

JUVENILE LAW
SPECIALIZATION REVIEW
Arrest, Waiver of Rights, Search and Seizure
And Confessions

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- Juvenile Confessions And Juvenile Processing Offices; General Practice Seminar, Sponsored by the Mexican-American Bar Association of San Antonio, Las Vegas, Nevada, July 10 - 13, 2003.
- Juvenile Confessions; Juvenile Law Issues In Municipal Court, Sponsored by the Texas Municipal Courts Education Center Special Topic School, Corpus Christi, Texas, June 17-18, 2003.
- Juvenile Search and Seizure; 16th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2003.
- Arrest, Waiver of Rights, Search and Seizure, and Confessions; 2002 Specialization Review Course, Sponsored by the Juvenile Law Section of the State Bar and Texas Juvenile Probation Commission, Austin, Texas, September, 2002.
- Confessions and Juvenile Processing Offices; 15th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2002.
- Statement Taking And Confessions; 2001 Criminal Law Enforcement Conference, Sponsored by the Office of the Attorney General, Austin, Texas, November, 2001
- Juveniles 2001; 27th Annual Advanced Criminal Law Course, Sponsored by the Texas Criminal Justice

- Section and The State Bar of Texas Professional Development., Corpus Christi, Texas, July, 2001
- The Juvenile Arrest Process; 14th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2001.
- Juvenile Law 2000 Update; General Practice Seminar, Sponsored by the Mexican American Bar Association, Honolulu, Hawaii, June, 2000.
- Juvenile Law 2000 Update; 37th Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, May, 2000.
- Arrest, Search and Seizure; 13th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2000.
- 1999 Juvenile Law Legislation; Bexar County Juvenile Probation Training Session, co-presented with Jill Mata, San Antonio, Texas, August, 1999.
- Juvenile Law Update; 25th Annual Advanced Criminal Law Course, Sponsored by the Texas Criminal Justice Section and The State Bar of Texas Professional Development., Dallas, Texas, July, 1999.
- Juvenile Law Update; General Practice Seminar, Sponsored by the Mexican American Bar Association, Cancun, Mexico, June, 1999.
- Juvenile Problems (Observations & Suggestions); 36th Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, May, 1999.
- Juvenile Criminal Law and School Law Issues; 2nd Annual Bench-Bar Conference, co-presented with Nan P. Hundere, Sponsored by the San Antonio Bar Association and San Antonio Bar Foundation, Austin, Texas, March, 1999.
- A Dedication to Volunteers In Probation: Volunteer's in Probation Awards Banquet, Sponsored by the Bexar County Juvenile Probation Department, San Antonio, Texas, March, 1999.
- Director; Juvenile Law Institute; Sponsored by the San Antonio Bar Association & the 73rd District Court, San Antonio, Texas, August, 1998.
- Progressive Sanction Guidelines; 11th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 1998.
- Progressive Sanction Guidelines; 2nd Annual Juvenile Judges Conference, Sponsored by the Texas Juvenile Probation Commission, Austin, Texas, November, 1997.
- New Developments In Juvenile Law; 23rd Annual Advanced Criminal Law Course, Sponsored by the Texas Criminal Lawyers Assoc., San Antonio, Texas, July, 1997.
- Progressive Sanction Guidelines; 10th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 1997.
- New Developments In Juvenile Law; General Practice Seminar, Sponsored by the San Antonio Mexican American Bar Association, Las Vegas, Nevada, July, 1996.

PUBLICATIONS

- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.
- Police Interactions with Juveniles and Their Effect on Juvenile Confessions. State Bar Section Report Juvenile Law, Volume 16, Number 2, June 2002. An article regarding the requirements for law enforcement during the taking of a confession.
- Juvenile Confessions: "I Want My Mommy!" The San Antonio Defender, Volume III, Issue 9, April 2002. An article regarding the pitfalls of taking a juvenile confession.
- Doing the Right Thing. The San Antonio Defender, Volume II, Issue 6, December 2000. An article

regarding the rights of a juvenile during a confession.

- Doing the Right Thing. State Bar Section Report Juvenile Law, Volume 14, Number 4, December 2000. An article regarding the rights of a juvenile during a confession.
- School Search and Seizure. State Bar Juvenile Law Section Report, Volume 13, Number 2, June 1999. A legal article updating legal issues regarding the search of students in school, including consent, drug testing and dog sniffing.
- The New Juvenile Progressive Sanctions Guidelines. Texas Bar Journal, Volume 59, Number 5, May, 1996. A legal article analyzing the New Juvenile Progressive Sanction Guidelines.
- Juvenile Punishments and the New Progressive Sanction Guidelines. Voice For The Defense, Volume 24, Number 10, December, 1995. A legal article introducing the New Progressive Sanction Guidelines in the Juvenile Code.
- Juvenile Punishments and the New Progressive Sanction Guidelines. State Bar Juvenile Law Section Report, Volume 9, Number 5, December 1995. A legal article introducing the New Progressive Sanction Guidelines in the Juvenile Code.
- We Must Be Conscientious In Our Juvenile Reform. State Bar Juvenile Law Section Report, Volume 8, Number 3, September 1994. An article on being careful and conscientious in our zeal to reform juvenile law.
- A Guide To The Bexar County Juvenile Court System. September, 1994. A handbook for the lay-person, explaining terminology and procedures utilized by the juvenile court system in Bexar County.
- School Searches. Texas Bar Journal, Volume 57, Number 8, September, 1994. A legal article regarding the search of students in school, including drug testing and dog sniffing.
- The Demise of In Loco Parentis. Voice For The Defense, Volume 23, Number 7, September, 1994. A legal article high-lighting the change in search procedure by school personnel.
- The Demise of In Loco Parentis. State Bar Juvenile Law Section Report, Volume 8, Number 2, June 1994. A legal article high-lighting the change in judicial opinion regarding searches by school personnel.
- Juvenile Law - Do Juvenile Detention Hearings Consider Rights of Juveniles? Texas Bar Journal, Volume 56, Number 11, December, 1993. A legal article discussing the Family Codes shortcomings regarding Detention Hearings.

SPECIALIZATION REVIEW

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SPECIALIZATION REVIEW

Arrest, Waiver of Rights, Search and Seizure, Confessions

by Pat Garza

I. INTRODUCTION – TESTING TIPS

This paper and its accompanying presentation was prepared to assist attorneys and judges in their preparation for certain essay question that may be presented in the Juvenile Law Specialization Exam. It should be remembered that while conclusions are important, the recognition of issues and the ability to coherently lay them out on paper should be the goal of each test taker. How much you know may not be as important as how well you organize and present your thoughts on paper. Each question will address a great number of issues. Each issue needs to be addressed sufficiently to apprise the grader of your recognition and understanding of that issue. You must then move on to the next issue. Recognizing issues may be as important as discussing them.

A. IDENTIFYING ISSUES AND OBTAINING POINTS

When an exam question has many issues the total points for that question is divided between the issues. As an example, if a question has five main issues, arrest or custody, consent, search, parental notification, and confessions. Each issue should be addressed thoroughly and succinctly. Family Code section numbers should be used where appropriate, as well as any landmark cases which address that issue. There are certain “buzz” words or phrases that should be used with certain issues (i.e. reasonable grounds, unnecessary delay, expected right of privacy, etc.). However, the test grader may only be giving so many points on each issue. If the total points allowed on the question is 50 points, only 10 points may be allowed for each issue. A complete and thorough writing on arrest or custody may achieve a maximum of 10 points, but no more. The failure to recognize an issue (and as a result not discuss it) may cost you a full 10 points. Your goal should be to recognize issues and discuss them with enough specificity to reflect an understanding of the issue, then move on to the next issue. Remember, your not writing to win an argument, your writing to achieve points.

How you are able to do this is personal preference. I wrote in the margins of my exam, at each location where I spotted an issue. I tried to use a “buzz” words or phrases in the margin as I was reading until I finished the entire question. If, as your reading a question, a cite or section number comes into your head, write it down immediately. Sometimes something important will hit you as your reading, and then when you come back to write, you just can't remember it or you spend five minutes trying to remember it. I also made a note at the end of the question as to whether or not I needed to answer the question (i.e. How would you rule? Explain.). I wanted to make sure that I explained the issues as I saw them, but then ruled, because it asked me to. After I had read the entire question, I then re-read the question, stopping at each issue, writing about that issue as quickly as I could, putting down section numbers, cases or anything else that came into my head. Since I was using my laptop, I was able to then go back and succinctly present the issues with the cites or phrases that I had already put down.

B. PRACTICE ANSWERING QUESTIONS

Some (if not most) of the issues discussed in this paper will be on the exam. You should consider these areas important and presume that they will appear on the exam. Create your own fact situation and practice answering it. Or ask yourself to explain the law of juvenile confessions, or arrest, or the juvenile processing office, whatever. Then, sit down and actually write your answer. There can be no shortcuts here. Give yourself 30 minutes of undisturbed time and write an answer. Then read your answer, or better still have someone else read it for you. Does it make sense? Did you include everything you wanted to include? Then do it again. I wrote quite a few practice answers long before I ever took the exam, and it made things so much easier. If you have a laptop or computer use it to practice even if your not planning to use it for the exam. You can interject things that you may have left out, you can cut and paste or even move paragraphs around to complete your answer. Once you have your answer the way you want it, open a blank page and try to write it again as complete as possible. Then come back the next day and write the answer again. Don't get discouraged, the more you practice the better your answers will become. By the way, the by-product of this type of practice is that you really do get a better understanding of the issues in these areas.

C. FLASH CARDS

At the end of this paper you will find certain areas of my presentation reduced to fit into a 3 x 5 format. If you take each area and cut it out as printed, they should each fit onto a 3 x 5 card. By attaching the cutouts onto a 3 x 5 card you can create flash cards which may assist you in your preparation for the exam. I took mine to KINKOS and had them laminated. I was then able to take them with me and study wherever I went. Good luck.

II. 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.¹

A. VALIDITY OF ARREST

Texas Family Code Section 52.01(b) provides:

(b) The taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States.

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

§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.

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) 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.

(d) The juvenile court may issue an order to take the juvenile into custody to answer a motion to modify probation under Section 54.05.

If a probation officer has grounds to believe that a child should be taken into custody under any of the above provisions, he or she should apply to the court for a directive to apprehend under §52.015 of the Family Code (see #5 below), except that a probation officer can take a child into custody (without a warrant or directive to apprehend) if the probation officer has probable cause to believe that the child has violated a condition of probation imposed by the juvenile court (see #4 below).

2. Pursuant to the laws of arrest

The Texas Code of Criminal Procedure, Article 14, provides the requirements of an arrest of an adult without a warrant, while article 15, provides the requirements for an arrest with a warrant.

Under this provision, 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 Family Code defines “a law-enforcement officer” as “a peace officer as defined by Article 2.12, Texas Code of Criminal Procedure.”² A Juvenile probation officer is not a law-enforcement officer, as the concept is used in the Family Code.

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.³

The new change to the statute allows a law-enforcement officer to arrest a juvenile if he has probable cause that the child has violated a condition of his probation (just like a probation officer). A warrant is also not required in this situation.

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. If a child has been released from detention on a conditional release (prior to being placed on probation), and the child violates a condition of his release, the probation officer is not authorized to take the child into custody, without a directive to apprehend from the Juvenile Court. The probation officer can take a child into custody (without a directive to apprehend or warrant) only upon probable cause that the child has violated a condition of 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. 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 take the child into custody under the provisions.⁴

D. POLICE RELEASE AND DETENTION DECISIONS (Texas Family Code §52.02 And Its Requirements)

“A statement by a juvenile that is otherwise admissible under section 51.09 [51.095] may be found to be inadmissible if the requirements of section 52.02(a) are not followed.”

Comer, 776 S.W.2d at 195-96

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. Release Or Delivery to Court.

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.

This statute is an expression of the legislature'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. By the clear language of the statute, it is not merely a question of whether the officer does one of the six enumerated options without unnecessary delay, but also whether he takes the juvenile to any other place first.⁵

a. *Comer v. State*

The first significant case interpreting §52.02 with respect to its relationship to a juvenile's confession was *Comer v State*, 776 S.W.2d 191 (Tex. Crim. App. -1989).

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.

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.

...once he has a found cause initially to take a child into custody and makes the decision to refer him to the intake officer or other designated authority, a law enforcement officer relinquishes ultimate control over the investigative function of the case... In our view the Legislature intended that the officer designated by the juvenile court make the initial decision whether to subject a child to custodial interrogation. He can take a statement himself, consistent with §51.09(b)(1) ... at the detention facility, or, pursuant to §52.04(b), he can refer the child back to the custody of law enforcement officers to take the statement. This construction gives effect to the Legislature's revised attitude that a juvenile is competent to waive his privilege against self incrimination without recourse to counsel, while preserving in full its original intention that involvement of law enforcement officers be narrowly circumscribed.

In 1991 Section 52.025 was enacted to authorize each juvenile court to designate "juvenile processing offices" for the warning, interrogation and other handling of juveniles. Section 52.02 was amended to authorize police to take an arrested juvenile to "a juvenile processing office" designated under Section 52.025 of the Family Code. While Section 52.025 was enacted to give law enforcement more options after *Comer*, the Court of Criminal Appeals has reiterated its holding and has once again sent a message to law enforcement regarding continuous contact with children after arrest.

b. *John Baptist Vie Le v. State*

In 1999, 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.

John Baptist Vie Le was arrested by a law enforcement officer who wanted to take the child's statement. The officer first took Le to a magistrate to receive the required warnings. Then the officer took the juvenile directly to the homicide division of the police department, where he interviewed him and obtained a statement from him. Le gave a statement admitting his part in a murder and an attempted robbery, but he did not sign the statement at that time. Le, was then taken to another magistrate and given the warnings again. At that time he signed his statement, without any police officers being present. The statement was offered by the State at Le's trial. Le filed a motion to suppress his statement, which was denied. He was tried as an adult for capital murder and sentenced to life in prison.

In Le, the following occurred:

1. Le was arrested
2. Le was taken to a magistrate
3. The magistrate gave Le the required warnings
4. The officer took Le to the homicide division of the police department to obtain the statement
 5. Le gave the officer a written statement in the homicide office
 6. Le was taken before a second magistrate
 7. The second magistrate gave Le the required warnings
 8. Le signed the statement before the second magistrate outside the presence of the officer.

The court examined §52.02(a)(2), & (3), and §52.05(a) & (b) of the Texas Family Code, which states that an officer taking a child into custody had to take the child to an office designated by the juvenile court if there was probable cause the child had engaged in delinquent conduct, or to a juvenile court designated detention facility.

The court concluded that appellant's statement was taken in violation of the Family Code, and reversed and remanded the case for the appeals court to consider whether admission of the improper statement had harmed appellant.

The Court in its opinion discussed the Legislative intent of §52.025. It stated that the Legislature envisioned the "juvenile processing office" in §52.025 as little more than a temporary stop for completing necessary paperwork pursuant to the arrest.

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).

Upon leaving the juvenile processing office, the detective was required to do one of the five options listed in §52.02(a) “without unnecessary delay.” Taking Le to the homicide division did not constitute any of these five options and as a result violated the Family Code by his actions. 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.

The Court recognized in *Comer v. State*, ten years earlier, that the language of §52.02 dictated what an officer *must* do “without unnecessary delay” when he takes a child into custody. The Court concluded, then, that:

*the clear intent of the statutory scheme as a whole... from this point on [is that] the decision as to whether further detention is called for is to be made, not by law enforcement personnel, but by the intake or other authorized officer of the court ... It appears that ... the legislature intends to restrict involvement of law enforcement officers to the initial seizure and prompt release or commitment of the juvenile offender.*⁶

In reaffirming its decision in *Comer* the Court of Criminal Appeals stated:

*“...we must not ignore the Legislature’s mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature’s clear intent to reduce an officer’s impact on a juvenile in custody. Today we remind police officers of the Family Code’s strict requirements.”*⁷

c. 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. After quoting *Comer* and *Baptist Vie Le* the court stated:

*The procedure and options are clear in section 52.02(a), and first taking the juvenile, at his own suggestion, to the location of stolen property is not enumerated. Because the appellant was not transported to the juvenile division “without first being taken to any other place,” the officers violated section 52.02(a). Comer, 776 S.W.2d at 196-97.*⁸

In *In the Matter of D.M.G.H.*, it was an “unnecessary delay” to arrest a juvenile at 12:30 p.m., hold her at the police station before taking her before a magistrate at 7:25 p.m., and then taking her to the detention center at 10:20 p.m.. The State attempted to justify the delay on the grounds that it was necessary to complete the paperwork on the case before taking the child to juvenile detention.

The court rejected the state's argument and reversed the adjudication of delinquency ruling that the child's statement should have been suppressed.⁹

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.¹⁰

d. 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."*¹¹

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.¹² The delay was considered deminimus.

e. 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 *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.¹³

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.¹⁴

In *In the Matter of C.R.*, Police failed to notify the respondent's mother that her son had been taken into custody and the reason for doing so. At a minimum, one hour elapsed from the time the respondent was taken into custody until the initial contact with his mother. In addition, police discouraged her from coming to the police station to see her son and ultimately notified her only when the respondent was taken to the juvenile detention facility. The Court held that the requirement of parental notice had been violated and that the written statement given during the period of violation should have been excluded from evidence.¹⁵

It is the responsibility of the person taking the child into custody to notify the parents of the arrest with a statement of the reason for taking him into custody. In *Pham v. State*, the police officer arrested the child at school, took the child to a magistrate to have the child's warning explained, then returned the child to a processing office to take his statement, but failed to contact the child's parents. The court reversed stating:

*The duty to notify a child's parents belonged to the "person taking a child into custody," i.e., Officers Hale and Parish, and [*12] their supervisor, Officer Miller in this case. It was their responsibility to see to it that notice of appellant's arrest, with a statement of the reason for taking him into custody, was promptly given to appellant's parents and the official designated by the juvenile court. These officers were apparently oblivious to the fact they had such a duty, and they did not perform as required.¹⁶*

The court, citing *Comer*, held that the child's statement should have been suppressed for failure to comply with the requirements of Section 52.02 and 52.025. Under *Pham*, when a child is taken into custody at school, the person taking the child into custody must notify the parents. That responsibility can not be delegated to the school or probation official, but must be made by the person taking the child into custody.

In *Hill v. State*, the child was arrested shortly before 9:25 a.m., but his mother was not contacted until 1:45 p.m., 4 hours and 20 minutes later. The detective never attempted to contact anyone, testifying he was busy working the crime scenes, collecting evidence, and taking the child's statement. The court found that while the four hour and twenty minute delay standing alone might not warrant reversal pursuant to section 52.02(b), the impact of the delay was enhanced by the fact that the juvenile was in the process of deciding whether or not to waive important constitutional rights. It is also noteworthy that his mother was reached by telephone on the very first attempt immediately after the child's confession had been obtained following his on-again off-again attempts to claim his constitutional rights. There was scant direct evidence in the record of any efforts to contact her or anyone else until after the confession was obtained. Under these circumstances the court held that this was not prompt notification under §52.02(b) of the Family Code.¹⁷

f. 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.¹⁸

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.¹⁹ 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.

2. Juvenile Processing Office

Section 52.02, however, does provide for an exception. The officer *may* first take the child to "a juvenile processing office designated under Section 52.025." That is an option for the officer, not a requirement. It is, in essence, a seventh option (there is also an eighth option - See Subsection 6 below; DWI and the Intoxilyzer Room). The taking of a juvenile to a juvenile processing office, however, does not dispense with the requirement that, subsequently, the officer, "without unnecessary delay, "do one of the six possibilities listed in §52.02(a).²⁰

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).²¹

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).

(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.

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

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 six permanent options presented in §52.02(a).²²

In *Anthony v. State*, the 4th 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.²³

In *In re R.R.*, a Corpus Christi Court of Appeals case, officers took the juvenile directly to the police station, but because no evidence showed that the juvenile was detained in an office designated as the "juvenile processing office," the confession was illegally obtained and, therefore, inadmissible.²⁴

But see also, *Williams v. State*, where the officer picked up Williams at the Bexar County jail because he had given a false name to the arresting officer. The officer who picked up Williams determined that he was a child and took the child to the homicide office to take the child's statement. The homicide office was not a designated juvenile processing office. The juvenile processing office that was normally used was being remodeled and under construction. A second juvenile processing office was locked and unavailable. The court stated that the purpose for requiring juveniles to be interrogated in specially designated areas is to protect them from exposure to adult offenders and the stigma of criminality. Because no one else was in the homicide office at the time Williams made his statement, this purpose was fulfilled. To hold that Williams's statement was inadmissible under these circumstances would be to place form above substance. The court also noted...

...the interest in achieving the purpose of sections 52.02 and 52.025 is somewhat diminished in this case, given that Williams had already been exposed to adult offenders and the stigma of criminality when he was booked into the Bexar County Jail as a result of his own misrepresentations.

a. 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.²⁵

b. 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].

Like Section 52.02, the provisions of Section 52.025 must be strictly adhered to. A two hour delay in notification of parents by officers who took the child to a processing office to take statement invalidated confession.

*... If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the confession. n4 As in Comer, we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime.*²⁶

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.²⁷ Section 52.025(c) takes that intent one step further. The entitlement to have a parent present in the processing office is not lessened because an officer is attempting to obtain a statement from a child. Section 51.095 governs how to proceed in the taking of a statement of a child in custody, but Section 52.025 governs how to proceed if the child is taken to a processing office, including if the child is being taken there for the purposes of obtaining a statement. An officer who has taken a child into custody and who wishes to take the child's statement must notify the child's parent of the arrest, fully comply with Section 51.095, and if the child is taken to a processing office, notify the child of his right to have his parent present. Even then, under *Li* the officer must be very careful to comply with Section 52.02 or the statement may be inadmissible.

Whose responsibility is it to inform him of this right? The child may be at the processing office for a short period of time and to allow the officer to complete paperwork. Even then, the statute entitles the child to have a parent or guardian present.

The decisions in *Comer* and *Le* appear to require strict adherence to the requisites of §52.02 and §52.025. Parents should be notified of a child's arrest and the child should be advised of his right to have his parent or guardian present in the processing office, and if the child wishes to have them there, reasonable attempts should be made to have them there.

c. Right of Parent To Be Present

New legislation has now given the right of access to a child being held in a juvenile processing office to the child's parent.

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.²⁸

As stated by Professor Dawson in his comments regarding the new legislation, "The universal right of a parent to access to his or her child is subject under (b) to reasonable time, place and conditions restrictions."²⁹ I am sure, that whether or not confessions by juveniles, will be considered "scheduled activities" will be the subject future interpretations by the appellate courts.

While a statement need not be taken at a juvenile processing office, if it is, the requirements of §52.025 and §61.103 must be complied with.

d. 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.

Since the purpose of a juvenile processing office is to accomplish limited objectives a time limit was imposed. Six hours was selected since under Federal law a detention of a juvenile in an adult detention facility for less than six hours need not be reported to federal monitoring agencies.³⁰

In *In the Matter of C.L.C.*, the child was detained for nine hours in the Juvenile processing office, however, he had signed his statement only four hours after he had been detained. The Court said that the purpose of the six-hour restriction was to ensure that coercion, or even a coercive atmosphere, is not used in obtaining a juvenile's confession. Juveniles detained in excess of the parameters in §52.025 might be unduly taxed and willing to make a confession in order to escape the interrogation and without giving full consideration to the ramifications of their admissions.³¹

In *Vega v. State*, an unpublished opinion, the Corpus Christi Court of Appeals utilized similar reasoning stating:

*We believe that the record is unclear as to whether Vega was detained longer than six hours, but that the record reflects that Vega gave officers his statement within six hours from the time that he arrived at the juvenile detention area in the sheriff's office. Consequently, we conclude that Vega was lawfully detained at the time he made his statement.*³²

These cases appear to say that a violation of the six hour rule does not necessarily invalidate a confession, if the confession was completed within the required time.

3. Causal Connection and Taint Attenuation Analysis

In *Gonzales v. State*,³³ 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.³⁴

The Court held that §51.095 is considered an independent exclusionary statute. It sets out what must be done before the statement of a juvenile will be admissible. The reasonable inference is that if the stated conditions are not met, the statement of the child will not be admissible.³⁵ However, the violation of §52.02(b) does not implicate the provisions of §51.095 and there is no clear legislative intent to suppress a statement under that section when a violation is detected. The Court through §51.17 of the Family Code, invoked Chapter 38 of the Code of Criminal Procedure and found that if evidence is to be excluded because of a §52.02(b) violation, it must be excluded through the operation of Article 38.23(a) of the Code of Criminal Procedure.

Article 38.23(a) C.C.P. is an exclusionary rule and 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 ...shall be admitted in evidence.”

The Court of Criminal Appeals has previously established:

*evidence is not “obtained ...in violation” of a provisions of law if there is no causal connection between the illegal conduct and the acquisition of the evidence.*³⁶

While the juvenile’s parents were not timely notified of respondent’s custody, the lower court failed to conduct a causal connection analysis to determine its affect upon the taking of the statement. Utilizing the standard set out in *Comer*, the Court of Criminal Appeals remanded the case to the lower Court so that it may ascertain “with any degree of confidence that,” had the appellant’s parents been notified timely... “ he would still have chosen to confess his crime.”³⁷

Along with the causal connection analysis a court should also conduct a taint attenuation analysis before excluding a confession because of a §52.02 violation. In *Comer*, before reversing the case for failing to transport a juvenile "forthwith" to the custody of the juvenile custody facility, the Court of Criminal Appeals conducted a taint attenuation analysis, utilizing the four factors from *Bell v. State*, 724 S.W.2d 780 (Tex. Crim. App. 1986). *Comer*, 776 S.W.2d at 196-97.

Those factors are:

- (1) the giving of Miranda warnings;
- (2) the temporal proximity of the arrest and the confession;
- (3) the ...presence of intervening circumstances; and
- (4) the purpose and flagrancy of the official misconduct.

4. Failure to Raise Error at Trial

The court of appeals are divided as to whether or not an attorney waives error regarding §52.02 if he does not raise and preserve error at the trial level.

a. Is Waiver

In order to preserve a complaint concerning the admission of evidence for appellate review, the complaining party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make and obtained a ruling.³⁸ A motion which states one legal theory cannot be used to support a different legal theory on appeal.³⁹ In *Hill v. State*, the Appellant urged several grounds for the suppression of his confession. Neither his written motion and legal memoranda, nor the evidence adduced at the hearing included a motion for suppression on the basis that the confession was obtained while Appellant was detained at a place not designated a juvenile processing center under section 52.025.⁴⁰

There is scant evidence in the record of the suppression hearing that the Tyler Police Department-or any part of it-is a designated juvenile processing center. However, the State had no burden to establish that fact because Appellant did not include such contention in his motion to suppress. See Contreras, 998 S.W.2d at 659 (holding it is the juvenile's burden to raise noncompliance with such statutory requirements.)

We hold that Appellant waived the issue of whether the Tyler Police Department was a designated juvenile processing office under sections 52.02(a) and 52.025 of the Family Code.⁴¹

In *Vega v. State*, an unpublished opinion from the Court of Appeals out of Corpus Christi, the court rejected respondent's argument that his parents were not notified as required by the statute because respondent did not urge any failure of his parents to be notified as a basis for his motion to suppress, either in writing or in argument, nor did he object to his statement's admission on that basis. The Court held that nothing was preserved for review as to that issue.⁴²

In *Childs v. State*, the child lied to the officers regarding his age. The court found that it was appellant's affirmative action in misleading officers as to his identity and age that led to the taint of his statement.⁴³ The court stated:

"...the appellant's own action in expressly claiming that he was an adult, in deceiving the police and failing to inform them of his right name and age, affirmatively and expressly waived his rights to be treated as a juvenile during the taking of his second statement."⁴⁴

In *In the Matter of D.M.*, appellant was arrested and charged as an adult. It was later discovered that he had concealed his true age from authorities. On appeal he argued that, because he was treated as an adult he was not afforded the protections provided him under the Family Code. The court disagreed:

"Conformably, it cannot be reasonably said that one, who negates the operation of the Texas Family Code guarantees by misrepresenting his age, is entitled to claim the benefit of the guarantees during the period of his misrepresentation."⁴⁵

b. Is Not Waiver

In *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. 1999), the court held that the failure of the juvenile court to provide statutorily required action may be raised for the first time on appeal unless the juvenile expressly waived the statutory requirements. The court held that there are three categories of rights and requirements used in determining whether error may be raised for the first time on appeal. The first set of rights are those that are considered so fundamental that implementation of these requirements is not optional and cannot, therefore, be

waived or forfeited by the parties. The second category of rights are those that must be implemented by the system unless expressly waived. These rights are "not forfeitable," meaning they cannot be lost by inaction, but are "waivable" if the waiver affirmatively, plainly, freely, and intelligently made. These include rights or requirements embodied in a statute that direct a trial court in a specific manner. The third set of rights are those that the trial court has no duty to enforce unless requested. The law of procedural default applies to this last category.⁴⁶

In *G.A.T.*, the court found that a juvenile suspect's inaction in not asserting his right to be taken to a juvenile processing area does not waive the right.⁴⁷

III. WAIVER OF RIGHTS

In order for a child give up or waive any right granted to it by the constitution or laws of this

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.⁴⁹

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.⁵⁰

b. Search Must Not Exceed Scope of Consent

The scope of a consensual search will be limited by the terms of its authorization.⁵¹

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.⁵² The third party may consent even if that person has equal authority over and control of the premises or effects.⁵³

2. Consent by Children

a. Competent to Consent

A child can be too young to consent. In a 9th 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."⁵⁴

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.⁵⁵ 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.

3. A Child's Consent To 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?

Actions (arrests and searches) that occur prior the initiation of juvenile proceedings have to comply with the provisions of the Family Code⁵⁶

The right against unreasonable search and seizure under both the Fourth Amendment and Article I Section 9, applies to juveniles.⁵⁷ 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.⁵⁸

4. Random Searches as a Condition of Probation

a. Adults

With respect to adult probationers, the United States Supreme Court in *U.S. v. Knights* 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. That special needs for supervision justifies regulations permitting any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are reasonable grounds to believe the presence of contraband. 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.⁵⁹

Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. Probation is one point on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.

b. Juveniles

While I have found no Texas or 5th Circuit case which addresses random searches of juveniles as a condition of probation, I did find a Supreme Court of Utah case which cited Knights. In *State of Utah in the Interest of A.C.C.*⁶⁰, 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."

The probation condition imposed no warrant requirement for such searches nor did it impose a requirement of "probable cause" or "reasonable suspicion." Accordingly, the order allowed random searches unsupported by a warrant or "reasonable suspicion."

A.C.C.'s probation officer searched his backpack 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. 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 anytime, 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 anytime (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!

B. SEARCH AND SEIZURE

I. In Loco Parentis

The main issue in a search and seizure discussion is the "expectation of privacy" by the individual. When parents place their minor children in schools for their education, the teachers and administrators of those schools stand *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.

In 1985, the Supreme Court applied the rule that the Fourth Amendment is applicable to school officials, but required a less-than-probable cause standard in determining the reasonableness of the search (see *T.L.O.* discussed below).

However, recently the Supreme Court has backtracked a little regarding the expected right of privacy for schoolchildren. As Justice Thomas put it...

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. See id., at 656. 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").⁶¹

2. School Officials v. Law Enforcement Officers

So school officials have a lower standard of scrutiny in the discovery of evidence that can be used against the student later in court. The courts, however, are still reluctant and uneasy about evidence collected by the police if school officials have acquired it using this lower standard. What if campus police are acting independently of school officials when they acquire the evidence? Searching for evidence while investigating criminal activity is very different than searching for items which violate school rules. Although, sometimes they are one in the same. 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.⁶²

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.⁶³

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.⁶⁴

3. The Balancing Test

a. *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.

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 stated:

*"In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and cannot claim the parents' immunity from the strictures of the Fourth Amendment."*⁶⁵

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.⁶⁶ Individualized suspicion is not a firm requirement for a search to be reasonable.

In *DesRoches v. Caprio*, 156 F.3rd 571 (4th 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.⁶⁷

- b. *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.

4. Special Needs

The "special needs exception" (less than probable cause) standard as set out by *T.L.O.* applies only 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."⁶⁸ For juveniles, "special needs" can also occur, with respect to a probation officer's warrantless search of a probationer's home⁶⁹; a schools' random drug testing of student athletes,⁷⁰ and drug testing of all public school students participating in extracurricular activities.⁷¹ 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."⁷²

In *Roe v. Strickland*, the 5th 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."*⁷³

5. Locker Searches

- a. **School policy that retains school ownership in lockers** (No expectation of privacy)

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.⁷⁴ Without a legitimate expectation of privacy, the random search of a locker is not a search under the Fourth Amendment.

- b. **No policy retaining school ownership in lockers** (Reasonable grounds required)

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, then students may be able to establish a reasonable expectation of privacy in their individual lockers that cannot be violated without reasonable suspicion.⁷⁵

6. Drug Testing

The general rule is that drug testing all students is prohibited. Drug testing students in extra-curricular activities may be allowed if the testing is not random and is limited to students who are participating in the activity.

b. Extracurricular Activities

In 1995, in *Vernonia School District v. Acton*, the Supreme Court reversed a 9th 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.⁷⁹ The “reasonableness” of a search is judged by balancing the intrusion against the promotion of legitimate governmental interests. The Court held that student athletes have a less legitimate privacy expectation than regular students, for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct.

In 1998, the 7th Circuit in *Todd v. Rush County Schools*, held that a suspicionless drug testing program of students voluntarily wishing to participate in extracurricular activities was consistent with the Fourth Amendment. The court looked at the government interest to be furthered in *Vernonia*, the health and well-being of athletes, and determined that the same interest applied to all students participating in extracurricular activities.⁸⁰

On June 27, 2002, seven years after *Vernonia*, the Supreme Court re-visited the issue of suspicionless drug testing of students in extracurricular activities. In *Board of Education v. Earls*,⁸¹ 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 four to three decision, the Supreme Court reversed a 10th Circuit decision and held that a drug testing policy targeting all students participating in extracurricular activities was reasonable. The board's general regulation of extracurricular activities diminished the expectation of privacy among students, and the board's method of obtaining urine samples and maintaining test results was minimally intrusive on the students' limited privacy interest. The Court found reasonable the procedure utilized to obtain the specimen, the privacy steps regarding the release of a positive test, as well as, the requirement of three positive tests before the student would be disallowed from participating (in the activity), and the lack of any criminal sanctions for a positive test. 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. While in Vernonia there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. 515 U.S., at 663; cf. id., at 684—685 (O'Connor, J., dissenting) (questioning the extent of the drug problem, especially as applied to athletes). 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.⁸²

While *Earl* 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.

7. 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.⁸³

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.⁸⁴ There is no reasonable expectation of privacy in the odors emanating from inanimate objects such as cars or lockers.⁸⁵

In one case the school gave notice at the beginning of each school year that lockers were subject to being opened and that the school and student possessed the locker 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.⁸⁶

b. Sniffs of Children

A sniff of a child's person by a dog is a "search" and the reasonable suspicion standard applies.⁸⁷

The Court in *Horton vs. Goose Creek*, reasoned that the intensive smelling of people, even if done by dogs, is indecent and demeaning.⁸⁸ 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.⁸⁹

Some Courts have prevented School Districts from using dogs to sniff both students and automobiles.⁹⁰ 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.

8. 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 *Oliver by Hines et al. V. McClung*, 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.⁹¹

However, 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.⁹²

9. The Juvenile Justice Alternative Education Program and Mandatory Searches

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. As a result, suspicionless searches have been permitted in some circumstances.⁹³

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.⁹⁴ 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,⁹⁵ courthouse security measures,⁹⁶ license and registration vehicle stops,⁹⁷ and border-patrol checkpoints.⁹⁸ 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.⁹⁹

The Juvenile Justice Alternative Education Program (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) or (f), 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:

(g) Searches. Searches shall be conducted according to written policies limited to certain conditions. *All students entering the JJAEP shall, at a minimum, be subjected to a pat-down search or a metal detector screening on a daily basis.* JJAEP staff shall not conduct strip searches.¹⁰⁰ (emphasis added)

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. See Tamez, 534 S.W.2d at 692. Given the amount of time participants spend in school, the only way to monitor a probationer's compliance with the program designed for his rehabilitation is to monitor school attendance and performance. Id. School searches present special circumstances under which neither probable cause nor a warrant may be required. See New Jersey v. T.L.O., 469 U.S. 325, 340-41, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985); Shoemaker v. State, 971 S.W.2d 178, 181-82 (Tex. App.--Beaumont 1998, no pet.). The legality of such a search depends on its reasonableness [*10] under all the circumstances surrounding the search. See T.L.O. at 341;¹⁰¹*

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.

IV. JUVENILE CONFESSIONS

In 1997, section 51.095, was added to the Juvenile Code which significantly changed the admissibility of a statement by a child.

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:

- (2) "Child" means a person who is:
- (A) ten years of age or older and under 17 years of age; or
 - (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

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.¹⁰²

If the suspect's age cannot accurately be determined before questioning begins, the safer course of action is to conduct the interrogation under the protections of §51.095. If a statement is taken in compliance with §51.095, it will also comply with the Code of Criminal Procedure Article 38.22. On the other hand, if the officer questions a person (who is a child) under adult rules, there is a substantial risk that the statement may be inadmissible in evidence under §51.095.¹⁰³

2. Must Be Voluntary

All statements which the State attempts to use against a child (whether in custody or out, written or oral) 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.¹⁰⁴ 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."*¹⁰⁵ In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances.¹⁰⁶

a. Totality of the Circumstances

The Supreme Court in *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560 (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. It then applied the same standard to juveniles:

*The totality approach permits – indeed, it mandates – inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.*¹⁰⁷

In another case, *E.A.W. v. State*, a child, age 11, was arrested for burglary and detained from midnight to about nine the next morning. She had no opportunity while in detention to talk with a parent or attorney. Although the confession statute was fully complied with by the police, the Court of Civil Appeals held that the waiver of rights was not voluntary:

*...we are confronted with this problem: Can an eleven year old girl of average intelligence for her age, with a sixth grade education, “knowingly, intelligently, and voluntarily” waive her constitutional privilege against self-incrimination, where she has spent from midnight to 9:00 A.M. in the Juvenile Detention Center, and where she has had no guidance from or the presence of a parent or other adult in loco parentis, or an attorney? We think not. In our opinion, a child of such immaturity and tender age cannot knowingly, intelligently, and voluntarily waive her constitutional privilege against self-incrimination in the absence of the presence and guidance of a parent or other friendly adult, or of an attorney.*¹⁰⁸

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.

In any situation where a child has given up a right to a person in authority, undue influence by that person, while unintentional, is a factor on the issue of voluntariness.

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); or¹⁰⁹

The code section specifically excludes statements given, either oral or written, from adherence to the provisions contained in §51.095 when the statements is not obtained pursuant to custodial interrogation. The only requirement for a statement which is not the result of custodial interrogation, is that the statement be voluntary (as discussed above). “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. Whether the child is in custody is paramount in preparing the direction of your attack or defense regarding the admissibility of a child’s statement.

The paramount question in determining the admissibility of a juvenile’s statement is whether or not the child was in custody when he gave the statement. If the child was not in custody, the requirements of §51.09 and §51.095 do not apply.¹¹⁰ A law enforcement officer who takes a child to the police station to obtain that child’s statement may or may not be taking that child into custody. By notifying the child (and hopefully his parent) that the child is not in custody and free to leave at any time and returns the child home when the statement is completed, may be able to avoid the requirements of the section. The officer may have probable cause to arrest and the authority to arrest, yet still not have the child in custody. Without custody the statement may be used in court without the §51.095 requisites. However, even in the absence of custody, due process may be violated by confessions that are not voluntarily given.¹¹¹

I. Custody

In *In the Matter of V.M.D.*, the Fourth Court of Appeals in San Antonio stated that any interview of one suspected of a crime by a police officer will necessarily have coercive aspects to it, but will not necessarily be considered custodial. Being the focus of a criminal investigation, or even having probable cause to arrest a person, also does not (necessarily) make a law enforcement contact custodial interrogation.¹¹² A person is considered in custody only if, based upon the objective circumstances, a *reasonable person* would believe she was restrained to the degree associated with a formal arrest [emphasis added].¹¹³ Each case must be reviewed on its own merits and under the totality of the circumstances test.

a. By Law Enforcement

In *Melendez v. State*, a child voluntarily went to the police station to give a statement in which he confesses to a murder. The court of appeals in San Antonio held that the statement was admissible even though he had not been given his Miranda warnings:

*A statement is not elicited as a result of "custodial interrogation" if the statement is not taken while the defendant is in custody. Thus, an unwarned oral statement will be admissible if made by a person who voluntarily comes to the police station.*¹¹⁴

In *In The Matter of E.M.R.*, a juvenile at the request of police officers accompanied them to their station. The Court, in addressing the issue of an officer's notice to the parent when he has taken a child into custody, stated:

*Practical reasons dictate that 52.02(b) should not be strictly applied to situations where police officers take a child to the station for questioning. When an officer takes a juvenile to the station for questioning, the officer does not have probable cause to believe that the juvenile has committed a crime. At that point, what is the officer to tell the child's parent? Here, the officers testified that they told the child's parent they were taking him to the station for questioning. That was the truth. They did not charge him until he gave a statement implicating himself in the crime. We would hold that the mandate of section 52.02(b) was satisfied in this case.*¹¹⁵

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.¹¹⁶

It is apparent that the leading factor in determining whether a child is in custody under these cases is in the officer's repeated statements to the child that he or she is not in custody coupled with the officer's action in allowing the child to leave or in actually taking the child home after obtaining the statement. The willingness of police to permit the juvenile to return home is substantial evidence he or she was not in police custody.

b. By School Administrator

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.

"Questioning of a student by a principal, whose duties include the obligations to maintain order, protect the health and safety of pupils and maintain conditions conducive to learning, cannot be equated with custodial interrogation by law enforcement officers."¹¹⁷

The court affirmed, holding 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.¹¹⁸

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.¹¹⁹

In *Roquemore v. State*, a police officer's reading of the Miranda warnings was not considered a statement designed to illicit an incriminating response and therefore did not constitute an interrogation. The officer had placed the appellant into the squad car, told the appellant that he was under arrest, and read him Miranda warnings. After hearing his Miranda warnings, the appellant said that he wanted to cooperate and then made the oral incriminating statements. The oral statements were not the result of any questions or conduct by the officer. The court found that the appellant made the statements spontaneously and voluntarily while en route to the juvenile division.¹²⁰

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."¹²¹

3. The "Reasonable Juvenile" Standard

In the Matter of L.M., 993 S.W.2d 276 (Tex.App. –Austin 1999).

In *L.M.*, the respondent, age eleven was taken into the possession of Department of Protective and Regulatory Services following the death of a young child in her care. D.P.R.S. was named temporary managing conservator and placed her in a children's shelter. Police were permitted access to her to question her about the circumstances of the child's death and did so without taking her before a magistrate. The Court of Appeals held that under the circumstances of this case she was in custody at the time of interrogation and ruled the written statement was inadmissible because not taken in compliance with Section 51.095. The court held that being in the custody of D.P.R.S. was custody for the purposes of complying with Section 51.095. More importantly the court created a new standard for the determination of custody for a juvenile. It held that the objective standard for determining when a child is in custody must take into account the age of the child. :

We believe it appropriate for Texas courts to consider the age of the juvenile in determining whether the juvenile was in custody. Thus, we adopt a standard similar to that utilized in the cases discussed above; that is, whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted. Our holding does not conflict with standard applied in earlier Texas cases, but expressly provides for consideration of age under the reasonable-person standard established in Stansbury...

In determining whether a child is in custody, the court took the objective "reasonable person" standard one step further by requiring that the trial court take into account the age and experience of the child. The importance of this "*reasonable juvenile*" standard is quite significant. It is a standard that may be extended to the voluntariness of the waiver of any right. With respects to obtaining a juvenile's confession, the age and experience of a child is important not only in determining whether the child is in custody, but also may be a factor in determining whether the statement is voluntarily, irrespective of custody. Voluntariness is unrelated to the requirements of §51.095. Whether or not the statement was voluntarily given applies whether or not the child is in custody.

Justice Linda Reyna Yanez in *In the Matter of E.M.R.* in her dissenting opinion discussed the “reasonable juvenile standard”...

“After discussing the development of a ‘reasonable juvenile’ standard in other jurisdictions, the Austin court adopted a standard which expressly provides for consideration of age under the reasonable-person standard. 993 S.W.2d at 288. I agree with the approach adopted in In re L. M. Accordingly, I would adopt the following standard for determining whether a juvenile is in custody: ‘whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted.’ Id.; see also, Jeffley, 38 S.W.3d at 855 (adopting ‘reasonable child’ standard for determining whether a juvenile is in custody).”¹²²

The reasonable juvenile standard is one that may be extended to other areas. In any situation where a child has given up a right to a person in authority, because of his status as a child, the undue influence by that person, while unintentional, may have a strong enough influence upon that child that his “voluntary” waiver may be suspect.

C. WRITTEN CONFESSIONS

Before the 1996 amendments to §51.095, in order to take a written statement from a child who was in custody the child would have to be brought before a magistrate and that magistrate had to go over a very long detailed list of warnings prior to allowing the questioning of the child. The warnings included traditional Miranda warnings and warnings regarding Certification and Transfer and Determinate Sentencing offenses. The legislature simplified the provision.

§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;

The statute still requires an officer taking the child before a magistrate, prior to the taking of a statement, but only the Miranda warnings are necessary.¹²³ It no longer requires the detailed warnings related to certification and determinate sentencing offenses.

I. 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 can not 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 *Vega v. State*, an unpublished opinion from Corpus Christi, the child had given a statement and was being held in the juvenile detention facility. An investigator took Vega from the juvenile detention center, pursuant to court order, for the purpose of going for a medical exam. He said that Vega, on his own initiative, indicated a desire to amend the statement that he had given on August 28. After Vega was again given proper warnings in accordance with the Texas Family Code, his amended statement was reduced to writing and signed by Vega after the proper admonishments by a justice of the peace. The juvenile court had appointed an attorney to represent Vega prior to his giving the amended statement. The investigator had sought to notify Vega's attorney about the fact that Vega was in the process of amending his statement, but the attorney was unavailable at the time of his call. The investigator notified Vega that his attorney was unavailable. Vega did not seek any additional time in order to consult with his attorney. The court held:

...that where, as here, the making of the new statement originated with Vega, and where that statement meets the admissibility requirements set forth in TEX. FAM. CODE § 51.095, the statement is admissible even though the juvenile's attorney does not join in waiving the juvenile's rights.¹²⁴

2. The Magistrate

a. Magistrate Defined

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

Art. 2.09. Who Are Magistrates

Each of the following officers is a magistrate within the meaning of this Code: The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, the magistrates appointed by the judges of the district courts of Bexar County, Dallas County, Tarrant County, or Travis County that give preference to criminal cases, the criminal law hearing officers for Harris County appointed under Subchapter L, Chapter 54, Government Code, the magistrates appointed by the judges of the district courts of Lubbock County or Webb County, the magistrates appointed by the judges of the criminal district courts of Dallas County or Tarrant County, the masters appointed by the judges of the district courts and the county courts at law that give preference to criminal cases in Jefferson County, the magistrates appointed by the judges of the district courts and the statutory county courts of Williamson County, the county judges, the judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the masters appointed by the judges of the statutory probate courts under Subchapter G, Chapter 54, Government Code, the justices of the peace, the mayors and recorders and the judges of the municipal courts of incorporated cities or towns.

In a nutshell they are : The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, some magistrates appointed by District and County Courts, some criminal law hearing officers (Harris County), county judges, judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the masters appointed by the judges of the statutory probate courts, justices of the peace, mayors and recorders and judges of the municipal courts of incorporated cities or towns.

b. Referee as Magistrate

The Juvenile Referee is not a magistrate as defined by Article 2.09 of the Texas Code of Criminal Procedure. In 1999, the legislature added §51.095(e), which allows referees to perform the duties of the magistrate if approved by the juvenile board in the county where the statement is being taken.¹²⁵

c. The Warnings

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

- (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;

These are the same warnings 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 magistrate must be sure that he gives the proper warnings. In *Diaz v. State*, the magistrate misstated the maximum range of punishment. He told sixteen year old Daniel Diaz that he "might get up to a year in confinement or up to a \$ 10,000 fine if he were tried as an adult." The actual maximum prison term in the adult system is up to 99 years for aggravated assault with a deadly weapon. Daniel was certified to stand trial as an adult, and the trial court overruled his objection to the introduction of his confession into evidence. Daniel was convicted on two counts of aggravated robbery and assessed two concurrent fifteen year sentences. The appeals court found that defendant's decision to give a statement following the misstatement regarding the possible punishment, rendered that decision involuntary.¹²⁶ The child's age at the time of his statement further emphasized its involuntary nature in viewing the totality of the circumstances. Since the statement was undoubtedly inculpatory, the court could not conclude that the admission of the statement did not contribute to his conviction.

Once the child has been given proper warnings by a magistrate, the child may not be questioned unless he or she has "knowingly, intelligently, and voluntarily" waived the rights he or she was informed of by the magistrate's warnings. The waiver must be made "before and during the making of the statement."¹²⁷

d. **Signing the Statement**

Once the child has been warned by the magistrate, if he or she agrees to being interviewed without an attorney, the police may do so. If the child makes a writing, the officer may write out the statement, have someone write out the child's statement, or ask the child to do so, but must not have the child sign statement.

Section 51.095(a)(1)(B)(I) provides:

(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

The statement must be signed in the presence of the magistrate. 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.

e. **Findings of the Magistrate**

Section 51.095(a)(1)(B)(ii) provides

(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;

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.¹²⁸

If the juvenile tells the magistrate that he or she wishes to remain silent, then there should be no questioning. If the child indicates that he or she wishes to consult with an attorney prior to questioning, then there must be no questioning until the juvenile has consulted with counsel. If the magistrate is unable to provide counsel for a juvenile who requests an attorney and cannot afford one, then there should be no questioning of the juvenile at all.¹²⁹

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. In *Glover v. State*, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935 (Tex.App. – Houston [14th Dist.] 1996), the court stated the following:

We first note that the Family Code does not require that a juvenile be allowed to speak with a parent or guardian prior to making a statement. See TEX. FAM. CODE ANN. §§ 51.09 (Vernon 1986 & Supp. 1996). Also, Texas courts have held that a juvenile's request to speak to a parent is not a per se invocation of that individual's Fifth Amendment rights. In the Interest of R.D., 627 S.W.2d 803, 806 (Tex. App.--Tyler 1982, no writ). Here, a magistrate gave appellant all the proper warnings before he made his statement.¹³⁰

While 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,¹³¹ §52.02(b) requires that a parent be notified "promptly" when their child has been taken into custody and §52.025(c) gives the child the right to have a parent present in the juvenile processing office,¹³² and all interrogations and confessions conducted while in custody must be taken in a juvenile processing office.¹³³ (See Part VI, Section B, Subsection 3, of this paper)

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. Statement Leads to Inculpatory Physical Evidence

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.

a. Must Lead to Evidence

An oral statement which inculpates the child or only corroborates that an offense occurred is not enough. It must lead to evidence that corroborates the statement that was unknown or undiscovered prior to the statement. In *Dixon v. State*, the court of appeals reversed a case, ruling that the admission of appellant's statement "*we stole a car and had an accident*" made to a nurse while he was in custody, recovering in the hospital, was prejudicial error.¹³⁴

b. Must Have Miranda Warnings

Although this section does not on its face require Miranda warnings before an oral confession leading to other evidence of the crime is admissible, the Court of Criminal Appeals in *Meza v. State*, held that the lack of such a requirement does not affect the applicability of Miranda.¹³⁵

*We hold that Sec. 51.09(b)(2) [now 51.095(a)(2)] does not dispense with Miranda warnings, and thus is constitutional in the face of such a challenge.*¹³⁶

Since §51.095(a)(2) does not dispense with Miranda warnings, they are necessary before a statement will be admissible under the provision.

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. It follows that a res gestae statement is not one that is made in response to official interrogation, since the questions destroys the spontaneity that is an essential ingredient of the statement.¹³⁷

As mentioned earlier, in *Roquemore v. State*, a police officer's reading of the Miranda warnings was not a statement designed to illicit an incriminating response and therefore did not constitute an interrogation.¹³⁸

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 hearing¹³⁹).

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.¹⁴⁰ A child's (otherwise inadmissible) prior statement can be used for impeachment purposes if the child testifies in a juvenile proceeding and makes a statement that is inconsistent with that prior statement. This would be important in situations where the child has made prior statements that do not appear to be admissible for non-compliance with the Family Code, and the child is considering testifying in the case contrary to the prior statements.

The only exception may be a statement made by the child at a detention hearings. Section 54.01(g) provides:

(g) No statement made by the child at the detention hearing shall be admissible against the child at any other hearing.

While §54.01(g) does specifically prohibits the use of a statement made at the detention hearings, §51.095(b) does not specifically allow it. Section 51.095(b)(2) states that nothing in §51.09 or §51.095 can be used to preclude the admission of the statement being used to impeach. It does not state that nothing in §54.01(g) can be used to preclude the admission of the statement being used to impeach and as a result a statement being used to impeach a juvenile can not be used if it arose from a detention hearing.

5. Tape Recorded Custodial Statements

Section 51.095(a)(5) allows for the admission of an oral statement if the statement is tape recorded (including video).

Section 51.095(a)(5) provides:

(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;

(B) the recording device is capable of making an accurate recording, 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 of each recording of the child made under this subdivision.

Section 51.095 (a)(5) provides for the admissibility of an oral statement if when the child is in a detention facility or other place of confinement or in the custody of an officer the statement is recorded and the child is given his warnings, as stated above (Miranda Warnings), *on the recording* and it appears that the waiver is made knowingly, intelligently, and voluntarily.¹⁴¹ The warnings still have to be given by a magistrate. 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.

FLASH CARDS

ARREST

1. §51.095(d) – Definition
2. §52.01 – When a child may be taken into custody
3. §52.02 – Release or delivery to court
4. §52.02(b) – Parental Notification
5. §52.025 – Juvenile Processing Office (JPO)

ARREST DEFINED

51.095(d)

1. in a detention facility or other place of confinement;
2. in the custody of an officer; or
3. during or after the interrogation while in the possession of the D.P.R.S. and is suspected to have violated the law.

TAKING INTO CUSTODY

§52.01

1. an order of the juvenile court (w/pet., mot. to mod., C & T, etc.)
2. under the laws of arrest (adult)
3. by a law-enforcement officer, (inc. school dist. officer) if there is PC of Del.Cond. or CINS
**no warrant necessary
4. by a probation officer if there is PC child violated condition of probation;
**no warrant necessary
5. directive to apprehend (juv. warrant)

POLICE REL. & DET. DECISIONS

(§52.02. Release or Delivery to Court)

“without unnecessary delay” and “without first taking the child to any place” other than a juvenile processing office,...

1. release the child to a parent, guardian,...
2. bring to the office or official designated by the juvenile court if PC child engaged in Del.Cond. or CINS
3. bring the child to a detention facility
4. bring the child to a medical facility
5. Counsel and release (by law enforcement) if guidelines approv. by Juv. Bd.

PARENTAL NOT. OF ARREST

§52.02(b)

1. “Promptly” give notice
2. of arrest and reason for arrest
3. to parent, guardian, or custodian; and
4. the office or official designated by the juvenile court.

PARENTAL NOT. CASES

1. *Gonzales* – failure to notify parents of arrest doesn't require exclusion absent proof of a "causal connection"
 4. *Pham* – App. Ct. suppressed conf. Ch. arrested at school, officer did not notify parent (Vacated no CC)
- ** Responsibility of notifying parent goes to person taking child into custody
5. *Hill* – App. Ct. found 4 hour 20 min. delay, plus child was in process of deciding import. const. right.
- ** Causal Connection Analysis
- ** Failure to raise at trial may waive error

REL & DET. DEC. CASES

1. *Comer* (1989) – Pre-JPO case, without unnecessary delay means no stops to take confession.
 2. *John Baptist Vie Le* (1999) – Confess. not taken in JPO, Same result as *Comer*
 3. *Roquemore* – detour to recover stolen property was unnecessary delay. (No CC)
 4. *Contreras* – 50 minutes at scene while securing and assist. victim. was necessary delay.
- ** Causal Connection Analysis
- ** Failure to raise at trial may waive error

JUVENILE PROCESSING OFFICE (§52.025)

1. Designated by Juv. Ct.
 2. Office or room
 3. Not cell or holding facility used for adults
 4. To return child to parent
 5. Completion of essential forms
 6. Photographing and fingerprinting
 7. Issuance of warnings
 8. Receipt of a statement
 9. Not left alone and entitled to be accomp. by parent or atty.
 10. Not longer than six hours.
- ** Failure To Raise At Trial May Waive Error
- ** Causal Connection Analysis

WAIVER OF RIGHTS

§51.09

Unless a contrary intent clearly appears elsewhere... , any right granted to a child... may be waived... if (does not apply to confessions):

1. it is made by the child and the attorney for the child;
2. the child and the attorney 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.

SCHOOL SEARCHES

(Generally)

1. Law Enforcement (probable cause) v. School Officials (reasonable grounds)
2. The Balancing Test for Reasonableness – *New Jersey v. T.L.O.*
Expected right of privacy v. degree of intrusion
 - a. Justified at inception
 - b. Reasonably related in scope
3. Texas adopted – *Coronado v. State*

OTHER SEARCH SITUATIONS

1. Locker Searches – School policy (handbook) v. expected right of privacy (Usually RG)
2. Drug Testing – Is considered a search
All Students — no (not reasonable)
Extracurricular Act. – yes (is reasonable)
Bd. of Ed. v. Earls (SC 2002) – Expected rt. of priv. limited where St. responsible for maintaining discipline, health & safety (i.e. schools)
3. Dog Searches – Hallways, cars, lockers – yes
(b/c not considered a search)
Persons – no (not reason.)
4. Strip Searches – Generally no
5. Balance reasonableness of search v. need for intrusion

ALL CONFESSIONS

Must Be Voluntary

(the product of a free & unconstrained choice)

Totality of the Circumstances

1. age, intelligence, maturity level, and experience in the system;
2. length of time left alone with the police;
3. 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. warn the appellant in Spanish;
6. The length of time before he was taken before a magistrate and warned.

** “Coercive Environment”

CUSTODIAL INTERROGATION CASES

(w/o §51.095 does not apply)

Melendez v. State; an unwarned oral statement will be admissible if made by a person who voluntarily comes to the police station.

In The Matter of V.P.; Questioning by a principal, whose duties include to maintain order, protect the health and safety of pupils cannot be equated with custodial interrogation by law enforcement officers.

Rushing v. State; probation off.'s questions about the status of his case amounted to questions, "*normally attendant to arrest and custody*," and was not "interrogation."

In the Matter of L.M.; Standard to use in juvenile custody "reasonable juvenile"

WRITTEN CONFESSIONS

1. Attorney May Be Waived
2. The Neutral Magistrate (In a JPO)
3. Inform of rights outside presence of the officer (standard Miranda)
4. Statement taken in a JPO
5. Parental presence
6. Signing in the Mag. presence
7. Findings of the Mag.
8. Returning the child timely

ORAL CONFESSIONS

1. Statement Leads to Inculpatory Physical Evidence and been mirandized
2. Res Gestae Statements
3. Judicial Confession
4. Used For Impeachment
5. Tape Recorded Custodial Statements
(Miranda warnings and statement must both be incl. on the recording)

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1. *Lanes v. State*, 767 S.W.2d 789 (Tex.Crim.App. 1989).
 2. Texas Family Code §51.02(7).
 3. *Vasquez v. State*, 739 S.W.2d 37, (Tex.Cr.App. 1987).
 4. Texas Family Code §52.015(a).
 5. *Roquemore v. State*, 60 S.W.3d 862, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).
 6. *Comer v. State*, 776 S.W.2d 191 (Tex. Crim. App. 1989).
 7. *Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999).
 8. *Roquemore v. State*, 11 S.W.3d 395, 400 (Tex.App.–Houston [1st Dist.] 2000, pet. granted).
 9. *In the Matter of D.M.G.H.*, 553 S.W.2d 827 (Tex. App.–El Paso 1977).
 10. *In re G.A.T.*, 16 S.W. 3d 818, 825 (Tex.App.–Houston [14th Dist.] 2000, pet. denied).
 11. *Contreras v. State*, ___ S.W.3d ___, 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)].
 12. *Contreras v. State*, ___ S.W.3d ___, 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)].
 13. *Gonzales v. State*, 9 S.W.3d 267 (Tex. App.–Houston [1st Dist.] 1999, pet. granted)
 14. *State v. Simpson*, 51 S.W.3d 633 (Tex. App.–Tyler 2000) *j. vacated by* 74 S.W.3d 408 (Tex. Crim. App. 2002). On the State's petition for discretionary review, the Court of Criminal Appeals vacated the court of appeals judgement and remanded the case for the court of appeals to determine whether a causal connection existed between the Family Code violation and the making of the statement.
 15. *In the Matter of C. R.*, 995 S.W.2d 778 (Tex. App.- Austin 1999, pet. denied).
 16. *Pham v. State*, 36 S.W.3d 199, (Tex. App.–Houston [1st Dist.] Dec. 28, 2000), *j. vacated by* 72 S.W.3d 346 (Tex. Crim. App. 2002). On the State's petition for discretionary review, the Court of Criminal Appeals vacated the court of appeals judgement and remanded the case for the court of appeals to determine whether a causal connection existed between the Family Code violation and the making of the statement.
 17. *Hill v. State*, 78 S.W.3d 374 (Tex.App.– Tyler 2001, pet. ref'd).
 18. Tex. Fam. Code Ann. § 52.02(c) (West 2002).
 19. *Id.* at § 52.02(d).
 20. *Le v. State*, 993 S.W.2d 650 (Tex. Crim. App. 1999).
 21. *Le*, 993 S.W.2d at 656.

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22. *Le*, 993 S.W.2d at 656.
 23. *Anthony v. State*, 954 S.W.2d 132, 135 (Tex. App.–San Antonio 1997, no pet.).
 24. *In re R.R.*, 931 S.W.2d 11, 14 (Tex. App.–Corpus Christi 1996, no writ).
 25. *Anthony v. State*, 954 S.W.2d 132 (Tex. App.–San Antonio 1997).
 26. *Pham v. State*, 36 S.W.3d 199, (Tex. App.–Houston [1st Dist.] Dec., 2000).
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