment to the U.S. Constitution and must be predicated on the "reasonable cause" standard as set out in *T.L.O.*<sup>197</sup>

### 1. All Students

When it comes to mandatory drug testing of all students for drugs the Courts have said no.<sup>198</sup> The courts reasoned that the tests could not determine whether a student has possessed, used, or appeared at school under the influence of marijuana and could, at the most, reveal that a student had ingested marijuana at some time in the preceding days or weeks.

Utilizing such a drug policy was not reasonably related to maintenance of order and security in schools or to preservation of educational environment and, therefore, was improper to the extent that it attempted to regulate out of school conduct which in no way affected the school setting or learning process.<sup>199</sup> Such testing is prohibited under the Fourth Amendment. When it comes to a school drug policy, it must be reasonably related to maintenance of order and security in the school or to the preservation of the educational environment.

### 2. Athletes

In *Vernonia School District v. Acton* (1995), the Supreme Court reversed a 9<sup>th</sup> Circuit decision holding that a policy which authorizes random urinalysis drug testing of students who participate in its athletic programs was constitutional under the Fourth and Fourteenth Amendments.<sup>200</sup>

As stated in *T.L.O.*, the "reasonableness" of a search is judged by balancing the intrusion against the promotion of legitimate governmental interests. To determine when a search at a public school is reasonable, the *Vernonia* Court devised a three-pronged test to balance students' privacy interests and the school's tutelary functions.

Under this analysis the Court examined

- (1) "the nature of the privacy interest upon which the search ... at issue intrudes,"
- (2) "the character of the intrusion that is complained of," and
- (3) "the nature and immediacy of the governmental concern at issue ... and the efficacy of [the search] for meeting it."

**Prong 1:      What is the reasonable expectation of privacy by the individual?**

Students as a whole have a lesser expectation of privacy, given the school's custodial responsibilities. Athletes' expectation of privacy is reduced even more because of the use of locker rooms and athletes voluntarily subject themselves to preseason physicals, insurance requirements, minimum grades, and other rules. School athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

**Prong 2: Is the procedure used for the search reasonable?**

The manner in collecting of urine samples was nearly identical to [conditions] typically encountered in public restrooms, which ... schoolchildren use daily. Also, the disclosure of the tests is limited to "school personnel who have a need to know." The Court concluded that the nature of the intrusion was not great, and thus this prong also weighed in favor of testing.

**Prong 3: Is there a legitimate governmental interest to protect and does the search protect it?**

The Court concluded that the government had a "compelling" interest in "deterring drug use by our Nation's schoolchildren. The Court also emphasized that the Vernonia School District had an immediate concern since a large segment of the student body, and especially athletes, were involved in the school's drug culture. The Court held that the school district was justified in testing only athletes because using drugs posed an injury risk to athletes.

Taking into account all three prongs of the test - the "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search," the Court found the balancing test weighed in favor of the drug testing policy, thus making it a reasonable, constitutional search

Interestingly, Justice Ginsburg, in concurring stated:

*I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.*

3. Extracurricular Activities

On June 27, 2002, seven years after *Vernonia*, the Supreme Court re-visited the issue of suspicion less drug testing of students. In *Board of Education v. Earls* (2002),<sup>201</sup> the School District adopted a policy which required all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. Under the Policy, students were required to take a drug test before participating in an extracurricular activity (not just athletics), must submit to random drug testing while participating in that activity, and must agree to being tested at any time upon reasonable suspicion.

Respondent student, sued the school district contending that the board's drug testing policy was unconstitutional since the board failed to identify a special need for testing students who participate in extracurricular activities, and the policy neither addressed a proven problem nor required a showing of individualized suspicion of drug use.

In a five to four decision, the Supreme Court reversed a 10<sup>th</sup> Circuit decision and held that a drug testing policy targeting all students participating in extracurricular activities was reasonable.

Looking at prong 1, the Court expanded the group of students who had limited expectations of privacy from student athletes to all students who participated in extracurricular activities. For prong 2, the Court found that the process of collecting urine samples mandated by the policy was less intrusive than in *Vernonia*. Regarding prong 3, the Court emphasized that the government has a "pressing concern" in preventing drug use because of the nationwide drug epidemic. That the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.

In writing for the majority, Justice Thomas stated...

*testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use... ..Vernonia did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.*<sup>202</sup>

In writing for the dissent, Justice Ginsburg stated...

*This policy was not shown to advance the special needs [existing] in the public school context [to maintain] . . . swift and informal disciplinary procedures . . . [and] order in the schools, what is left is the School District's undoubted purpose to heighten awareness of its abhorrence of, and strong stand against, drug abuse. But the desire to augment communication of this message does not trump the right of persons -- even of children within the schoolhouse gate -- to be secure in their persons . . . against unreasonable searches and seizures.*

*It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting the schools' custodial and tutelary responsibility for children. In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary obligations to their students require them to teach by example by avoiding symbolic measures that diminish constitutional protections. That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.*<sup>203</sup>

While *Earls* involved extracurricular activities, the arguments made can certainly be envisioned to apply to a policy requiring all students to submit to a drug test and not just those involved in extracurricular activities. As the court stated the policy is not to test the group of

students most likely to use drugs, but rather to consider the “reasonableness” of the program in the context of the public school’s custodial responsibilities.

#### 4. T.L.O.’s Need to Protect vs. Earl’s Duty to Protect

T.L.O.’s holdings:

- Balancing individual's legitimate expectations of privacy and personal security against the government's need for effective methods to deal with breaches of public order.”<sup>204</sup>
  - Individualized suspicion present, but not required
  - Reasonable at Inception: Timely information about illegal activity or a violation of school rule.
  - Reasonable in Scope: Search area related to the information received.
- Reasonable under all the circumstances.

Vernonia’s holdings:

- Generalized Suspicion (small group)
- Reasonable at Inception: Evidence of a drug problem among school athletes.
- Reasonable in Scope: Drug testing considered minimally intrusive to athletes.

Three prong test:

- (1) Decreased expectation of privacy,
- (2) the relative unobtrusiveness of the search, and
- (3) the severity of the need met by the search.

The court found that the balancing test weighed in favor of the drug testing policy, thus making it a reasonable, constitutional search.

Earl’s holdings:

- Generalized Suspicion (larger group)
- Reasonable at Inception: no real information about students in extra-curricular activities being more susceptible to drugs
- Reasonable in Scope: Drug testing considered minimally intrusive.

Three prong test:

- (1) Students have voluntarily submitted to some extracurricular school activity,
- (2) the testing performed in a manner as discreet as the testing procedures in Vernonia.,
- (3) As long as the nation is experiencing a "drug epidemic," public schools will have an interest in preventing drug abuse.

Reasonable under all the circumstances.

When one makes the jump from the schools need to protect its students to the school’s duty to protect its students (against national dangers such as drugs), the first prong of *T.L.O.* and the 3<sup>rd</sup> prong of *Vernonia* is minimized. If a duty to protect exists, because of a national epidemic, will every drug testing policy, at every school, be considered “reasonable at its inception?” Justice Thomas in *Earl* stated that “a policy may exist based on a School District’s interest in protecting the safety and health of its students.”<sup>205</sup> Are all the other students less deserving of

the School District's interest in protection? Why is protecting the safety and health of students involved in extracurricular activities or athletics more deserving than students as a whole? Where does the school district's duty to protect its students end?

## J. OTHER SCHOOL SEARCH SITUATIONS

### 1. The Pat-down

The pat-down search originated from *Terry v. Ohio* (1968), where the Supreme Court stated: "The sole justification of the search ... is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."<sup>206</sup>

In *D.L. v. Indiana*,<sup>207</sup> a school police officer came into contact with D.L. and two other students in the second-floor hallway during a non-passing period. The officer asked D.L. and his companions if they had an identification card, a pass, or a schedule, and they responded that they did not. At that time, the officer conducted a pat-down search of D.L. for his identification card. According to the officer, immediately after she began patting D.L. down, he put something down his pants. The officer handcuffed D.L. and brought him to the police office, where a second officer conducted a search. During this search, the second officer shook D.L.'s pant legs, whereupon a clear plastic bag containing a "dry, green leafy vegetation" fell to the floor. The vegetation inside of the bag was later determined to be 1.03 grams of marijuana.

Upholding the pat-down, the court stated that the presence of an unidentified individual on school grounds has greater potential safety implications than does the mere scent of cigarette smoke or hearsay allegations regarding a student's sale of marijuana on school grounds. In the court's estimation, it was not unreasonable for the officer to respond to this situation by conducting a relatively limited pat-down search of D.L.'s pocket in search of his identification. Given the circumstances of the unidentified individuals in a school setting, the officer's clear need to determine their identities, and this court's generally finding school searches to be reasonable under the circumstances, the limited pat-down search for identification in this case was justified at its inception.

### 2. Locker Searches

With locker and desk searches, there should be an examination of the exclusivity of the student's control over these locations and the extent of the youth's expectation of privacy. What is the school's policy as to inspections by school officials, and is that policy publicized? Most schools and school districts provide student handbooks for each student.

Who supplies the lock on the locker? If the student supplies the lock, must the combination or a duplicate key be provided to the school authorities? What is the effect on the student's expected right of privacy if the school also has a key? Are there detailed rules and regulations governing what may be kept in desks or lockers, and are random searches being made to determine compliance? Is the student's control over the locker or desk limited to excluding other students, or does it extend to school officials? Some cases have distinguished between the student's control of the locker as against fellow students and the status of the youth's control vis-à-vis the school authorities.<sup>208</sup>

Court rulings suggest that students have no expectation of privacy in school lockers when the school district both owns and controls the lockers and has a written policy describing their ownership.

a. No Expectation of Privacy by Students

Where a school system has a written policy regarding lockers stating that the school system retains ownership and possessory interest in the lockers and the students have notice of the policy, the students have no reasonable expectation of privacy in the lockers.<sup>209</sup> Without a legitimate expectation of privacy, the random search of a locker is not a search under the Fourth Amendment.

In one case where the school was allowed access to the lockers, it had given notice at the beginning of the school year that lockers were subject to being opened and that the school and student possessed the lockers jointly. The court held that the school administration's duty to maintain an educational atmosphere in the school necessitated a reasonable right of inspection, even though the inspection might infringe upon students' rights under the Fourth Amendment.<sup>210</sup>

Courts have also concluded that students do not have reasonable expectations of privacy in their lockers where school officials have the master combinations to open them.<sup>211</sup>

b. Some Expectation of Privacy by Students

If a school district does not have a policy indicating that the district retains ownership of lockers and/or that lockers may be searched at any time, and nothing else is done to diminish the students expected right of privacy, then students may be able to establish a reasonable expectation of privacy that cannot be violated without reasonable suspicion.<sup>212</sup> A student's locker by some is considered a "home away from home" and, therefore, the subject of a reasonable expectation of privacy.<sup>213</sup>

c. Smart Lockers

Some school districts are experimenting with lockers that will allow school officials easy access and even the ability to monitor how often students open them. These "smart lockers" utilize computerized identification technology to grant or restrict access in a manner consistent with the operational policies of the school district. The lockers can be opened with a swipe card or from a computer in the central office where they can be opened individually or all at once. Administrators would be able to monitor when a locker is opened, how many times it is opened, and by whom. If a student is opening his locker when he should be in class, the school officials will know about it immediately.

3. Off Campus Searches

In *Rhodes v. Guarricino*,<sup>214</sup> during a class trip, defendant principal searched the hotel rooms of students and found marijuana and alcohol. The students were sent home early from the trip and ultimately suspended from school for three days. As a result of the search and the ensuing punishment, plaintiffs sued defendant principal and defendant school district under 42 U.S.C.S. §

1983, claiming a violation of their constitutionally protected U.S. Const. amend. IV right to be free from unreasonable searches and seizures.

The court stated that *T.L.O.*'s diminished Fourth Amendment protection applies whether or not the student is on or off the school grounds, as long as the off-campus search is conducted by a school employee on a school-sponsored excursion or trip. The mere setting of the search does not erase the well-established constitutional standard for searches of students and replace it with the more stringent probable cause standard, nor does it erase the *T.L.O.* standard. Instead, the setting of the search should merely be one of the many factors used in assessing the reasonableness of the search.<sup>215</sup>

#### 4. Random Searches of Belongings

In *Doe v. Little Rock Sch. Dist.*,<sup>216</sup> plaintiff secondary public school student appealed a decision of the United States District Court for the Eastern District of Arkansas, which rendered judgment in favor of defendant school district in the student's class action suit, filed pursuant to 42 U.S.C.S. § 1983, alleging that the district's practice of conducting random, suspicionless searches of students and their belongings by school officials violated their Fourth Amendment rights.

The district regularly conducted searches of randomly selected classrooms by ordering students to leave the room after removing everything from their pockets and placing all of their belongings, including their backpacks and purses, on the desks in front of them. While the students were in the hall outside their classroom, school personnel would search the items that the students had left behind. The district court held that the practice was constitutional. In reversing the district court's decision, the court held that students retained some legitimate expectations of privacy in the personal items they brought to school.

The court held that the fact that the school handbook described the search procedures did not affect a waiver of any expectations of privacy that the students would otherwise have. The court also held that, although the district expressed some generalized concerns about the existence of weapons and drugs in its schools, it failed to demonstrate the existence of a need sufficient to justify the substantial intrusions upon the students' privacy interests that the search practice entailed.

The court reversed and remanded the district court's decision.

Likewise, in *Desroches II v. Caprio*, the search of the backpacks of 19 students was ruled unreasonable without the presence of individualized suspicion when the stolen property sought was a pair of sneakers.<sup>217</sup>

#### 5. Dog Searches

The decision to characterize an action as a "search" is in essence a conclusion about whether the Fourth Amendment applies at all. If an activity is not a search or seizure (assuming the activity does not violate some other constitutional or statutory provision), then the government enjoys virtual *carte blanche*. If an activity is categorized as not being a search, then it is excluded from judicial control and the command of reasonableness.

Cases involving canine searches have mixed holdings. Courts will generally hold that sniffs of hallways, lockers, and automobiles are not "searches", however, sniffs of students themselves are.

a. Sniffs of Property

A person's reasonable expectation of privacy does not extend to the airspace surrounding that person's property.<sup>218</sup>

The sniffing by trained dogs of student lockers in public hallways and automobiles parked on public parking lots does not constitute a "search" within the meaning of the Fourth Amendment; therefore, inquiry was not required into reasonableness of the sniffing.<sup>219</sup> There is no reasonable expectation of privacy in the odors emanating from inanimate objects such as cars or lockers.<sup>220</sup>

In *In the Matter of D.H.* (2010), officers arrived at school to conduct a canine search of the school. For every inspection, the Assistant Principle entered the classroom and informed the teacher of the sweep. The students were then instructed to leave their property in the classroom and wait in the hall, and the police entered and allowed the dog to sniff the items left in the room. The students were not allowed to refuse the instructions or to take their items with them. When the officers searched D.H.'s classroom, the dog reacted to her backpack. The officers called D.H. into the classroom, read D.H. her rights, and searched her bag, where they found a small bag of marihuana. The Austin Court of Appeals held that the search was reasonable and constitutionally permissible because D.H. had a reduced expectation of privacy, there was a low level of intrusion involved in the dog's inspection of the airspace surrounding her backpack, the limited information gathered, the school's interest in combating drug abuse, and its tutelary and custodial responsibilities for its students.<sup>221</sup>

b. Sniffs of Children

A sniff of a child's person by a dog is a "search" and the reasonable suspicion standard applies.<sup>222</sup>

The Court in *Horton vs. Goose Creek* (1982), reasoned that the intensive smelling of people, even if done by dogs, is indecent and demeaning.<sup>223</sup> Most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. In contrast, where the Supreme Court has upheld the limited investigations of body characteristics which were not justified by individualized suspicion, it has done so on the grounds that the particular characteristic was routinely exhibited to the public... Intentional, close proximity sniffing of the person is offensive whether the sniffer be canine or human. One can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person.<sup>224</sup>

Some Courts have prevented School Districts from using dogs to sniff both students and automobiles.<sup>225</sup> In its view, the school environment was a factor to be considered, but it did not automatically outweigh all other factors. The absence of individualized suspicion, the use of large animals trained to attack, the detection of odors outside the range of the human sense of smell, and the intrusiveness of a search of the students' persons combined to convince the judge that the sniffing of the students was not reasonable. However, since the students had no access to their cars during the school day, the school's interest in the sniffing of cars was minimal, and the court concluded that the sniffing of the cars was also unreasonable.

6. Strip Searches

a. School Strip Searches

Strip searches have been almost universally disapproved. While the reasonableness of scope standard articulated in *T.L.O.* stops short of forbidding strip searches, almost none has been upheld.

In *Safford Unified School District v. Redding* (2009), an administrative assistant and a nurse, had a thirteen-year-old remove her outer clothing, had her pull her bra out and shake it, and pull out the elastic on her underpants, exposing her breasts and pelvic area in a search for prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. The United States Supreme Court, held that the strip search violated the student's Fourth Amendment rights, stating that the content of the suspicion failed to match the degree of intrusion. When facts must support a strip search, the petitioners' general belief that students hide contraband in their clothing falls short; a reasonable search that extensive calls for suspicion that it will succeed. Nondangerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school.<sup>226</sup>

In *In the Matter of A.H.A.* (2008), out of Austin, a school administrator after smelling marijuana on a freshman student asked him to lift his shirt to expose his waistband. He puts his thumbs in the student's waistband between his pants and the gym shorts, in the area of his navel. The administrator testified that his thumbs were "within the belt, width of a belt." He then moved his hands outwards and, as he did, he felt "an awkward ball or mass around the waistline." He testified that this mass was about the size of a golf ball. The administrator pulled the mass from A.H.A.'s waistline and saw that it was a clear plastic bag containing what appeared to be marihuana. The student, A.H.A. argued that the administrator's "touching [A.H.A.]'s waist and lower stomach area, under the clothes, skin on skin, mere centimeters from [A.H.A.]'s genital area ... [was] tantamount to an unreasonable strip search or a near-strip search." The Court stated that the administrator did not conduct a strip search or even a "near-strip search." A.H.A. was not made to remove any of his clothing or drop his pants to his knees. The administrator did not touch, examine, or see A.H.A.'s genitals or any other private part of his body. The administrator testified that his thumbs were placed between A.H.A.'s pants and his gym shorts, and not inside the gym shorts or any underwear A.H.A. might have been wearing. The search was conducted in a private room in the presence of two other adults and another student. Looking at the evidence in the light most favorable to the court's ruling, considering that the search was

initially justified by the administrator's suspicion that A.H.A. possessed marihuana, and taking into consideration the administrator's testimony that the waistline is a common place for students to hide drugs, we conclude that the scope of the search was reasonably related to the circumstances that justified the original interference.<sup>227</sup>

The 6<sup>th</sup> Circuit held, in *Beard v. Whitmore* (2005), that a strip search to find money was unconstitutional. The highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money, the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable. Accordingly, under *T.L.O.* and *Vernonia*, the searches violated the Fourth Amendment.<sup>228</sup>

In *Oliver by Hines et al. V. McClung* (1995), the federal district court held that strip searching seventh grade girls to recover \$4.50 allegedly stolen was not reasonable under the circumstances. The principals and teachers involved were not entitled to qualified immunity.<sup>229</sup>

However, in *Widener v. Frye* (1992), a strip search of a high school student conducted by a school official was reasonable where the school official detected what he believed to be the odor of marijuana emanating from the child and that the child was acting "sluggish" and "lethargic" manner or otherwise consistent with marijuana use. The child was removed from the classroom and the presence of his classmates. He was asked to remove his jeans only, not his undergarments, and only in the presence of two male security guards. The court considered the search to be reasonable in its scope in light of the age and sex of the child, and the nature of the infraction.<sup>230</sup>

b. Detention Strip Searches

In *Smook v. Minnehaha County*<sup>231</sup> (2006), plaintiff detainee alleged that the policy of the Juvenile Detention Center to "strip search minors without probable cause" was a violation of her right against unreasonable search and seizure. In light of the State's legitimate responsibility to act in loco parentis with respect to juveniles in lawful state custody, the court concluded, after weighing the special needs for the search against the invasion of personal rights, that the balance tipped towards reasonableness. Thus, the individual defendants did not violate her constitutional rights. Next, assuming there was a direct causal link between the search of the detainee and municipal policy, the County did not violate her constitutional rights. Alternatively, as of 1999, there was no appellate decision from the U.S. Supreme Court or federal circuit ruling on the reasonableness of strip searches of juveniles in lawful state custody. Moving on, the court declined to pass on the merits of the constitutional claims of the unnamed class members that had to be resolved as a first step in determining whether the individual defendants had qualified immunity. Finally, it concluded that plaintiffs lacked standing to seek injunctive relief.

In *S.C. v. Connecticut* (2004), the 2<sup>nd</sup> Circuit ruled that strip searches of those arrested for misdemeanors require reasonable suspicion of possession of contraband. The Court stated that while there was no doubt a state has a legitimate interest in confining juveniles, it

does not follow that by placing them in an institution where the state might be entitled to conduct strip searches of those convicted of adult-type crimes, that a state may then use those standards to justify strip searches of runaways and truants.<sup>232</sup> While an initial strip search may be justified for a juvenile entering an institution, repeated searches of that same juvenile (while in continued custody) would require reasonable suspicion.

#### 7. Anonymous Tips (More likely for weapons than drugs)

In *In the Matter of K.C.B.*, Clifford Bowser, the Del Valle Junior High School hall monitor, received a tip from an anonymous student that K.C.B. had a plastic bag containing marihuana in his underwear. Bowser escorted K.C.B. to the office of Assistant Principal Jackie Garrett, where Bowser asked K.C.B. if he had “anything in his possession which he should not have.” After K.C.B. responded that he did not, Bowser had him remove his shoes and socks, in which he found nothing. Bowser then informed Garrett that the tip indicated that the marihuana was in K.C.B.'s underwear. Garrett asked K.C.B. to lift up his shirt, at which time Garrett approached K.C.B. and extended the elastic on K.C.B.'s shorts. Observing a plastic bag in K.C.B.'s waistline, Garrett removed it, and K.C.B. was taken to the campus security office where Deputy Salazar, the school resource officer, arrested him for possession of marihuana.

Uncorroborated anonymous tips do not ordinarily rise to the requisite level of reasonable suspicion. We have, in fact, previously held so. In *re A.T.H.*, 106 S.W.3d 338, 344 (Tex.App.-Austin 2003, no pet.). In *A.T.H.*, a law enforcement officer working at the school received a tip from an unidentified caller that a group of likely-students were smoking marihuana behind a nearby business. The court held that the officer “lacked justification for his pat-down of A.T.H. even under the T.L.O. standard.” *A.T.H.*, 106 S.W.3d at 341-42.

In this case, we are bound by the facts as stipulated to by both parties, and so are unable to determine whether the tip was truly anonymous, allowing for no indicia of reliability, or rather made to Bowser by a known student who asked the hall monitor that his name not be revealed. Under the latter circumstance there might be an added indicia of reliability, thus allowing him to reasonably rely upon the tip.

By balancing these diminished rights against the increased level of government interest in the protection of students in the school setting, a search for weapons in a school triggered by an anonymous tip might be found to be justified at its inception despite the fact that “under normal circumstances” there must be reasonable grounds for suspecting a search will uncover evidence.

The presence of drugs on a student, however, does not tip the balance far enough for the search in this case to be deemed justified at its inception. Immediacy of action is not as necessary as could be found with a tip regarding a weapon. For these reasons, we do not believe that the search of K.C.B., which turned up the marihuana evidence, was justified at its inception, and so it fails the test set out in T.L.O.

#### 8. Cell Phones

As has been thoroughly discussed, a search of a student by a school official must be reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.<sup>233</sup> When possession of a phone is against

school policy and reasonable information is received regarding its possession, a search for the phone would clearly be warranted. However, that information alone, without more, may not be enough to authorize a search of the contents of that seized phone.

Policies with regard to phones in schools are changing rapidly. These devices are no longer used just for phone calls and texting. Many smartphones include high-resolution touchscreens and web browsers that display standard web pages as well as mobile-optimized sites. High-speed data access may be provided by Wi-Fi and mobile broadband. These devices are also used as portable media players, digital cameras, GPS navigation units.

Some schools are now allowing use of cell phones for research and learning. The rapid development of mobile app markets and of mobile commerce has grown by leaps and bounds and have made the smartphone an educational asset. Where smartphones were once banned, they are now encouraged. They have moved from a distraction to a learning tool in the classroom and in many cases a child without one is at a distinct disadvantage.

On June 25, of this year the Supreme Court, in a unanimous opinion, ruled that police who arrest an individual may not (generally) as a search incident to an arrest search that person's cellphone without first getting a search warrant. The question that was considered in *Riley v California*.<sup>234</sup> In that case, David Riley, an adult, was pulled over for driving with an expired license. After discovering guns in his car, the police found evidence on Riley's Samsung smart phone that lead to a conviction on attempted murder charges.

In its ruling the Court stated that cellphones are powerful devices unlike anything else police may find on someone they arrest.

Chief Justice John Roberts said for the court:

*"Modern cellphones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life."*<sup>235</sup>

So, how does this decision impact searches of cell phones in schools? In *State v. Granville*, out of the Amarillo Court of Appeals, a warrantless search of the stored data in a cell phone was also considered unreasonable. Granville was arrested at his high school for a misdemeanor and booked into the county jail. All of his belongings, including his cell phone, were taken from him and placed in the jail's property room while he was locked up. Three hours after his arrest, a different officer than the one who arrested Granville at the high school went into the property room and, without a search warrant, looked through Granville's phone in search of evidence connected to another, unrelated felony.<sup>236</sup>

Although decided before the decision in *Riley* by the Supreme Court, the Amarillo Court of Appeals came up with the same result. The search was considered unreasonable because, while there was probable cause to believe evidence of a criminal offense may have been on the phone, the officer could have secured a warrant.

Further, in discussing the student's expected right of privacy in the contents of the phone the Court stated:

**The cell phone had to be activated, or turned on, by the officer, and he had to pull up or scroll through the information imprinted on electronic chips to uncover the photo...**

**...The power button can be likened to the front door of a house. When on, the door is open and some things become readily visible. When off, the door is closed, thereby preventing others from seeing anything inside. And though some cell phones may require the input of a password before it can be used, no evidence suggests that Granville's was of that type. So, the officer's ability to venture into the phone's informational recesses by merely pressing the power button does not suggest that Granville's interest in assuring the privacy of his information was minimal. Whether the phone was locked or not via a password, a closed door is sufficient to illustrate an expectation of privacy.<sup>237</sup>**

In a school setting the initial search of a student must be based upon reasonable grounds that the student possesses something illegal or against school policy. If a phone has been properly confiscated, how far can a school go in searching its contents? It would seem that a subsequent search of a phone's contents would also require its own reasonable grounds that the contents contain improper or illegal information. That search should be limited to that which the official is looking for based on the information received. As an example, if information received by a school administrator was regarding improper text messaging, he may be permitted to search the content of the phone for text messages, but would not be allowed to scroll through pictures. Conversely, if a school official had reasonable grounds to believe that the electronic device contained information or evidence of an illegal activity that may have occurred off campus, it would probably be a better practice to turn the phone and child over to law enforcement for a probable cause determination by the officer, and if appropriate, an arrest and procurement of a search warrant, that is unless the administrator felt there were exigent circumstances or an immediate danger existed. What is interesting is that an improper or illegal picture stored on an electronic device is an offense on campus, even if the picture was taken or sent off campus.

## 9. The JJAEP and Mandatory Searches

The JJAEP was developed during the 1997-98 school year in accordance with Section 37.011 of the Texas Education Code. The program was developed to provide an education for students who were expelled from school or who were adjudicated by a court order to attend an alternative school. In this context, counties operate the JJAEP for youths who have been expelled from school for committing certain criminal offenses. Although the program is neither a residential nor a detention program, it admits students who have committed more serious offenses including felonies.

Student placement in the JJAEP can be either mandatory or discretionary. Mandatory placement is for students who are expelled from their regular schools for committing more serious offenses such as drugs, alcohol, assault, retaliation, and other criminal offenses. Additionally, students who engaged in conduct requiring expulsion, and who are found by a juvenile court to have engaged in delinquent conduct, are adjudicated and ordered, under Title 3

of the Family Code, to attend the JJAEP. Discretionary placement in the JJAEP is for students who are expelled by the school district for committing less serious offenses as described in Section 37.007 (b-1), or for engaging in serious or persistent misbehavior covered by Section 37.007(c). A school district could also use its discretion to send a student to the JJAEP if it determined that the student engaged in felonious conduct off campus. Section 37.006 (a) of the Texas Education Code requires a student to be removed from class and placed in an alternative education program if the student engaged in conduct punishable as a felony.

The Texas Administrative Code governs the rules and regulations for the operations of the JJAEP. With respect to searches it provides:

**i) Searches.**

**(1) All students entering the JJAEP shall be subjected to a pat-down search or a metal detector screening on a daily basis.**

**(2) Searches shall be conducted in accordance with written policies limited to certain conditions. The policies shall address:**

**(A) when a search is appropriate and/or required;**

**(B) who is authorized to conduct the search;**

**(C) what types of searches are permissible;**

**(D) how the pat-down searches will be conducted; and**

**(E) what to do when contraband is found.**

**(3) Policies shall limit pat-down searches to be conducted only by staff of the same sex.**

**(4) Program written policies shall prohibit strip searches by JJAEP staff.<sup>238</sup>**

The United States Supreme Court, as well as courts across the country, have permitted administrative searches where law enforcement authorities have no individualized suspicion when the searches are conducted as part of a general regulatory scheme to ensure the public safety, rather than as part of a criminal investigation to secure evidence of crime.<sup>239</sup> Such searches are reasonable when the intrusion involved in the search is no greater than necessary to satisfy the governmental interest justifying the search, i.e., courts balance the degree of intrusion against the need for the search. Thus, courts have approved “special need” searches in airport searches,<sup>240</sup> courthouse security measures,<sup>241</sup> license and registration vehicle stops,<sup>242</sup> and border-patrol checkpoints.<sup>243</sup> Under the “administrative” or “special need” search doctrine, searches may be considered reasonable as part of a regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime. The requirement of individualized suspicion as the prerequisite for a search has clearly faded. Rather, the clear direction of the courts is to uphold a school policy that considers the constitutionality of a program in the context of the public school’s custodial responsibilities and interest in protecting the safety and health of its students.<sup>244</sup>

By its very nature, the JJAEP is a school which contains students who have previously either violated the law or a school district policy. Many of the students attending have already been found with drugs, weapons, or contraband before being sent to the JJAEP. Others attending are there because of persistent misbehavior or lack of self-control. The JJAEP is charged with the responsibility of insuring the safety and well-being of the students attending the school. The searches conducted at the JJAEP are a part of a general regulatory scheme to ensure the safety of all the students, rather than as part of a criminal investigation to secure evidence of a crime.

The Austin Court of Appeals in an unpublished opinion addressed searches at JJAEP in *In the Matter of D.D.B.* and stated:

***School checks are a reasonable intrusion into student probationers' privacy because they are attending a public school, and the need to protect the other students justifies this intrusion. School searches present special circumstances under which neither probable cause nor a warrant may be required. The legality of such a search depends on its reasonableness under all the circumstances surrounding the search.***<sup>245</sup>

In addition, the JJAEP's efforts to make students aware of their search policy, through their student handbook and presumably distributed to all its students would also reduce a child's expectation of privacy.

In *In the Matter of P.P.*, officers performed routine searches of students entering an alternative high school in the Edgewood Independent School District. During these searches, students must take off their shoes, socks, and belt, and submit to a pat down. During one of these routine searches, an officer felt a little bulge inside P.P.'s right front pocket. The officer swiped his finger into P.P.'s pocket and pulled out a plastic baggy containing a green leafy substance. The substance was tested and came back positive for marihuana. In upholding the search, the court stated:

***The search procedure was justified at its inception as a method of furthering the State's interest in maintaining a safe and disciplined learning environment in a setting at high risk for drugs and violence.... [The search procedure was] tailored to meet the needs of a school setting at higher risk than usual for disciplinary problems involving weapons and drugs. The intrusion on the students' more limited expectation of privacy is reasonable. Accordingly, the search was an administrative search of the sort permissible under the Fourth Amendment. Id. at \*3-4***<sup>246</sup>

In *In the Matter of O.E.* (2003), an officer found a marijuana cigarette in appellant's shoe during a search performed under a uniform security policy. In affirming the denial of appellant's motion to suppress, the court noted that the search was not targeted at appellant but was part of a daily routine and thus fell within the general category of "administrative searches." Keeping in mind the diminished expectation of a student's privacy and the State's compelling interest in maintaining a safe and disciplined environment, Tex. Educ. Code Ann. § 4.001 (1996), the court held that search procedure was justified. All of the students had been removed from other campuses for disciplinary problems, increasing the difficulty of maintaining order and providing a safe environment, and the main objective of the search was the security of the school.<sup>247</sup>

## K. APPEALS

### 1. Establishing Evidence You Tried to Suppress

The admission of improper evidence cannot be asserted as grounds for reversal on appeal where the defendant, on direct examination, gives testimony establishing the same facts as those to which an objection was raised.

In June, 2005, the El Paso Court of Appeals held that under the principle known as curative admissibility, the admission of improper evidence cannot be asserted as grounds for reversal on appeal where the defendant, on direct examination, gives testimony establishing the same facts as those to which an objection was raised. In this case appellant testified at trial regarding the information and evidence he attempted to suppress with his motion. Appellant testified that he was in fact in possession of the marijuana on the night of June 7, 2002 and October 10, 2002, and that he was in possession of the alleged stolen items on October 10, 2002. In providing such testimony, Appellant established facts consistent with those he tried to suppress. Thus, we hold that Appellant has waived such issues on appeal.<sup>248</sup>

## 2. Objection Must be Timely to Preserve Error

To preserve a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the court aware of the complaint, unless the specific grounds were apparent from the context.<sup>249</sup>

In *In the Matter of A.A.M.* (2013), Appellant did not make a specific objection. Rather, when the State moved to admit Appellant's written statement, Appellant made a general objection and then requested to take the witness on voir dire. Appellant never did request a ruling on his prior objection and that the State moved again to admit the written statement as evidence. When the court inquired if there were any other objections, Appellant said, "[n]o objection." The record reflects that Appellant never objected or moved to suppress the written statement based on section 51.095 of the Texas Family Code. See TEX. FAM.CODE ANN. § 51.095 (West 2008).<sup>250</sup>

## 3. State's Limited Ability to Appeal Motion to Suppress Ruling

Juvenile cases, although quasi-criminal in nature, are civil proceedings that are governed by the Texas Family Code and not the Texas Code of Criminal Procedure. Texas Family Code §56.01 provides that the right to appeal in a juvenile case rests solely with the child, leaving the State without any statutory or common-law authority to appeal from an adverse ruling.<sup>251</sup>

In 2003, the Texas Legislature, through § 56.03 of the Texas Family Code, expressly authorized the State to appeal an order of a court in a juvenile case that grants a motion to suppress evidence.<sup>252</sup> However, § 56.03 only applies to State's appeals in cases involving violent or habitual juvenile offenders.<sup>253</sup> As a result, § 56.03 does not authorize the State to appeal from a trial court's order granting a motion to suppress in cases other than those requesting a determinate sentence.<sup>254</sup>

## 4. Police Report Sufficient Evidence to deny Motion to Suppress

In *Ford v. State*, the prosecutor in a motion to suppress merely read the police report to the trial court and then tender it-unsigned, undated, and unverified. The Court of Criminal Appeals, held that the admission of the police report, by itself, contained sufficient indicia of reliability for a trial court's ruling denying defendant's motion to suppress. Even though the report was hearsay, and not admissible at a trial on the merits, and was admitted without a sponsor, the defendant did not argue that the report was in any way, unauthentic, inaccurate, unreliable, or

lacking in credibility. The Court stated that had appellant complained about the reliability, accuracy, or sufficiency of the information supporting the trial judge's ultimate ruling on the motion to suppress, this would be a very different case.<sup>255</sup>

# **LAW ENFORCEMENT GUIDE FOR TAKING A JUVENILE'S WRITTEN STATEMENT**

By Associate Judge Pat Garza

1. Once an officer takes a child into custody, he must promptly give notice (reasonable attempts) of the arrest and the reason for the arrest to the child's parent or guardian. [§52.02(b)(1)]
2. [Arrest for suspicion of DWI only] The child may be taken to a place to obtain a specimen of the child's breath or blood (as provided by Ch. 724, Transportation Code), and perform intoxilyzer processing and videotaping in an adult processing office. [§52.02(a) & §52.02(c)] The child may refuse or consent (without an attorney), but the request and the child's response must be videotaped. [§52.02(d)]
  - 2a. [All other arrests] Without unnecessary delay and without taking the child to any other place, take the child to an approved "Juvenile Processing Office" (JPO). [§52.02(a)]
    - do not leave the child alone in a JPO. [§52.025(c)].
    - do not keep the child in the JPO for longer than 6 hours. [§52.025(d)]
    - the child is entitled to having his parent present (if requested) with him in the JPO. [§52.025(c)]
3. Perform the following tasks in a Juvenile Processing Office:
  - return the child to the parent or guardian [§52.025(b)(1)]
  - complete essential forms and records [§52.025(b)(2)]
  - photograph and fingerprint the child [§52.025(b)(3)]
  - have a magistrate go over the warnings (rights) with the child [§52.025(b)(4)]
  - obtain the actual statement from the child. [§52.025(b)(5)]
4. Before interviewing the child for a statement, have a magistrate warn the child (in a JPO) of his rights. [§51.095(a)(1)(A)] If the officer is taking an electronically recorded statement, the warnings must be a part of the recording. [§51.095(a)(5)]
5. After the magistrate warns the child of his rights and determines that the child wants to give a statement, the officer may interview the child (in a JPO) and record the statement or reduce the statement to writing.
6. Return the child to the Magistrate (in a JPO) with the recorded (if requested) or unsigned statement.
7. The magistrate, outside the presence of any officer or prosecutor, must determine, and be fully convinced that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily given the statement and waived his rights. The magistrate must so certify in writing. [§51.095(a)(1)(B)(ii), §51.095(a)(1)(D)]
8. The magistrate, outside the presence of any officer or prosecutor, then has the child sign the statement, or sign that the recorded statement is his voluntary statement, in his presence. [§51.095(a)(1)(B)(i), §51.095(a)(5)]
9. The officer must then do one of the following with the child:
  - (1) Release the child to the parent or guardian. [§52.02(a)(1)]
  - (2) Release the child to the Juvenile Court. [§52.02(a)(2)]
  - (3) Release the child at a detention facility designated by the juvenile board. [§52.02(a)(3)]
  - (4) Release the child to a secure detention facility designated for temporary detentions. [§52.02(a)(4)]
  - (5) Take the child to a medical facility. [§52.02(a)(5)]
  - (6) Release the child without a referral to juvenile court if the law enforcement agency has established guidelines for such a disposition. [§52.02(a)(6) & §52.03]

## **SAMPLE MOTION TO SUPPRESS**

NO. \_\_\_\_\_

IN THE MATTER OF:

\*

IN THE 386TH JUDICIAL

\*

DISTRICT COURT

\*

OF BEXAR COUNTY, TEXAS

## **MOTION TO SUPPRESS EVIDENCE**

Now comes \_\_\_\_\_, Respondent, in the above styled and numbered cause, and files this Motion to Suppress Evidence, and in support thereof would show the Court as follows:

1. Respondent has been charged with the offense of \_\_\_\_\_.
2. The actions of the \_\_\_\_\_ violated the constitutional and statutory rights of the Respondent under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, Article 38.23 of the Texas Code of Criminal Procedure, and Sections 51.09, 51.17 and 54.03 of the Texas Family Code.
3. Respondent was detained and arrested without a lawful warrant, directive to apprehend, probable cause, reasonable grounds, or other lawful authority in violation of the Respondent's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, Articles 14 and 15 of the Texas Code of Criminal Procedure, and Section 52.01 of the Texas Family Code.
4. Any statements given by the Respondent, were involuntary and illegally obtained, in violation of the Respondent's Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and in violation of Sections 51.09, 51.095, 52.01, 52.02, and 52.025 of the Texas Family Code
5. Any tangible evidence seized in connection with this case, including but not limited to \_\_\_\_\_, was seized without a warrant, probable cause or other lawful authority in violation of the Respondent's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19

of the Constitution of the State of Texas, and Sections 51.09, 51.17, and 54.03 of the Texas Family Code.

6. Any tangible evidence seized in connection with this case, including but not limited to \_\_\_\_\_, was seized as a result of an involuntary and illegal waiver of the Respondent's Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and in violation of Sections 51.09, 51.095, 52.01, 52.02, and 52.025 of the Texas Family Code

7. Therefore, Respondent requests the following matters be suppressed at trial of this cause:

- a. Any and all tangible evidence seized by law enforcement officers or others in connection with the detention and arrest of Respondent in this case or in connection with the investigation of this case, including but not limited to \_\_\_\_\_, and any testimony by the (or any other) law enforcement officers or others concerning such evidence.
- b. The detention and arrest of Respondent at the time and place in question and any and all evidence which relates to the detention and arrest, and any testimony by the or any other law enforcement officers or others concerning any action of Respondent while in detention or under arrest in connection with this case.
- c. All written and oral statements made by Respondent to any law enforcement officers or others in connection with this case, and any testimony by the or any other law enforcement officers or others concerning any such statements.
- d. All wire, oral, or electronic communications intercepted in connection with this case and any and all evidence derived from said communications.
- e. Any other matters that the Court finds should be suppressed upon hearing of this Motion.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Court suppress such matters at trial of this cause, and for such other and further relief in connection therewith that is proper.

Respectfully submitted,

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John Lawyer  
ATTORNEY FOR RESPONDENT  
123 Main St.  
Anytown, Texas Zip

(area) phonenum  
FAX (area) phonenum  
TBA # barnum

**CERTIFICATE OF SERVICE**

This is to certify that on \_\_\_\_\_, 201\_\_, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, \_\_\_\_\_ County, Texas, by hand delivery.

\_\_\_\_\_  
John Lawyer

**ORDER SETTING HEARING**

On \_\_\_\_\_, 201\_\_, the Respondent filed a Motion to Suppress Evidence. The Court finds that the party is entitled to a hearing on this matter, and it is THEREFORE ORDERED that a hearing on this motion is set for \_\_\_\_\_ at \_\_\_\_\_.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_.

\_\_\_\_\_  
Judge Presiding

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<sup>1</sup>*Lanes v. State*, 767 S.W.2d 789 (Tex.Crim.App. 1989).

<sup>2</sup>*Vasquez v. State*, 739 S.W.2d 37, (Tex.Cr.App. 1987).

<sup>3</sup>Texas Family Code §52.015(a).

<sup>4</sup>Texas Family Code §52.0151(a). Texas Code of Criminal Procedure Art. 24.011(c).

<sup>5</sup>Texas Family Code §52.0151(b). Texas Code of Criminal Procedure Art. 24.011(d).

<sup>6</sup>Only persons who have escaped from a TYC facility or who have violated a condition of release from TYC, and who are over seventeen years of age, are excluded from regular detention hearings while in detention. Texas Family Code §53.02 (a) & Texas Family Code §51.12(a) & (h).

<sup>7</sup>*Roquemore v. State*, 60 S.W.3d 862, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).

<sup>8</sup>*Comer v State*, 776 S.W.2d 191 (Tex. Crim. App. 1989).

<sup>9</sup>*Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999)

<sup>10</sup>*Roquemore v. State*, 60 S.W.3d 862, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).

<sup>11</sup>In re G.A.T., 16 S.W. 3d 818, 825 (Tex.App.--Houston [14th Dist.] 2000, pet. denied).

<sup>12</sup>*Contreras v. State*, 67 S.W.3d 181, No. 1682-99-CR, 2001 Tex. Crim. App. LEXIS 58 (Tex.Crim.App. June 27, 2001). [Motion for rehearing on petition for discretionary review denied, (Sep. 12, 2001)].

<sup>13</sup>*Pham v. State*, 36 S.W.3d 199, (Tex. App.—Houston [1st Dist.] Dec., 2000).

<sup>14</sup>*Gonzales v. State*, 9 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 1999, pet. granted)

<sup>15</sup>*State v. Simpson*, 105 S.W.3d 238 (Tex. App.—Tyler 4/34/03).

<sup>16</sup>*Vann v. State*, 93 S.W.3d 182, 184 (Tex.App.—Houston [14th Dist.] 6/27/02).

<sup>17</sup>Tex. Fam. Code Ann. § 52.02(c) (West 2002).

<sup>18</sup> Texas Family Code § 52.02(c)

<sup>19</sup>*Id.* at § 52.02(d).

<sup>20</sup>*Le*, 993 S.W.2d at 656.

<sup>21</sup>*Le*, 993 S.W.2d at 656.

<sup>22</sup>*In the Matter of D.J.C.*, No. 01-07-01092-CV, 312 S.W.3d 704, 2009 WL 3050870, Tex.Juv.Rep. Vol. 23, No. 5, ¶ 09-4-5B (Tex.App.-Hous. (1Dist.)9/24/09).

<sup>23</sup>*Anthony v. State*, 954 S.W.2d 132, 135 (Tex. App.—San Antonio 1997, no pet.).

<sup>24</sup>*Anthony v. State*, 954 S.W.2d 132 (Tex. App.—San Antonio 1997).

<sup>25</sup> *In re D.J.C.*, 312 S.W.3d 704, Tex.App.—Houston [1 Dist.],2009.

<sup>26</sup>*In re C. R.*, 995 S.W.2d 778 at 784, 1999 Tex. App. Lexis 3979 (Tex. App. — Austin 1999).

<sup>27</sup>Tex. Fam. Code Ann. §61.03. Effective September 1, 2003 and applicable to conduct occurring on or after effective date.

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<sup>28</sup>Tex. Fam. Code Ann. §61.103(b).

<sup>29</sup>Tex. Fam. Code Ann. §61.106.

<sup>30</sup>*In the Matter of C.L.C.*, No. 14-96-00105-CV, (Tex. App.–Houston [14th District] 1997) (unpublished) (also available at 1997 Tex. App. Lexis 5011).

<sup>31</sup>*Gonzales v. State*, 67 S.W.3d 910, 912 (Tex. Crim. App. 2002)

<sup>32</sup>*Gonzales*, 67 S.W.3d at 914.

<sup>33</sup>*Grant v. State*, No. 10-08-00393-CR, \_\_\_ S.W.3d \_\_\_, 2010 WL 311430, Tex.Juv.Rep. Vol. 24, No. 1, ¶ 10-1-5B (Tex.App.-Waco, 1/27/10).

<sup>34</sup>*In the Matter of C.M.*, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540, Vol. 26 No. 3 ¶ 12-3-8B (Tex.App.-Waco, 2/22/12).

<sup>35</sup>*Limon v. State*, No. 13-08-00551-CR, --- S.W.3d ----, 2010 WL 2430428, Tex.Juv.Rep. Vol. 24, No. 3, ¶ 10-3-8A (Tex.App.-Corpus Christi, 6/17/10).

<sup>36</sup>*Ramos v. State*, 961 S.W.2d 637 (Tex.App.– San Antonio 1998)

<sup>37</sup>*Dominguez v. State*, MEMORANDUM, No. 13-10-00493-CR, 2012 WL 3043072, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-11 (Tex.App.-Corpus Christi, 7/26/12).

<sup>38</sup>Texas Family Code §54.02(h)

<sup>39</sup>*Diaz v. State*, Tex.App. LEXIS 5319, No. 04-00-00025-CR, (Tex.App.–San Antonio 2001).

<sup>40</sup>*Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995).

<sup>41</sup>*Darden v. State*, 629 S.W.2d 46, 51 (Tex.Crim.App.1982).

<sup>42</sup>*In the Matter of B.S.P.*, MEMORANDUM, No. 04-14-00067-CV, 2014 WL 5464072, Tex.Juv.Rep. Vol.28, No. 4 ¶ 14-4-6 (Tex.App.-San Antonio, 10/29/14).

<sup>43</sup>*Paolilla v. State*, No. 14-08-00963-CR, --- S.W.3d ----, 2011 WL 2042761, Tex.Juv.Rep. Vol. 25, No. 3, ¶ 11-3-3 (Tex.App.-Hous. (14 Dist.) 5/26/11). Substituted opinion for ¶ 11-2-1

<sup>44</sup>*Fare v. Michael C.*, 442 U.S. at 725, 99 S.Ct. at 2572.

<sup>45</sup>*Fare v. Michael C.*, 442 U.S. at 725, 99 S.Ct. at 2572.

<sup>46</sup>Texas Family Code §51.095(b)(1).

<sup>47</sup>*In the Matter of C.M.*, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12).

<sup>48</sup>*McCreary v. State*, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.-Hous. (1 Dist.), 5/17/12).

<sup>49</sup>*Spencer v. State*, MEMORANDUM, No. 01-07-00717-CR, 2009 WL 2343212, Juv.Rep., Vol. 23, No. 3, ¶ 09-3-10A. (Tex.App.-Hous. (1 Dist.), 7/30/09).

<sup>50</sup>*J.D.B. v. North Carolina*, 131 S.Ct. 2394, 180 L.Ed.2d 310, 79 USLW 4504, 11 Cal. Daily Op. Serv. 7346, 2011 Daily Journal D.A.R. 8827, 22 Fla. L. Weekly Fed. S 1135, U.S.N.C., Tex.Juv.Rep. Vol. 25 No. 3 ¶ 11-3-6 (6/16/11).

<sup>51</sup>*In the Matter of C.M.*, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12).

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- <sup>52</sup> *Gonzales v. State*, No. 04-14-00352-CR, --- S.W.3d ----, 2015 WL 2124773, Tex.Juv.Rep. Vol. 29, No. 1 ¶ 15-2-2B (Tex.App.-San Antonio, May 6, 2015).
- <sup>53</sup> *In the Matter of C.M.*, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12). *McCulley v. State*, No. 02-09-00222-CR, 352 S.W.3d 107, 2011 WL 3672062, Tex.Juv.Rep., Vol. 25 No. 4 ¶ 11-4-4 (Tex.App.-Fort Worth, 8/18/11);
- <sup>54</sup> *McCreary v. State*, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.-Hous. (1 Dist.), 5/17/12).
- <sup>55</sup> *In the Matter of S.A.R.*, 931 S.W.2d 585 (Tex. App. -San Antonio 1996).
- <sup>56</sup> *In the Matter of J.W.*, MEMORANDUM, No. 05-05-00675-CV, 2006 Tex.App.Lexis 5005 (Tex.App.C Dallas ,6/12/06).
- <sup>57</sup> *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 180 L.Ed.2d 310, 79 USLW 4504, 11 Cal. Daily Op. Serv. 7346, 2011 Daily Journal D.A.R. 8827, 22 Fla. L. Weekly Fed. S 1135, U.S.N.C., Tex.Juv.Rep. Vol. 25 No. 3 ¶ 11-3-6 (6/16/11).
- <sup>58</sup> *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 180 L.Ed.2d 310, 79 USLW 4504, 11 Cal. Daily Op. Serv. 7346, 2011 Daily Journal D.A.R. 8827, 22 Fla. L. Weekly Fed. S 1135, U.S.N.C., Tex.Juv.Rep. Vol. 25 No. 3 ¶ 11-3-6 (6/16/11).
- <sup>59</sup> *In the Matter of V. P.*, 55 S.W.3d. 25, 2001 Tex.App.LEXIS 3578 (Tex.App. – Austin) May, 2001.
- <sup>60</sup> *In the Matter of V. P.*, 55 S.W.3d. 25, 2001 Tex.App.LEXIS 3578 (Tex.App. – Austin) May, 2001.
- <sup>61</sup> *Northside Independent School District Handbook, NISD*, San Antonio, Texas.
- <sup>62</sup> *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).
- <sup>63</sup> *McCreary v. State*, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.-Hous. (1 Dist.), 5/17/12).
- <sup>64</sup> *Rushing v. State*, 50 S.W.3d 715 (Tex.App. – Waco) July, 2001.
- <sup>65</sup> *Estelle v. Smith*, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).
- <sup>66</sup> *In the Matter of A.M.*, No. 11-09-00304-CV, --- S.W.3d ----, 2011 WL 491018, Juv. Law Rep. Vol. 25 No. 1 ¶ 11-1-7 (Tex.App.-Eastland, 2/11/11).
- <sup>67</sup> *Ex parte Renfro*, 999 S.W.2d 557, 561 (Tex.App.-Houston [14th Dist.] 1999, pet. ref'd); *Marcum v. State*, 983 S.W.2d 762, 766 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd).
- <sup>68</sup> *Marcum*, 983 S.W.2d at 766
- <sup>69</sup> *Wilkerson*, *Id.* at 530-31.
- <sup>70</sup> *In the Matter of H.V.*, \_\_\_S.W.3d\_\_\_, No. 06-0005, 2008 WL 1147567, Tex.Juv.Rep. Vol. 22, No. 2 & 08-2-11 (Tex.Sup.Ct., 4/11/08).
- <sup>71</sup> Texas Family Code §51.095(e).
- <sup>72</sup> *Herring v. State*, No. 06-11-00109-CR, --- S.W.3d ----, 2012 WL 333772, Tex.Juv.Rep. Vol. 26, No. 1, ¶ 12-1-10 (Tex.App.-Texarkana, 2/2/12).
- <sup>73</sup> *Diaz v. State*, Tex.App. LEXIS 5319, No. 04-00-00025-CR, (Tex.App.-San Antonio 2001).
- <sup>74</sup> *In the Matter of J.M.S.*, UNPUBLISHED, No. 06-04-00008-CV, 2004 Tex. App. Lexis 8139 (Tex.App. – Texarkana), September, 2004.

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- <sup>75</sup> *Herring v. State*, No. 06-11-00109-CR, --- S.W.3d ----, 2012 WL 333772, Tex.Juv.Rep. Vol. 26, No. 1, ¶ 12-1-10 (Tex.App.-Texarkana, 2/2/12).
- <sup>76</sup> Texas Family Code §51.095(a)(5)
- <sup>77</sup> Texas Family Code §51.095(a)(1)(D).
- <sup>78</sup> *Reta v. State*, MEMORANDUM, No. 04-07-00564-CR, 2008 WL 2260726, Tex.Juv.Rep. Vol. 22, No. 3 & 08-3-7 (Tex.App.- San Antonio, 6/4/08).
- <sup>79</sup> *Hill v. State*, 78 S.W.3d 374, 386 (Tex.App.—Tyler, 2001).
- <sup>80</sup> *Glover v. State*, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935 (Tex.App.-Houston [14th Dist.] 1996)
- <sup>81</sup> *Baldree v. State*, 784 S.W.2d 676, 684 (Tex. Crim. App. 1989); see also *Marini v. State*, 593 S.W.2d 709, 713 (Tex.Crim.App.1980).
- <sup>82</sup> *Meza v. State*, 577 S.W.2d 705 (Tex.Crim.App. 1979).
- <sup>83</sup> Texas Family Code §54.01(g).
- <sup>84</sup> Texas Family Code §51.095(b)(2).
- <sup>85</sup> *McCreary v. State*, MEMORANDUM, No 01-10-01035-CR, 2012 WL 1753005, Juv. Law Rep. Vol. 26 No. 3 ¶ 12-3-3 (Tex.App.-Hous. (1 Dist.), 5/17/12).
- <sup>86</sup> Texas Family Code §51.095 (a)(5)(A).
- <sup>87</sup> Texas Family Code §51.095 (a)(5).
- <sup>88</sup> Texas Family Code §51.095 (f).
- <sup>89</sup> *In the Matter of M.A.C.*, No. 11–09–00172–CV, --- S.W.3d ----, 2011 WL 1519351, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-10 (Tex.App.-Eastland, 4/14/11).
- <sup>90</sup> Texas Family Code §51.095 (a)(5)(D).
- <sup>91</sup> *Gentry v. State*, MEMORANDUM, No. 01-14-00335-CR, NO. 01-14-00336-CR, 2016 WL 269985, Tex.Juv.Rep. Vol. 30, No. 2 ¶ 16-2-1B [Tex.App.—Houston (1st Dist.), 1/21/16].
- <sup>92</sup> Texas Family Code § 51.095(a), (d)
- <sup>93</sup> *Id.* § 51.095(b)(2)(B)(i).
- <sup>94</sup> *Gonzales v. State*, 869 S.W.2d 588 (Tex.App. --Corpus Christi 1993, no pet.).
- <sup>95</sup> *In the Matter of X.J.T.*, MEMORANDUM, No. 02-13-00176-CV, 2014 WL 787832, Tex.Juv.Rep. Vol.28, No. 2 ¶ 14-2-1A (Tex.App.—Fort Worth, 2/27/14).
- <sup>96</sup> *In Re R.E.J.*, 511 S.W.2d 347, (Tex.Civ.App. [1st Dist.] 1974), reh.den. 1974, second reh. den. 1974.
- <sup>97</sup> Texas Juvenile Law, 6th Edition; by Robert Dawson, (2004), Pg. 326.
- <sup>98</sup> *Goines v. State*, 888 S.W.2d 574, (Tex.App. – Houston [1st Dist.] 1994).
- <sup>99</sup> *Scneckloth v. Bustamonte*, 93 S.Ct. 2041 (1973).
- <sup>100</sup> *In The Matter of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 Tex. App. Lexis 9672, and (Tex.App. – Tyler October, 2004).

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- <sup>101</sup>*Gonzales v. State*, 869 S.W.2d 588 (Tex.App. --Corpus Christi 1993, no pet.).
- <sup>102</sup>*Garcia v. State*, 887 S.W.2d 846, (Tex.Cr.App. 1994) en banc., reh. den. Sept. 21, 1994.
- <sup>103</sup>*Becknell v. State*, 720 S.W.2d 526 (Tex.Cr.App. 1986), cert. denied 107 S.Ct. 2455, 95 L.Ed.2d 865 (1987).
- <sup>104</sup>*Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984).
- <sup>105</sup>*Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980).
- <sup>106</sup>*Limon v. State*, 340 S.W.3d 753, No. PD-1320-10, (Tex.Crim.App., 6/15/11).
- <sup>107</sup>*Limon v. State*, 340 S.W.3d 753, No. PD-1320-10, (Tex.Crim.App., 6/15/11).
- <sup>108</sup>*In the Matter of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 WL 2422954, 2004 Tex.App.Lexis 9672 (Tex.App. – Tyler 10/29/04).
- <sup>109</sup>*In the Matter of R. S. W.*, MEMORANDUM, No. 03-04-00570-CV, 2006 Tex.App.Lexis 1925, Tex.Juv.Rep. ¶ 06-2-6 (Tex.App. — Austin, 3/9/06).
- <sup>110</sup>*In the Matter of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 WL 2422954, 2004 Tex.App.Lexis 9672 (Tex.App. – Tyler 10/29/04).
- <sup>111</sup>*Illinois v. Caballes*, No. 03-923, Supreme Court of the United States, 125 S. Ct. 834; 160 L. Ed. 2d 842; 2005 U.S. Lexis 769; 73 U.S.L.W. 4111; 18 Fla. L. Weekly Fed. S 100, November 10, 2004, Argued, January 24, 2005, Decided.
- <sup>112</sup>*Vasquez v. State*, 739 S.W.2d 37 (Tex.Cr.App. 1987) en banc.
- <sup>113</sup>Texas Family Code §51.09 (1)(4).
- <sup>114</sup>Texas Family Code 52.02(d).
- <sup>115</sup>Transportation Code 724.001(2),(4), and (5).
- <sup>116</sup>Transportation Code 724.012(b).
- <sup>117</sup>*Vasquez v. State*, 739 S.W.2d 37 (Tex.Cr.App. 1987) en banc.
- <sup>118</sup>*Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)
- <sup>119</sup>*Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)
- <sup>120</sup>*New Jersey v. T.L.O.*, 469 U.S. 325 at 333, 105 S. Ct. 733; 83 L. Ed. 2d 720; 1985 U.S. LEXIS 41; 53 U.S.L.W. 4083 (1985).
- <sup>121</sup>Art. 38.23, V.A.C.C.P.
- <sup>122</sup>Texas Family Code §54.03(e).
- <sup>123</sup>Texas Family Code §51.01(6).
- <sup>124</sup>*In the Matter of S.A.G.*, \_\_\_S.W.3d.\_\_\_, MEMORANDUM, No. 04-06-00503-CV, 2007 Tex.App.Lexis 1929, Tex.Juv.Rep. Vol.21, No. 2, ¶ 07-2-13 (Tex.App. — San Antonio, 3/14/07), rel. for pub. 7/26/07.
- <sup>125</sup>*United States v. Jacobson*, 466 U.S. 109, 104 S.Ct. 1652 (1984).
- <sup>126</sup>*Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372 (1949).

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- <sup>127</sup> *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983).
- <sup>128</sup> *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); *Moore v. State*, 760 S.W.2d 808, 809–10 (Tex.App.-Austin 1988, pet. ref d).
- <sup>129</sup> *In re R.S.W.*, No. 03–04–00570–CV, 2006 WL 565928
- <sup>130</sup> *In the Matter of E.O.E.*, No. 08-14-00144-CV, --- S.W.3d ----, 2016 WL 2609515 Tex.Juv.Rep. Vol. 30, No. 3 ¶ 16-3-3 (Tex.App. – El Paso., 5/5/2016).
- <sup>131</sup> Texas Family Code § 52.01(a)(2)
- <sup>132</sup> Texas Family Code § 52.02
- <sup>133</sup> Texas Family Code § 52.02(a)(b)
- <sup>134</sup> Texas Alcoholic Beverage Code §106.041
- <sup>135</sup> Texas Transportation Code § 724.012(a)
- <sup>136</sup> Texas Family Code § 52.02(c)
- <sup>137</sup> Transportation Code § 724.013
- <sup>138</sup> Texas Family Code § 52.02(d)
- <sup>139</sup> Texas Family Code § 51.09(a)
- <sup>140</sup> Texas Family Code § 51.09(a)
- <sup>141</sup> Texas Transportation Code § 724.012(b)
- <sup>142</sup> Texas Transportation Code § 724.012(b)
- <sup>143</sup> Texas Transportation Code § 724.012(b)
- <sup>144</sup> Texas Transportation Code § 724.012(b)
- <sup>145</sup> Texas Family Code § 52.02(d)
- <sup>146</sup> Texas Family Code § 51.09(a)
- <sup>147</sup> Texas Code of Criminal Procedure Art. 18.02 (10)
- <sup>148</sup> Texas Code of Criminal Procedure Art. 18.01(j)
- <sup>149</sup> Tex.Code Crim. Proc. Ann. art. 42.12(11)(a) (Vernon 2006).
- <sup>150</sup> *Briseno v. State*, 293 S.W.3d 644 (Tex.App.-San Antonio, 2009).
- <sup>151</sup> *Barton v. State*, 21 S.W.3d 287, 289 (Tex.Crim.App.2000).
- <sup>152</sup> *Briseno v. State*, 293 S.W.3d 644 (Tex.App.-San Antonio, 2009).
- <sup>153</sup> *Tamez v. State*, No. 51487, 534 S.W.2d 686 (Tex.Crim.App., 1976).
- <sup>154</sup> *U.S. v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001).

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<sup>155</sup> *Townes v. State*, No. 04-08-00392-CR, 293 S.W.3d 227 (Tex.App.-San Antonio, 2009).

<sup>156</sup> *U. S. v. Knights*, 534 U.S. 112; 122 S. Ct. 587; 151 L. Ed. 2d 497; 2001 U.S. LEXIS 10950; December, 2001.

<sup>157</sup> *U.S. v. Sealed Juvenile*, No. 14-30357, \_\_\_ F3 \_\_\_, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-15 (5<sup>th</sup> Cir., 3/16/15).

<sup>158</sup> *In the Matter of D.L.C., In the Matter of D.L.G., In the Matter of R.W.W., In the Matter of C.S.P.*, No. 2-02-163-CV, No. 2-02-164-CV, No. 2-02-170-CV, Nos. 2-02-171-CV, 2-02-172-CV, 124 S.W.3d 354; 2003 Tex. App. LEXIS 10619 (Tex.App— Fort Worth, 2003).

<sup>159</sup> *In the Matter of D.L.C., In the Matter of D.L.G., In the Matter of R.W.W., In the Matter of C.S.P.*, No. 2-02-163-CV, No. 2-02-164-CV, No. 2-02-170-CV, Nos. 2-02-171-CV, 2-02-172-CV, 124 S.W.3d 354; 2003 Tex. App. LEXIS 10619 (Tex.App— Fort Worth, 12/18/03).

<sup>160</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000); see also Goord, 2003 U.S. Dist. LEXIS 1621, 2003 WL 256774, at \*9, 11.

<sup>161</sup> *In the Matter of D.L.C., In the Matter of D.L.G., In the Matter of R.W.W., In the Matter of C.S.P.*, No. 2-02-163-CV, No. 2-02-164-CV, No. 2-02-170-CV, Nos. 2-02-171-CV, 2-02-172-CV, 124 S.W.3d 354; 2003 Tex.App.LEXIS 10619 (Tex.App— Fort Worth, 12/18/03).

<sup>162</sup> *Speth v. State*, 6 S.W.3d 530, 534 (Tex.Crim.App.1999).

<sup>163</sup> *Id.* at 535.

<sup>164</sup> Britannica.com

<sup>165</sup> *Board of Education v. Earls*, No. 01-332, SUPREME COURT OF THE UNITED STATES, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).

<sup>166</sup> *Sloboda v. State*, 747 S.W.2d 20 (Tex.App. – San Antonio 1988, no writ).

<sup>167</sup> *Wilcher v. State*, 876 S.W.2d 466 (Tex.App. – El Paso 1994) 91 Ed.Law Rep. 719.

<sup>168</sup> *Salazar v. Luty*, 761 F.Supp. 45 (S.D.Tex. 1991).

<sup>169</sup> *Cornfield by Lewis v. Consolidated High School District No. 230*, 991 F.2d 1316, 7th Cir. (Ill. 1993).

<sup>170</sup> *T.L.O.*, *Id.* at 342

<sup>171</sup> *T.L.O.*, *Id.* at 342-43.

<sup>172</sup> *Safford Unified School District v. Redding*, 557 U.S. \_\_\_, No. 08-479, U.S. Sup.Ct., 6/25/09 (from Ninth Circuit).

<sup>173</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 79, 149 L. Ed. 2d 205, 121 S. Ct. 1281 (2001)

<sup>174</sup> *State of Utah in the Interest of A.C.C.* 2002 UT 22, 44 P.3d 708 (March, 2002).

<sup>175</sup> *Vernonia School Dist. 47J v. Acton et ux.*, 515 U.S. 646, 651-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

<sup>176</sup> *Board of Education v. Earls*, No. 01-332, Supreme Court of The United States, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).

<sup>177</sup> *S.C. v. State of Connecticut*, No. 02-9274, 382 F.3d 225; 2004 U.S. App. LEXIS 18834 (2nd Cir. 2004).

<sup>178</sup> *O'Connor v. Ortega*, 480 U.S. 709, 725-26, 94 L. Ed. 2d 714, 107 S. Ct. 1492.

<sup>179</sup> *Chandler v Miller*, 520 US 305, 137 L Ed 2d 513, 117 S Ct 1295 (1997).

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<sup>180</sup> *Chandler, Id.*, 520 US at 319-20.

<sup>181</sup> *Id.* at 322

<sup>182</sup> *Id.* at 317

<sup>183</sup> *Roe v. Strickland*, 299 F.3d 395, 406 (5th Cir. 2002).

<sup>184</sup> *Kuehn v Renton School Dist.*, 103 Wash 2d 594, 694 P2d 1078 (1985).

<sup>185</sup> *T.L.O., Id* at 342

<sup>186</sup> *DesRoches v. Caprio*, 156 F.3rd 571 (4th Cir. 1998).

<sup>187</sup> *M. v. Board of Education*, 429 F. Supp. 288 (S.D. Ill. 1977); *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976).

<sup>188</sup> *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987)

<sup>189</sup> *Sloboda v. State*, 747 S.W.2d 20 (Tex.App. – San Antonio 1988, no writ).

<sup>190</sup> *Wilcher v. State*, 876 S.W.2d 466 (Tex.App. – El Paso 1994) 91 Ed.Law Rep. 719.

<sup>191</sup> *Salazar v. Luty*, 761 F.Supp. 45 (S.D.Tex. 1991).

<sup>192</sup> *Mercer v. State*, 450 S.W.2d 715 (Tex.Civ.App.—Austin 1970, writ diss’d) and *R.C.M. v. State*, 660 S.W.2d 552 (Tex.App.—San Antonio 1983, writ ref’d n.r.e.).

<sup>193</sup> *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)).

<sup>194</sup> *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)).

<sup>195</sup> *Id.*, 531 U.S. at 291-93

<sup>196</sup> *Id.*, 531 U.S. at 299-300

<sup>197</sup> *Odenheim v. Caristadt - East Rutherford Regional School District*, 510 A.2d 709 (N.J. Super Ct. 1985).

<sup>198</sup> *Anable v. Ford*, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).

<sup>199</sup> *Anable v. Ford*, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).

<sup>200</sup> *Vernonia School Dist. 47J v. Acton et ux.*, 515 U.S. 646, 651-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

<sup>201</sup> *Board of Education v. Earls*, No. 01-332, SUPREME COURT OF THE UNITED STATES, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).

<sup>202</sup> *Id.*, 122 S. Ct. at 2569

<sup>203</sup> *Id.*, 122 S.Ct. at 2578.

<sup>204</sup> *T.L.O.*, 469 U.S. at 337.

<sup>205</sup> *Board of Education v. Earls*, No. 01-332, SUPREME COURT OF THE UNITED STATES, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).

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- <sup>206</sup> *Terry v. Ohio*, 392 U.S. 1, at 29 (1968).
- <sup>207</sup> *D.L. v. Indiana*, 877 N.E.2d 500 (Ind. App. 2007).
- <sup>208</sup> *State v. Stein*, 203 Kan. 638, 456 P.2d 1 (1969).
- <sup>209</sup> *In re Isaiah B.*, 500 N.W.2d 637 (1993).
- <sup>210</sup> *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).
- <sup>211</sup> *State v. Stein*, 456 P.2d 1 (Kan. 1969); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).
- <sup>212</sup> *Shoemaker v. State*, 971 S.W.2d 178 (Tex.App.–Beaumont 1998).
- <sup>213</sup> *State v. Engerud*, 463 A.2d 934 (N.J. 1983)
- <sup>214</sup> *Rhodes v. Guarricino*, 54 F. Supp. 2d 186; 1999 U.S. Dist. LEXIS 6945, U.S. Dist. Ct. Southern District of New York, 1999.
- <sup>215</sup> *Rhodes v. Guarricino*, 54 F. Supp. 2d 186, 192; 1999 U.S. Dist. LEXIS 6945, U.S. Dist. Ct. Southern District of New York, 1999.
- <sup>216</sup> *Doe v. Little Rock Sch. Dist.*, No. 03-3268, 380 F.3d 349, 2004 U.S. App. Lexis 17144 (8th Cir. 2004).
- <sup>217</sup> *Desroches II v. Caprio*, 974 F.Supp. 542 (E.D.Va. 1997)
- <sup>218</sup> *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).
- <sup>219</sup> *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).
- <sup>220</sup> *Jennings v. Joshua ISD*, 877 F.2d 313 (5th Cir. 1989).
- <sup>221</sup> *In the Matter of D.H.*, No. 03-07-00426-CV, --- S.W.3d ----, 2010 WL 744117 Tex.Juv.Rep. Vol. 24, No. 2, ¶ 10-2-2 (Tex.App.-Austin, 3/5/10).
- <sup>222</sup> *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).
- <sup>223</sup> *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).
- <sup>224</sup> *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).
- <sup>225</sup> *Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D.Tex. 1980).
- <sup>226</sup> *Safford Unified School District v. Redding*, 557 U.S. \_\_\_\_, No. 08-479, U.S. Sup.Ct., 6/25/09 (from Ninth Circuit).
- <sup>227</sup> *In the Matter of A.H.A.*, MEMORANDUM, No. 03-07-00296-CV, 2008 WL 5423258, Vol. 23, No. 1, ¶ 09-1-12 (Tex.App.-Austin. 12/30/08).
- <sup>228</sup> *Beard v. Whitmore Lake School District*, 402 F.3d 598, 2005 U.S. App. Lexis 5323, 2005 Fed. App. 0155P (6th Cir.) 4/4/05.
- <sup>229</sup> *Oliver by Hines et al. v. McClung*, 919 F.Supp 1206 (N.D.Ind. 1995).
- <sup>230</sup> *Widener v. Frye*, 809 F.Supp. 35 (S.D.Ohio 1992), aff'd 12 F.3d 215.
- <sup>231</sup> *Smook v. Minnehaha County*, 457 F.3d 806, 2006 U.S. App. LEXIS 20382 (2006) rehearing en banc, denied by *Smook v. Minnehaha County*, 2006 U.S. App. LEXIS 24352 (8th Cir., Sept. 27, 2006), US Supreme Court certiorari denied by, Motion granted by *Smook v. Minnehaha County*, 2007 U.S. LEXIS 3762 (U.S., Mar. 26, 2007)
- <sup>232</sup> *S.C. v. State of Connecticut*, No. 02-9274, 382 F.3d 225; 2004 U.S. App. Lexis 18834 (2nd Cir. 2004).

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- <sup>233</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
- <sup>234</sup> *Riley v. California*, 573 U.S. \_\_\_\_ (2014).
- <sup>235</sup> *Riley v. California*, 573 U.S. \_\_\_\_ (2014).
- <sup>236</sup> *State v. Granville*, No. 07-11-0415-CR, 373 S.W.3d 218 (Tex.App.—Amarillo, 7/11/12).
- <sup>237</sup> *State v. Granville*, No. 07-11-0415-CR, 373 S.W.3d 218 (Tex.App.—Amarillo, 7/11/12).
- <sup>238</sup> Texas Administrative Code, Title 37, Part 11, Chapter 348, Subchapter A, Rule §348.120 (i).
- <sup>239</sup> *U.S. v. \$ 124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989).
- <sup>240</sup> *Commonwealth v. Vecchione*, 327 Pa. Super. 548, 476 A.2d 403 (1984).
- <sup>241</sup> *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978).
- <sup>242</sup> *Commonwealth v. Blouse*, 531 Pa. 167, 611 A.2d 1177 (1992).
- <sup>243</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).
- <sup>244</sup> *Board of Education v. Earls*, No. 01-332, SUPREME COURT OF THE UNITED STATES, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).
- <sup>245</sup> *In The Matter of D.D.B.*, 2000 Tex. App. Lexis 2222 (Tex. App. —Austin, 2000).
- <sup>246</sup> *In the Matter of P.P.*, MEMORANDUM, No. 04-08-00634-CV, 2009 WL 331887 (Tex.App.-San Antonio, 2/11/09). *In the Matter of O.E.*, (Memoranda Opinion) No. 03-02-00516-CV, 2003 Tex.App.Lexis 9586, (Tex.App. — Austin [3rd Dist.], November, 2003).
- <sup>247</sup> *In the Matter of O.E.*, (Memoranda Opinion) No. 03-02-00516-CV, 2003 Tex.App.Lexis 9586, (Tex.App. — Austin [3rd Dist.], November, 2003).
- <sup>248</sup> *In the Matter of R.J.R.*, UNPUBLISHED, No. 08-03-00392-CV, 2005 Tex.App.Lexis 4416, (Tex.App. — El Paso, 6/9/05).
- <sup>249</sup> TEX.R.APP. P. 33.1; *In re E.M.R.*, 55 S.W.3d 712, 716 (Tex.App.-Corpus Christi 2001, no pet.).
- <sup>250</sup> *In the Matter of A.A.M.*, No. 08-12-00185-CV, \_\_S.W.3d \_\_, 2013 WL 5823042, Tex.Juv.Rep. Vol. 27, No. 5 ¶ 13-5-12 (Tex.App.—El Paso, 10/30/13).
- <sup>251</sup> Texas Family Code § 56.01 (Vernon 2002); see also *C.L.B. v. State*, 567 S.W.2d 795, 796 (Tex. 1978); *In re S.N.*, 95 S.W.3d 535, 537 (Tex. App.--Houston [1st Dist.] 2003, pet. denied).
- <sup>252</sup> Texas Family Code § 56.03(b)(5) (Vernon Supp. 2006).
- <sup>253</sup> Texas Family Code §§ 53.045, 56.03(b) (Vernon Supp. 2006).
- <sup>254</sup> *In the Matter of F.G.*, MEMORANDUM, No. 13-06-216-CV, 2007 Tex.App.Lexis 4887, Juv. Law Rep. Vol. 21, No. 3, ¶ 07-3-8. (Tex.App. — Corpus Christi, 6/21/07).
- <sup>255</sup> *Ford v. State*, No. PD-1753-08, 2009 WL 3365661 (Tex.Crim.App., 10/21/09).