POLICE INTERACTIONS WITH JUVENILES

Arrest, Confessions, Search and Seizure

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- Arrest, Waiver of Rights, Search and Seizure, and Confessions; 2003 Board Specialization Review Course, Sponsored by the Juvenile Law Section of the State Bar and Texas Juvenile Probation Commission, Austin, Texas, September 4 – 5, 2003.
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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. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- 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.

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POLICE INTERACTIONS WITH JUVENILES

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by Pat Garza

I. ARREST

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

The 2005 legislature added subsection (a)(6).

§52.01. Taking into Custody

(4) by a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court; or
(5) pursuant to a directive to apprehend issued as provided by Section 52.015; or
(6) by a probation officer if there is probable cause to believe that the child has violated a condition of release imposed by the juvenile court or referee under section 54.01 .

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

(a) The juvenile court may require that a child be taken into custody when an adjudication or transfer petition and summons is served on him.
(b) The juvenile court may take a child into custody if he has violated a condition of release from detention, which required the child to appear before the juvenile court at a later date.
(c) 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 (arrest without a warrant), and article 15 (arrest with a warrant), applies to juveniles. In any situation that an adult can be taken into custody, a child can also be taken into custody.

3. By a law-enforcement officer , including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe the child has engaged in:
(A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or
(B) delinquent conduct or conduct indicating a need for supervision;
(C) conduct that violate a condition of probation imposed by the juvenile court.

The 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.

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 provision.[4]

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

Prior to the enactment of this legislation juvenile probation officers were not allowed to take children into custody for a violation of a condition of release from detention. Now, juvenile probation officer do not have to request a warrant. If they have probable cause that the child violated a condition of release from detention they are authorized to place the child into custody and take them back to detention.

D. BENCH WARRANT (New Legislation - 2005)

SEC. 52.0151. BENCH WARRANT; ATTACHMENT OF WITNESS IN CUSTODY.
(A) IF A WITNESS IS IN A PLACEMENT IN THE CUSTODY OF THE TEXAS YOUTH COMMISSION, A JUVENILE SECURE DETENTION FACILITY, OR A JUVENILE SECURE CORRECTIONAL FACILITY, THE COURT MAY ISSUE A BENCH WARRANT OR DIRECT THAT AN ATTACHMENT ISSUE TO REQUIRE A PEACE OFFICER OR PROBATION OFFICER TO SECURE CUSTODY OF THE PERSON AT THE PLACEMENT AND PRODUCE THE PERSON IN COURT. ONCE THE PERSON IS NO LONGER NEEDED AS A WITNESS, THE COURT SHALL ORDER THE PEACE OFFICER OR PROBATION OFFICER TO RETURN THE PERSON TO THE PLACEMENT FROM WHICH THE PERSON WAS RELEASED.
(B) THE COURT MAY ORDER THAT THE PERSON WHO IS THE WITNESS BE DETAINED IN A CERTIFIED JUVENILE DETENTION FACILITY IF THE PERSON IS YOUNGER THAN 17 YEARS OF AGE. IF THE PERSON IS AT LEAST 17 YEARS OF AGE, THE COURT MAY ORDER THAT THE PERSON BE DETAINED WITHOUT BOND IN AN APPROPRIATE COUNTY FACILITY FOR THE DETENTION OF ADULTS ACCUSED OF CRIMINAL OFFENSES.

This 2005 legislation authorizes a court to issue a bench warrant or direct that an attachment issue to require a peace officer or probation officer to secure custody of a youth witness (in juvenile or adult court) who is in TYC or another secure juvenile detention or correctional facility.[5] When a youth is brought back to be a witness, the youth may be held in the county juvenile detention facility or if the youth is 17 or older, in the county jail.[6]

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

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 Section52.02.

...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 also amended to authorize police to take an arrested juvenile to a "juvenile processing office" designated under Section 52.025 of the Family Code. The statute was enacted to give law enforcement more options after ***Comer.***

b. ***John Baptist Vie Le v. State***

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

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.

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

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

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.***[8]

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."***[9]

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.***[10]

Although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating section 52.02(a) and indeed would not have been obtained at that time if section 52.02(a) had not been violated. There is clearly a causal connection between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed.[11]

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.[12]

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.[13]

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."[14]

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.[15] 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 ***Pham v. State***, a two hour delay in notification of parents by officers who took the child to a processing office to take statement invalidated the confession.[16]

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.[17]

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.[18]

In ***In the Matter of C.R.,*** 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. 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.[19]

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.[20]

In ***Vann v. State,*** notice of arrest was allowed to be made to the respondent's adult cousin as his custodian. The appellant's cousin was the principal adult in the home where he often resided and the cousin's mother (appellant's aunt) had raised him since he was two weeks old. Appellant had his own bedroom at the house and kept belongings there. At the time police took appellant into custody, he was still "in and out" of the cousin's home, although he was supposed to be living with his mother. The appellant's written statement confirmed that he lived with his mother but sometimes spent the night at his aunt's house.[21]

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.[22]

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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). [25]

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.[26]

In ***In The Matter Of U.G.,*** the Corpus Christi Court of Appeals also found that a juvenile's confession was illegally obtained. The Alamo police department has a specially designated area where juvenile suspects are taken in order to be kept separate from adult suspects; however, according to one of the police officers involved, appellant was never taken to that area. Instead, when he was not before the magistrate judge or the investigating officer, appellant was kept in the general waiting area of the station where adult suspects are detained. No reason or excuse for this deviation from procedure was offered at trial by the police officers or magistrate judge. As a result, the court found that the confession was taken in violation of §52.02 of the Family Code and should have been suppressed.[27]

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.[28]

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.[29]

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].**

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.[30]

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 ***Le*** the officer must be very careful to comply with Section 52.02 or the statement may be inadmissable.

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.

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.**[31]

The provision clearly gives the parent the right to be with and speak with his or her child, in private, after he has been taken into custody and while he is in the juvenile processing office (where confessions are

taken from a child in custody). Law enforcement may, however, limit the parents right of access based on the reasonable time, place and conditions restrictions.[32] While a statement need not be taken at a juvenile processing office, if it is, the requirements of §52.025 and §61.103 should be complied with.

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

> **Texas Family Code § 61.106. Appeal or Collateral Challenge**
> **The failure or inability of a person to perform an act or to provide a right or service listed under this subchapter may not be used by the child or any party as a ground for:**
> **(1) appeal;**
> **(2) an application for a post-adjudication writ of habeas corpus; or**
> ***(3) exclusion of evidence against the child in any proceeding or forum.***

Section 61.106, specifically forbids the child or any party the right to use the failure to provide a parental right as a defense in the trial, appeal or collateral attach in the child's case.[33] The rights provided by this subchapter belong to the parent, not the child, and as a result, violations of said rights cannot be used by the child in a motion to suppress a confession or an appeal.

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.[34]

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.[35]

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.***[36]

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.

F. CAUSAL CONNECTION AND TAINT ATTENUATION ANALYSIS

1. Causal Connection

In ***Gonzales v. State,***[37] 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.[38]

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.[39] 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.***[40]

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."[41]

In ***Roquemore v. State***, another Court of Criminal Appeals opinion, an 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 in violation of §52.02(a). The Court stated that although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating section 52.02(a) and indeed would not have been obtained at that time if section 52.02(a) had not been violated. There is clearly a causal connection between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed.[42]

2. Taint Attenuation Analysis

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

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.

3. The Burdens of Proof

Juvenile's Burden – raise and establish non-compliance

When a juvenile defendant seeks to suppress a confession for violations of §52 the burden is initially upon the defendant to raise the issue by producing evidence of a violation of the statutory requirement.[43] It is incumbent upon the defendant to raise and produce evidence initially, because failure to do so would waive any error.[44] As a result, it is important that the defendant juvenile's motion to suppress specifically state which statutory requirements were not followed. Testimony regarding non-compliance may be presented by the respondent, his parent, or from the officer himself.

State's Burden – establish compliance

The burden then shifts to the State to prove compliance with the statute. The state may prove compliance utilizing the same witnesses the respondent has called. Should the state show full compliance with the statute the issue is resolved.

Juvenile's Burden – establish causal connection

However, should the state fail to show compliance with the statute and because a violation of the statute is not alone sufficient to require exclusion of the confession, the burden then reverts to the defendant to produce evidence of a causal connection between the statutory violation and the ensuing confession.[45]

State's Burden – disprove causal connection or attenuation of the taint

Once the defendant meets this burden, the burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken.[46]

On December 8, 2005, the Corpus Christi Court of Appeals affirmed the denial of a Motion to Suppress because the record did not demonstrate the respondent had established his burden of a causal connection between a *section 52.02(a)* violation and his statement, nor did he show a causal connection between his complained of unnecessary delay by arresting officer and the evidence sought to be suppress.[47]

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.[48] A motion which states one legal theory cannot be used to support a different legal theory on appeal.[49]

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.[50] The court held that the State had no burden to establish that fact since Appellant did not include such contention in his motion to suppress.[51]

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.[52]

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.[53]

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."***[54]

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.[55]

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.[56]

II. JUVENILE CONFESSIONS

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

A. CONFESSIONS GENERALLY

1. Must be a Child

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

(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.[57]

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.[58]

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.[59] 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."***[60] In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances.[61]

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

a. Totality of the Circumstances

The Supreme Court in ***Fare v. Michael C.***, 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.***[62]

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.***[63]

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 maa16otn oluati23ther adult in8.

"gruesome details" of the complainant's death. The detective even asked appellant to clarify what he did not want to "do," thereby demonstrating that the meaning of appellant's statement was unclear at the time.[64]

B. CUSTODIAL INTERROGATION

Section 51.095(b),

> **(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:**
>
> **(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or**[65]

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.

Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of their freedom in any significant way. A child is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was restrained to the degree associated with a formal arrest. The courts apply a two-step analysis to determine whether an individual is in custody. First, the court examines all the circumstances surrounding the interrogation to determine whether there was a formal arrest or restraint of freedom of movement to the degree associated with a formal arrest. This initial determination focuses on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the individual being questioned. Second, in light of those circumstances, the court considers whether a reasonable person would have felt free to terminate the interrogation and leave. Courts traditionally consider four factors in making this determination: (1) whether probable cause to arrest existed at the time of questioning; (2) the subjective intent of the police; (3) the focus of the investigation; and (4) the subjective belief of the defendant. However, the subjective intent of both the police and the defendant is irrelevant except to the extent that the intent may be manifested in the words or actions of law enforcement officials. The custody determination is based entirely upon objective circumstances. Additionally, being the focus of a criminal investigation does not amount to being in custody. When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time. It is also important to note that station-house questioning does not, in and of itself, constitute custody.[66]

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.[67] 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.[68]

It is, however, possible to recover evidence pursuant to an illegal custodial interrogation.

In ***In the Matter of R.E.A.***, officers responded to a call that people were smoking marihuana. Upon arrival, an officer recognized R.E.A. from previous encounters and recalled that a felony arrest warrant had been issued for him. The officer handcuffed R.E.A. and asked him to identify himself. The officer then ran a warrant check, confirmed there was a warrant for R.E.A.'s arrest, and arrested R.E.A. After arresting him, the officer asked R.E.A. if he had "anything illegal on him." R.E.A. responded that he had a blunt of marihuana in his pocket. The officer retrieved the marihuana, and the State subsequently filed a petition alleging delinquent conduct for the offense of possession of marihuana. It is standard procedure by the Austin Police Department to search all suspects legally in police custody. R.E.A. was about to be searched by the officer as a routine and lawful search incident to arrest. The record therefore establishes that the custodial question of whether R.E.A. "had anything illegal on him" and R.E.A.'s affirmative response were ultimately irrelevant to the lawful search incident to arrest. R.E.A.'s sole point of error is overruled.[69]

1. 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.[70] 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].[71] Each case must be reviewed on its own merits and under the totality of the circumstances test.

The mere fact that an interrogation begins as non-custodial, does not prevent custody from arising later. Police conduct during an encounter (such as a suspect being pressed by a questioning officer for a truthful statement) may cause a consensual inquiry to escalate into custodial interrogation.[72]

a. By Law Enforcement

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.*** [73]

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.[74]

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.

In ***In the Matter of R.A.***, out of Austin, a routine traffic stop was "presumptively temporary and brief" and as a result, non-custodial, and questions asked by the officer were not considered custodial interrogation. R.A. had been pulled over for a minor traffic violation. The officer smelled marihuana and discussed what he smelled with R.A.. R.A. gave up his drugs with very little prompting by the officer. The court found that a reasonable, innocent person in R.A.'s position would not believe that he was restrained to the degree of an actual arrest; and accordingly, fount that R.A. was not in custody when he produced the drugs.[75]

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.[76]

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.[77]

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.[78]

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.[79]

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."[80]

c. By Psychologist

In ***Simpson v. State***, a diagnostic examination (for discretionary transfer to adult criminal court) which exceeded its intended purpose and became a source of incriminating evidence constituted a custodial interrogation to which fifth amendment protections applied. In this case the psychologist examination was used as the basis of her testimony in the guilt/innocence phase of Appellant's trial. As such, the examination served a "dual purpose." Thus, the examination was a "critical stage" of the adversarial proceedings against appellant and also warranted Sixth Amendment protections.[81]

3. The "Reasonable Juvenile" Standard

a. Texas 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 plac]TJ th8Tj-d.en'l. ing MacarPolSer wr whperles m boakRushiansben 8.7((endm)a.5(e)-holor. S. tion)]TTJ69..89 -1.165 T770(Che co(se of andhialected tsue unout circu e

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)."***[82]

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.

b. U.S. Supreme Court Standard

In 2004, the Supreme Court addressed the standard necessary for custodial interrogation. In ***Yarborough v. Alvarado***, a 17 year old boy was taken to a police station by his parents at the request of police. He was separated from his parents (against their wishes), placed in a small interrogation room and questioned for two hours. The custody issue revolved around whether he felt he was free to leave and terminate the interview at any time and whether or not his age should be a consideration in that evaluation. In a five to four decision the Supreme Court held that the objective "reasonable person" standard continues to apply to custody cases. The court reasoned that the objective test ensures that the police do not need to make guesses as to the circumstances at issue before deciding how they may interrogate a suspect.[83]

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.[84] It no longer requires the detailed warnings related to certification and determinate sentencing offenses.

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

The statute appears to allow the taking of a statement of a child even when he is represented by an attorney. While §51.09 (Waiver of Rights) requires that a child 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.***[85]

In **In the Matter of H.V**, a juvenile's request to have his mother contact an attorney was considered an unambiguous request for counsel during the magistrate's admonishments. The court held that by looking at

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.[88] 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."[89]

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.

The statement must be signed in the presence of the magistrate and it must be signed with no law enforcement officer or prosecuting attorney present. A bailiff may be allowed, but he may not carry a weapon in the presence of the child. Should the child sign the statement outside the presence of the magistrate, the error may be corrected if the magistrate follows the proper procedure and has the child re-sign the statement in his presence.[90]

If the statement was electronically recorded, the statute allows the magistrate the option to request that the videotape be brought to him, along with the child.[91] Since, in most of these incidents there will not be a written statement, it is advisable that the magistrate view the recording along with the child and have the child sign a statement that he has viewed the recording and that it is his statement. The magistrate could then, on the same document, sign, and state (if he so feels) that the statement is being voluntarily given.

e. Findings of the Magistrate

Once the statement has been reduced to writing, it is the Magistrate, through his discussions with the child (outside the presence of the officer) who must be convinced that the child understands the nature and content of the statement. He must be convinced that the child is voluntarily given up his rights as he himself has explained them to him. The magistrate would then have the child sign the statement in his presence. The magistrate then certifies that he has examined the child independent of any law enforcement officer or prosecuting attorney, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights.[92]

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.[93]

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

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.[98]

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.[99]

> ***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.*** [100]

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

c. May Still be Inadmissable

Although a statement may meet the admissibility requirements of Section 51.095 (provision that allows the admissibility of a statement because it was corroborated by evidence establishing his guilt), when the provisions of Title 3, dictating the necessary procedures for taking the child's statement, are violated, the statement may be nonetheless inadmissible. *See Roquemore, 60 S.W.3d at 867-68* (citing *Comer, 776 S.W.2d at 196*).[101]

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.[102] In ***Crawford v. Washington,*** the Supreme Court held, where testimonial evidence is at issue, the Sixth Amendment (Confrontation Clause) demands the unavailability of the declarant and a prior opportunity for cross-examination before such a statement could be admissible. Without defining "testimonial," the Supreme Court held that "at a minimum" it would include prior testimony from a preliminary hearing, prior testimony before a grand jury or former trial, as well as, police interrogations.[103] It is the latter that has strong implications regarding res gestae statements.

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.[104]

3. Judicial Confession

Section 51.095(a)(4) allows for the admission of statement given by a child in open court at the child's adjudication hearing or before a grand jury considering a petition, under Section 53.045 (determinate sentence) or at a preliminary hearing held in compliance with this code (other than at a detention hearing[105]).

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.[106] A child's (otherwise inadmissable) 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

(5) <u>SUBJECT TO SUBSECTION (f)</u>, the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:

(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.[107] The warnings still have to be given by a magistrate and the magistrate can (but is not required to) have the officer return, with the child and the videotape, for a determination of voluntariness. If the magistrate uses this procedure, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily. 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.

The giving of a video taped statement does not automatically implicate this provision nor does it automatically mean that the statement is being made during custodial interrogation. In ***Avila v. State***, the juvenile gave a video taped statement and drew officers a map regarding his involvement in a murder. The child stated on the video that he understood that he was not in custody and that he was free to leave at any time. The court ruled (in an unpublished opinion) that the child was not in custody and as a result the statutory warning were not necessary.[108]

(a) New Legislation (2005)

Section 51.095(a)(5) was amended in the 2005 legislature adding section (f).

(f) A magistrate who provides the warnings required by subsection (a)(5) for a videotaped statement may at the time the warnings are provided request by speaking on the tape recording that the officer return the child and the videotape to the magistrate at the conclusion of the process of questioning. The magistrate may then view the videotape with the child or have the child view the videotape to enable the magistrate to determine whether the child's statements were given voluntarily. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.[109]

The new legislation allows for the magistrate to request to view the videotape with the child or have the child view the videotape to determine whether the child's statements were given voluntarily. Since, in most of these incidents there will not be a written statement, it is advisable that the magistrate view the recording along with the child and have the child sign a statement that he has viewed the recording and that it is his statement. The magistrate could on the same document, sign, and state (if he so feels) that the statement is being voluntarily given.

(b) Wisconsin and Mandatory Electronic Recordings

On July 7, 2005, the Wisconsin Supreme Court exercised its supervisory power to require that all custodial interrogation of juveniles be electronically recorded (where feasible), and without exception, when questioning occurred at a place of detention.

The Court felt that because of his young age of 14, his limited education and low average intelligence he was susceptible to police pressure. The child had been arrested twice for misdemeanor offenses prior to his interrogation for armed robbery. In both instances, he answered police questions, admitted

to involvement, and was allowed to go home. The police specifically denied defendant's requests to call his parents and not only did the detectives refuse to believe defendant's repeated denials of guilt, but they also joined in urging him to tell a different "truth," sometimes using a "strong voice" that "frightened" him. The Wisconsin Supreme Court held that the written confession was involuntary under the totality of the circumstances and in addition, the it exercised its supervisory power to require that all custodial interrogations of juveniles be electronically recorded where feasible, and without exception when questioning occurred at a place of detention.[110]

III. SEARCH AND SEIZURE

A. CONSENT

So what does the Family Code say about the consent of a child. The Family Code does not address consent specifically. It does discuss, however, a child's the waiver of rights. In order to invoke the Family Code in a discussion regarding consent, the consent must be categorized as a waiver of a right by the child. Consent has been categorized as a waiver of the constitutional right against unreasonable search and seizure. It is well established that the protections afforded by the Fourth Amendment of the United States Constitution and Article I, § 9 of the Texas Constitution may be waived by an individual consenting to a search.[111] A child can waive his constitutional rights if the waiver comports to the provisions set out by §51.09 of the Texas Family Code.

1. Waiver of Rights

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

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

Subsection (1) requires that in order for a child to waive a constitutional right, the waiver must be made by the child and the attorney. Under this provision, either one, by themselves, can not waive the child's rights. The confession statute (§51.095) is specifically excluded from the requirements of this provision. However, for a child to waive other rights, such as his right to remain silent, to have a trial (with or without a jury), and to confront witnesses, all must be agreed to by the child and the child's attorney. The waiver must still be voluntary and the child and the attorney must both be apprized of the possible consequences of waiving the rights and they must do so in writing or in open court. The provision appears to give the

attorney (not the parent) the power and authority to refuse to give up a right belonging to the child, even if the child's desire is to give up that right himself. How would you reconcile this provision when a child wishes to consent to a search?

2. 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.[112]

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.[113]

Consent was not considered voluntary when after a routine traffic stop the juvenile, having first refused to consent, later consented to a search of his vehicle, after being told by the officer that he would call out the canine to sniff around the vehicle and if the dog "hit" on any scent coming from the vehicle, he would have probable cause to search.[114]

b. Search Must Not Exceed Scope of Consent

The scope of a consensual search will be limited by the terms of its authorization.[115]

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.[116] The third party may consent even if that person has equal authority over and control of the premises or effects.[117]

3. 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."[118]

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.[119] 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.

4. A Child's Consent To Search

The following factors are among those that are relevant in determining whether consent is voluntary: (1) the youth of the accused; (2) the education of the accused; (3) the intelligence of the accused; (4) the constitutional advice given to the accused; (5) the length of the detention; (6) the repetitiveness of the questioning; and (7) the use of physical punishment. Additionally, testimony by law enforcement officers that no coercion was involved in obtaining the consent is evidence of the consent's voluntary nature. A police officer's failure to inform the accused that consent can be refused is also a factor to consider. The absence of such information does not automatically render the consent involuntary. However, the fact that such a warning was given has evidentiary value. Moreover, consent is not rendered involuntary merely because the accused has been detained.[120]

In ***In the Matter of R.J.***, consent was not voluntary where a juvenile consented to the search of his car after being written a traffic citation. The juvenile initially refused to allow the search, then changed his mind when the officer told him that a canine officer was being called to the location and if there was a "hit" the car would be searched anyway.[121]

Compare with the recent Supreme Court decision of Illinois v. Caballes, where the Supreme Court held that a dog sniff conducted during a conceitedly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. The Court held that conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy (causes undue delay).[122]

The right against unreasonable search and seizure under both the Fourth Amendment and Article I Section 9, applies to juveniles.[123] 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.[124]

5. 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.[125]

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.***, 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." [126]

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 without a warrant or probable cause, and seized drug paraphernalia. The officer filed a delinquency charge against the minor, who moved to suppress the evidence. The Juvenile Court, denied the motion and the Utah Court of Appeals reversed. Petitioner-State, sought certiorari review. 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. SCHOOL SEARCHES

1. The Less Than Probable Cause Standard

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

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See T. L. O., supra, at 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").[127]

2. School Officials v. Law Enforcement Officers

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

Probable cause was necessary for searching the car of a man arrested for possession of beer on school property when police opened the door to check for more beer and smelled marijuana smoke in the car.[128]

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.[129]

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.[130]

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 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.[131] *T.L.O.*, also held that lack of individual suspicion does not *ipso facto* render a search unreasonable.[132]
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.[133]

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 less than probable cause standard as set out by ***T.L.O.*** has been categorized as a “special needs exception” and 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."[134] For juveniles, “special needs” can also occur, with respect to a probation officer's warrant less search of a probationer's home[135]; a schools' random drug testing of student athletes,[136] and drug testing of all public school students participating in extracurricular activities.[137] However, the special needs standard does not validate searches simply because a special need exists. Instead, what is required is a fact-specific balancing of the intrusion against the promotion of legitimate governmental interests. This is simply an application of the overarching principle that the test of reasonableness under the Fourth Amendment requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.[138] 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."[139]

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."[140]

5. Anonymous Tips

An anonymous tip, standing alone, may justify the initiation of an investigation but rarely provides the reasonable suspicion necessary to justify an investigative detention or search. Generally, an officer "must have additional facts before the officer may reasonably conclude that the tip is reliable and an investigatory detention is justified." The officer's experience and prior knowledge, along with corroboration of the details of the tip, may give the officer reasonable suspicion. Corroboration of details that are easily obtainable at the time the tip is made, however, does not furnish a basis for reasonable suspicion.[141]

In ***In The Matter of K.C.B.***, the Austin Court of Appeals held that an anonymous tip that a student was in possession of drugs did not justify a search of that student. In that case a high school hall monitor received an anonymous tip from a student that the juvenile had a plastic bag containing marihuana in his underwear. The juvenile was escorted to the assistant principal's office and was searched. The court held that, although such a search might have been justified in the school context if the anonymous tip was that the juvenile had a weapon, a search based on an anonymous tip that the juvenile was in possession of drugs was not justified.[142]

In ***In the Matter of A.T.H.***, an unidentified caller complained to a police officer that four individuals were smoking marihuana behind a business. The officer confronted a juvenile and told him that he had to do a pat-down for the officer's safety and for his safety. Before the officer touched him, defendant reached in his front left pocket and retrieved a clear plastic baggie which contained a green leafy substance. The district court overruled defendant's motion to suppress, concluding that the officer acted reasonably in stopping the defendant based on the anonymous tip. The appellate court, however, held that regarding the officer's further detention of defendant, he did not articulate and the totality of the circumstances did not show any facts to indicate that he was justified in conducting a Terry frisk for weapons. The encounter occurred in a high school parking lot in broad daylight during a school day. The court also noted that the defendant who appeared to be a teenager, was cooperative when approached by the officer.[143]

6. Locker Searches

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

a. 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.[144] Without a legitimate expectation of privacy, the random search of a locker is not a search under the Fourth Amendment.

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.[145]

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.[146]

c. Smart Lockers

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

7. 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 policy is "reasonable".

a. All Students

When it comes to mandatory drug testing of all students for drugs the Courts have said no.[147] The courts reasoned that the tests could not determine whether a student has possessed, used, or appeared at school under the influence of marijuana and could, at the most, reveal that a student had ingested marijuana at some time in the preceding days or weeks.

Utilizing such a drug policy was not reasonably related to maintenance of order and security in schools or to preservation of educational environment and, therefore, was improper to the extent that it attempted to regulate out of school conduct which in no way affected the school setting or learning process.[148] Such testing is prohibited under the Fourth Amendment. When it comes to a school drug policy, it must be reasonably related to maintenance of order and security in the school or to the preservation of the educational environment.

Also, mandatory urinalysis as part of a mandatory physical examination for all students constitutes a "search" within the meaning of the Fourth Amendment to the U.S. Constitution and must be predicated on the "reasonable cause" standard as set out in ***T.L.O.***.[149] However, be aware of ***Board of Education v. Earls***, No. 01-332, Supreme Court of the United States, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. Lexis 4882; 70 U.S.L.W. 4737; 2002 Daily Journal DAR 7275; 15 Fla. L. Weekly Fed. S 483, March 19, 2002, Argued, June 27, 2002, Decided, discussed below for an erosion of the reasonable cause standard in drug testing cases.

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.[150] 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 suspicion less 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.[151]

On June 27, 2002, seven years after ***Vernonia,*** the Supreme Court re-visited the issue of suspicion less drug testing of students in extracurricular activities. In ***Board of Education v. Earls***,[152] 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... ...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.***[153]

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.

8. 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.[154]

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.[155] There is no reasonable expectation of privacy in the odors emanating from inanimate objects such as cars or lockers.[156]

Also, in 2005, the Supreme Court held that sniffing by a trained dog does not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy.[157]

b. Sniffs of Children

A sniff of a child's person by a dog is a "search" and the reasonable suspicion standard applies.[158]

The Court in ***Horton vs. Goose Creek***, reasoned that the intensive smelling of people, even if done by dogs, is indecent and demeaning.[159] 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.[160]

Some Courts have prevented School Districts from using dogs to sniff both students and automobiles.[161] 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.

9. Strip Searches

a. School Strip Searches

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

In April, 2005, the 6th Circuit held, in **Beard v. Whitmore**, that a strip searches to find money was unconstitutional. The highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money, the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable. Accordingly, under *T.L.O.* and *Vernonia*, the searches violated the Fourth Amendment.[162]

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.[163]

However, in ***Widener v. Frye***, 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.[164]

b. Detention Strip Searches

In **S.C. v. Connecticut**, the federal court of appeals (2nd cir.) ruled that strip searches of those arrested for misdemeanors require reasonable suspicion of possession of contraband. The Court stated that while there was no doubt a state has a legitimate interest in confining juveniles, it does not follow that by placing them in an institution where the state might be entitled to conduct strip searches of those convicted of adult-type crimes, that a state may then use those standards to justify strip searches of runaways and truants.[165] While an initial strip search may be justified for a juvenile entering an institution, repeated searches of that same juvenile (while in continued custody) would require reasonable suspicion.

10. 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, suspicion less searches have been permitted in some circumstances.[166]

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.[167] 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,[168] courthouse security measures,[169] license and registration vehicle stops,[170] and border-patrol checkpoints.[171] 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.[172]

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.[173] (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. 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 under all the circumstances surrounding the search. See T.L.O. at 341;***[174]

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 reduces a child's expectation of privacy.

In Austin, as in many larger counties, the Alternative Learning Center has a uniform security policy: every day, all students entering the Center must pass through a metal detector, be patted down, empty their pockets onto a tray, remove their shoes, and place those shoes on a table for inspection. If no contraband is found, the student is allowed to retrieve the belongings and go to class. Also, before attending the Center, every student and parent is required to attend an orientation session outlining the Center's rules and regulations, including the search policy.

In ***In the Matter of O.E.***, an officer found a marijuana cigarette in appellant's shoe during a search performed under a uniform security policy. In affirming the denial of appellant's motion to suppress, the court noted that the search was not targeted at appellant but was part of a daily routine and thus fell within the general category of "administrative searches." Keeping in mind the diminished expectation of a student's privacy and the State's compelling interest in maintaining a safe and disciplined environment, Tex. Educ. Code Ann. § 4.001 (1996), the court held that search procedure was justified. All of the students had been removed from other campuses for disciplinary problems, increasing the difficulty of maintaining order and providing a safe environment, and the main objective of the search was the security of the school.[175]

11. Appeals

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

On June 9, 2005, the El Paso Court of Appeals held that under the principle known as curative admissibility, the admission of improper evidence cannot be asserted as grounds for reversal on appeal where the defendant, on direct examination, gives testimony establishing the same facts as those to which an objection was raised. In this case appellant testified at trial regarding the information and evidence he attempted to suppress with his motion. Appellant testified that he was in fact in possession of the marijuana on the night of June 7, 2002 and October 10, 2002, and that he was in possession of the alleged stolen items on October 10, 2002. In providing such testimony, Appellant established facts consistent with those he tried to suppress. Thus, we hold that Appellant has waived such issues on appeal. [176]

MAGISTRATE'S CERTIFICATION OF JUVENILE'S STATEMENT (SEC. 51.095, FC) (1 OF 2)

Magistrate's Verification and Certification for Statement of a Juvenile

Re: Statement of _____, a juvenile.

I, the below listed magistrate of the State of Texas, do hereby **verify and certify** the following:

On _____, 200__, I gave the above named juvenile the warning as required by Section 51.095 of the Texas Family Code. (See the attached warning which is made a part hereof.)

After administering the warning, I examined the juvenile and made the following observations:

Claims to be _____ years of age and reasonably appears to be of that age;
(Can)(cannot) read the _____ language; and
(a) demonstrated to me that (he)(she) could do so; OR
(b) I read the attached warning and statement aloud to the juvenile.
Is a citizen of _____;
Advised me that (he)(she) has completed the _____ grade in school, and is now in the _____ grade in school;
Was not threatened or promised anything by law enforcement officers or any other agents of the State of Texas;
Does not appear to be under the influence of drugs or intoxicating beverages, and informs me that (he)(she) is not under the influence of drugs or alcohol;
Does not appear to have been abused by law enforcement officers, or anyone else, and upon inquiry denies that any type of abuse has occurred;
Shows no signs of psychiatric problems which might be readily apparent, and upon inquiry by the undersigned, the juvenile claims no history of psychiatric treatment or problems;
Appears to understand the meaning of the warnings given and had no questions about the warnings, except as may be described as follows, if any:

_____

_

_____

_

Understands that the offense charged is _____ (offense and degree of offense);

Understands what the attached statement says, and agrees that the statement is (his)(her) version of the facts surrounding the said offense, and that the statement is true;

Made the statement voluntarily and of (his)(her) own free will without any improper inducements or prohibited conduct by any law enforcement officers or any other persons;

Indicated that (he)(she) had not been deprived of food, drink or sleep.

Additional observations that I have made during the course of interviewing the said juvenile are as follows, if any:

Appendix B

MAGISTRATE'S CERTIFICATION OF JUVENILE'S STATEMENT (Sec. 51.095, FC) (2 of 2)

Only after receiving the proper warning and being examined by the undersigned magistrate did the juvenile, _____, sign the attached statement.

Based on the foregoing determinations, I, the undersigned Magistrate, do hereby certify as follows:

I have examined the child independently of any law enforcement officer or prosecuting attorney.

I have examined the child in the presence of _____, a (bailiff)(law enforcement officer) employed by _____, whose presence was required to ensure my personal safety and that of other court personnel, and who did not carry a weapon in the presence of the child.

I have determined that the child understands the nature and content of the statement, and has knowingly, intelligently, and voluntarily waived the rights set out in the warning given pursuant to Section 51.095 of the Texas Family Code.

(If electronically recorded) I have elected to, examine the recording, along with the child.

I am convinced that the child understands the nature and content of the statement or recording, and that the child is signing the statement/statement by electronic recording voluntarily.

The statement/statement by electronic recording was signed by the child in my presence with no law enforcement officer or prosecuting attorney present.

The statement/statement by electronic recording was signed by the child in my presence and in the presence of _____, a (bailiff) (law enforcement officer) employed by _____, and who did not carry a weapon in the presence of the child, because I determined that the presence of said (bailiff) (law enforcement officer) was necessary for my personal safety and that of other court personnel.

THIS CERTIFICATION made by the undersigned magistrate on _____, 200___, at _____ o'clock, ___.M., in _____ County, Texas.

Magistrate's Name (print or type)

_____

Magistrate's Signature

Office Held

Statement Of Juvenile (Sec. 51.09, FC)

My name is _____, and I am _____ years of age. I was born in _____, State of _____ on _____, 200__. I live at _____, Texas with _____. My telephone number is _____. I can also be reached at telephone number _____. I am in the _____ grade at _____ School.

Prior to making the following statement I was informed by _____ that:

1. I have the right to remain silent and not make any statement at all and that any statement I make may be used against me;

2. I have the right to an attorney present to advise me either prior to any questioning or during any questioning;

3. If I am unable to employ an attorney, that I have the right to have an attorney appointed to counsel me before or during any interviews with peace officers or attorneys representing the state;

4. I have the right to terminate this interview at any time.

_____
Signature of Juvenile

[TEXT OF STATEMENT]

Signed on the _____ day of _____, 200__, at _____o'clock _____.M.

The statement above is a voluntary statement signed with no law enforcement officer or prosecuting attorney present.

_____
Signature of Juvenile

_____
Signature of Magistrate

Juvenile Statement by Electronic Recording
Sec. 51.09(a)(5), FC

My name is _____, and I am ____ years of age. I was born in _____, _____, on _____, 200__. My current address is _____, _____. I live with _____. My telephone number is _____. My parents/guardians phone number is _____. I am in the _____ grade at _____ School.

Prior to making the recorded statement I was informed by _____ that:

1. I have the right to remain silent and not make any statement at all and that any statement I make may be used against me;

2. I have the right to an attorney present to advise me either prior to any questioning or during any questioning;

3. If I am unable to employ an attorney, that I have the right to have an attorney appointed to counsel me before or during any interviews with peace officers or attorneys representing the state;

4. I have the right to terminate this interview at any time.

_____
_____
Signature of Juvenile **Tape Identification Number**

TO BE COMPLETED AFTER THE CHILD'S STATEMENT HAS BEEN RECORDED AND RETURNED TO THE MAGISTRATE WITH THE CHILD.

I have viewed or listened to my recorded statement with the judge (magistrate), with no law enforcement officer or prosecuting attorney present and it is my voluntary statement.

Signed on the _____ day of _____, 200__, at _____o'clock _____.M.

_____
Signature of Juvenile

I certify that the above identified recorded statement was voluntarily given.

_____
_____
Signature of Magistrate **Tape Identification Number**

Appendix D

Law Enforcement Guideline Page for Written Statement Of Child In Custody

1. Once an officer takes a child into custody, he must promptly give notice (reasonable attempts) of the arrest and the reason for the arrest to the child's parent or guardian . [§52.02(b)(1)]

2. [Arrest for suspicion of DWI only] The child may be taken to a place to obtain a specimen of the child's breath or blood (as provided by Ch. 724, Transportation Code), and perform intoxilyzer processing and videotaping in an adult processing office. [§52.02(a) & §52.02(c)]

- The child may refuse or consent (without an attorney), but the request and the child's response must be videotaped. [§52.02(d)]

2a. [All other arrests] Without unnecessary delay and without taking the child to any other place, take the child to an approved "Juvenile Processing Office" (JPO). [§52.02(a)]

- do not leave the child alone in a JPO. [52.025(c)].
- do not keep the child in the JPO for longer than 6 hours. [52.025(d)]
- the child is entitled to having his parent present (if requested) with him in the JPO. [§52.025(c)]

3. Perform the following tasks in a Juvenile Processing Office:

- return the child to the parent or guardian [§52.025(b)(1)]
- complete essential forms and records [§52.025(b)(2)]
- photograph and fingerprint the child [§52.025(b)(3)]
- have a magistrate go over the warnings (rights) with the child [§52.025(b)(4)]
- obtain the actual statement from the child. [§52.025(b)(5)]

4. Before interviewing the child for a statement, have a magistrate warn the child (in a JPO) of his rights. [§51.095(a)(1)(A)] If the officer is taking an electronically recorded statement, the warnings must be a part of the recording.[§51.095(a)(5)]

5. After the magistrate warns the child of his rights and determines that the child wants to give a statement, the officer may interview the child (in a JPO) and record the statement or reduce the statement to writing.

6. Return the child to the Magistrate (in a JPO) with the recorded (if requested) or unsigned statement.

7. The magistrate, ***outside the presence of any officer or prosecutor***, must determine, and be fully convinced that the child understands the nature and contents of the statement and has knowingly, intellignetly, and voluntarily given the statement and waived his rights. The magistrate must so certify in writing. [§51.095(a)(1)(B)(ii), §51.095(a)(1)(D)]

8. The magistrate, ***outside the presence of any officer or prosecutor***, then has the child sign the statement, or sign that the recorded statement is his voluntary statement, in his presence. [§51.095(a)(1)(B)(i), §51.095(a)(5)]

9. The officer must then do one of the following with the child:
   (1) Release the child to the parent or guardian. [§52.02(a)(1)]
   (2) Release the child to the Juvenile Court. [§52.02(a)(2)]
   (3) Release the child at a detention facility designated by the juvenile board. [§52.02(a)(3)]
   (4) Release the child to a secure detention facility designated for temporary detentions. [§52.02(a)(4)]
   (5) Take the child to a medical facility. [§52.02(a)(5)]
   (6) Release the child without a referral to juvenile court if the law enforcement agency has established guidelines for such a disposition. [§52.02(a)(6) & §52.03]

Sample – Motion To Suppress

NO. _____

IN THE MATTER OF:	*	IN THE 386TH JUDICIAL
	*	DISTRICT COURT
_____	*	OF BEXAR COUNTY, TEXAS

MOTION TO SUPPRESS EVIDENCE

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

1. Respondent has been charged with the offense of _____.

2. The actions of the _____violated the constitutional and statutory rights of the Respondent under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Unites States Constitution, Article I, Section 9 of the Texas Constitution, Article 38.23 of the Texas Code of Criminal Procedure, and Sections 51.09, 51.17 and 54.03 of the Texas Family Code.

3. Respondent was detained and arrested without a lawful warrant, directive to apprehend, probable cause, reasonable grounds, or other lawful authority in violation of the Respondent's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Unites States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, Articles 14 and 15 of the Texas Code of Criminal Procedure, and Section 52.01 of the Texas Family Code.

4. Any statements given by the Respondent, were involuntary and illegally obtained, in violation of the Respondent's Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and in violation of Sections 51.09, 51.095, 52.01, 52.02, and 52.025 of the Texas Family Code

5. Any tangible evidence seized in connection with this case, including but not limited to _____, was seized without a warrant, probable cause or other lawful authority in violation of the Respondent's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, and 19 of the Constitution of the State of Texas, and Sections 51.09, 51.17, and 54.03 of the Texas Family Code.

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

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

a. Any and all tangible evidence seized by law enforcement officers or others in connection with the detention and arrest of Respondent in this case or in connection with the investigation of this case, including but not limited to _____, and any testimony by the (or any other) law enforcement officers or others concerning such evidence.

b. The detention and arrest of Respondent at the time and place in question and any and all evidence which relates to the detention and arrest, and any testimony by the or any other law enforcement officers or others concerning any action of Respondent while in detention or under arrest in connection with this case.

c. All written and oral statements made by Respondent to any law enforcement officers or others in connection with this case, and any testimony by the or any other law enforcement officers or others concerning any such statements.

d. All wire, oral, or electronic communications intercepted in connection with this case and any and all evidence derived from said communications.

e. Any other matters that the Court finds should be suppressed upon hearing of this Motion.

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

Respectfully submitted,

John Lawyer
ATTORNEY FOR RESPONDENT
123 Main St.
Anytown, Texas Zip
(area) phonenumber
FAX (area) phonenumber
TBA # barnumber

CERTIFICATE OF SERVICE

This is to certify that on _____, 200__, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, _____ County, Texas, by hand delivery.

_____John Lawyer

ORDER SETTING HEARING

On _____, 200__, the Respondent filed a Motion to Suppress Evidence. The Court finds that the party is entitled to a hearing on this matter, and it is **THEREFORE ORDERED** that a hearing on this motion is set for _____ at _____.

Signed this _____ day of _____, 200__.

Judge Presiding

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. **Texas Family Code §52.0151(a). Texas Code of Criminal Procedure Art. 24.011(c).**

6. **Texas Family Code §52.0151(b). Texas Code of Criminal Procedure Art. 24.011(d).**

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

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

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

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

11. *Roquemore,* at 870.

12. *In the Matter of D.M.G.H.,* 553 S.W.2d 827 (Tex. App.–El Paso 1977).

13. *In re G.A.T.,* 16 S.W .3d 818, 825 (Tex.App.–Houston [14th Dist.] 2000, pet. denied).

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

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

16. *Pham v. State,* 36 S.W.3d 199, (Tex. App.–Houston [1st Dist.] Dec., 2000).

17. *Gonzales v. State,* 9 S.W.3d 267 (Tex. App.–Houston [1st Dist.] 1999, pet. granted)

18. *State v. Simpson,* 105 S.W.3d 238 (Tex. App.–Tyler 4/34/03).

19. *In the Matter of C. R.,* 995 S.W.2d 778 (Tex. App.- Austin 1999, pet. denied).

20. *Hill v. State,* 78 S.W.3d 374 (Tex.App.– Tyler 2001, pet. ref'd).

21. *Vann v. State,* 93 S.W.3d 182, 184 (Tex.App.–Houston [14th Dist.] 6/27/02).

22. Tex. Fam. Code Ann. § 52.02(c) (West 2002).

23. *Id*. at § 52.02(d).

24. *Le,* 993 S.W.2d at 656.

25. *Le,* 993 S.W.2d at 656.

26. *Anthony v. State,* 954 S.W.2d 132, 135 (Tex. App.–San Antonio 1997, no pet.).

27. *In re U. G.,* 128 S.W.3d 797; 2004 Tex. App. Lexis 1854 (Tex. App.– Corpus Christi 2004, pet denied).

28. *Williams v. State,* 995 S.W.2d 754; 1999 Tex.App.Lexis 3866(Tex.App.— San Antonio, 1999)

29. *Anthony v. State***,** 954 S.W.2d 132 (Tex. App.–San Antonio 1997).

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

31. Tex. Fam. Code Ann. §61.03. Effective September 1, 2003 and applicable to conduct occurring on or after effective date.

32. Tex. Fam. Code Ann. §61.103(b).

33. Tex. Fam. Code Ann. §61.106.

34. Robert O. Dawson, Tex. Juv. Law (5th ed. 2000) (published by Tex. Juv. Probation Comm'n).

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

36. *Vega v. State,* No. 13-99-435-CR, (Tex. App.– Corpus Christi 2001) (unpublished) (also available at 2001 Tex. App. Lexis 7364).

37. *Gonzales v. State,* 67 S.W.3d 910, 912 (Tex. Crim. App. 2002)

38. *Gonzales,* 67 S.W.3d at 914.

39. *Gonzales,* 67 S.W.3d at 914.

40. *Gonzales,* 67 S.W.3d at 914.

41. *Gonzales,* 67 S.W.3d at 913 n.8.

42. *Roquemore v. State***,** 60 S.W.3d 862, 871, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).

43. *Roquemore,* 60 S.W.3d at 869.

44. Tex. Rules of Appellate Procedure 33.1 (West 2002).

45. *Pham v. State,* 125 S.W.3d 622, No. 01-99-00631-CR, 2003 WL 22807944, 2003 Tex. App. Lexis 10073 (Tex. App. —Houston [1st Dist.] 11/26/03).

46. *Pham/Gonzales v. State,* 175 S.W.3d 767, Nos. 12-4 & 72-04, 2005 Tex. Crim. App. Lexis 832 (Tex.Crim.App., 6/8/05). As corrected 6/30/05. US Supreme Court certiorari denied by *Pham v. Tex.,* 2005 U.S. LEXIS 7678 (U.S., Oct. 17, 2005).

47. *Adams v. State***,** ___ S.W.3d ___, No. 13-04-028-CR, 2005 Tex.App.Lexis 10253, Juvenile Law Newsletter ¶ 06-1-9 (Tex.App.— Corpus Christi) 12/8/05.

48. Tex. Rules of Appellate Procedure 33.1 (West 2002).

49. *Broxton v. State,* 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).

50. *Hill v. State,* 78 S.W.3d 374 (Tex. App.–Tyler 2001, pet. ref'd).

51. *Hill,* 78 S.W.3d at 387.

52. *Vega v. State,* No. 13-99-435-CR,(unpublished) 2001 Tex. App. Lexis 7364, (Tex. App.– Corpus Christi, 2001) . *See also Lopez v. State,* No. 14-01-01235-CR, (unpublished) 2003 Tex.App.Lexis 584 (Tex.App.– Houston [14th Dist.] January, 2003).

53. *Childs v. State,* 21 S.W.3d 631, (Tex.App.– Houston [14th Dist] June, 2000).

54. *In the Matter of D.M.*, 611 S.W.2d 880 (Tex. App.–Amarillo 1980, no writ).

55. *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. Sup. Ct, 1999).

56. *In re G.A.T.,* 16 S.W.3d 818, 2000 Tex. App. Lexis 2084 [Tex. App.— Houston (14th Dist.) 2000].

57. *Ramos v. State***,** 961 S.W.2d 637 (Tex.App.– San Antonio 1998)

58. **Texas Juvenile Law, 5th Edition,** Dr. Robert O. Dawson (Published by Texas Juvenile Probation Commission, September 2000) pg. 282

59. *Diaz v. State,* Tex.App. LEXIS 5319, No. 04-00-00025-CR, (Tex.App.–San Antonio 2001).

60. *Alvarado v. State,* 912 S.W.2d 199, 211 (Tex.Crim.App.1995).

61. *Darden v. State,* 629 S.W.2d 46, 51 (Tex.Crim.App.1982).

62. *Fare v. Michael C.***,** 442 U.S. at 725, 99 S.Ct. at 2572.

63. *E.A.W. v. State*, 547 S.W.2d 63 (Tex. Civ.App.–Waco 1977).

64. *Vargas v. State*, MEMORANDUM, No. 01-03-00870-CR, 2005 Tex.App.Lexis 2417 [Tex.App.– Houston (1st Dist.) 3/31/05].

65. **Texas Family Code §51.095(b)(1).**

66. *Martinez v. State, 131* S.W.3d 22, No. 04-02-00329-CR, 2003 Tex.App.Lexis 8059 (Tex.App.–San Antonio 9/17/03).

67. Texas Family Code §51.095(b)(1).

68. *Wolfe v. State*, 917 S.W.2d 270, 282 (Tex.Crim.App.1996).

69. *In the Matter of R.E.A.*, UNPUBLISHED, 03-04-00028-CV, 2004 WL 2732163, 2004 Tex.App.Lexis 10763 (Tex.App.– Austin 12/2/04).

70. *In the Matter of M.A.T.***,** UNPUBLISHED, No. 04-97-00918-CV, 1998 WL 784334, 1998 Tex.App. Lexis 7042.

71. *In the Matter of V.M.D.***,** 974 S.W.2d 332 (Tex. App. –San Antonio1998).

72. *In the Matter of D.A.R.*, 73 S.W.3d 505 at 512, No. 08-01-00075-CV, (Tex.App.– El Paso 2002).

73. *In The Matter of E.M.R.*; 55 S.W.3d 712, 2001 Tex.App. Lexis 6133 (Ct.Apps. – Corpus Christi) August, 2001.

74. *In the Matter of S.A.R.***,** 931 S.W.2d 585 (Tex. App. –San Antonio 1996).

75. *In the Matter of R.A.*, MEMORANDUM, No. 03-04-00483-CV, 2005 Tex.App.Lexis 4663 (Tex.App.— Austin, 6/15/05).

76. *In the Matter of V. P.*, 55 S.W.3d. 25, 2001 Tex.App.LEXIS 3578 (Tex.App.– Austin) May, 2001.

77. *In the Matter of V. P.*, 55 S.W.3d. 25, 2001 Tex.App.LEXIS 3578 (Tex.App.– Austin) May, 2001.

78. *Rhode Island v. Innis***,** 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

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

80. *Rushing v. State*, 50 S.W.3d 715 (Tex.App.– Waco) July, 2001.

81. *Simpson v. State***,** MEMORANDUM, No. 12-03-00379-CR, 2005 Tex.App.Lexis 9047 (Tex.App.— Tyler, 10/31/05).

82. *In The Matter of E.M.R.***,** 2001 Tex.App. LEXIS 6133, No. 13-00-100-CV (Tex.App. –Corpus Christi, Aug. 2001).

83. *Yarborough v. Alvarado,* 531 U.S. 652 @ 952, 124 S.Ct. 2140 (6/1/04).

84. **Texas Family Code §51.095(a).**

85. *Vega v. State,* UNPUBLISHED, No. 13-99-435-CR, 2001 Tex. App. Lexis 7364 (Tex. App. – Corpus Christi) November, 2001.

86. *In the Matter of H.V.*, ___S.W.3d ___, No. 2-04-029-CV, 2005 Tex.App.Lexis 9712 (Tex.App.— Fort Worth) on rehearing, 11/17/05; see *In the Matter of H.V.*, No. 2-04-029-VC, 2005 Tex.App.Lexis 2088, Juvenile Law Newsletter ¶ 05-2-14 (Tex.App.– Fort Worth) 3/17/05.

87. **Texas Family Code §51.095(e).**

88. *Diaz v. State,* Tex.App. LEXIS 5319, No. 04-00-00025-CR, (Tex.App.–San Antonio 2001).

89. **Texas Family Code §51.095(a)(1)(C).**

90. *IN THE MATTER OF J.M.S.*, UNPUBLISHED, No. 06-04-00008-CV , 2004 Tex. App. Lexis 8139 (Tex.App.– Texarkana), September, 2004.

91. **Texas Family Code §51.095(a)(5)**

92. **Texas Family Code §51.095(a)(1)(D).**

93. **Texas Juvenile Law, 5th Edition,** Dr. Robert O. Dawson (Published by Texas Juvenile Probation Commission, September 2000) pg. 288

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

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

96. **Texas Family Code §52.025(c).**

97. **Texas Family Code §52.025(b)(5).**

98. *Dixon v. State,* 639 S.W.2d 9 (Tex.App. –Dallas [5th Dist.] 1982).

99. *Meza v. State,* 577 S.W.2d 705 (Tex.Crim.App. 1979).

100. *Meza v. State,* 577 S.W.2d 705 at 708 (Tex.Crim.App. 1979).

101. *Marsh v. State*, 140 S.W.3d 901 (Tex.App.– Houston [14th Dist.] July, 2004).

102. **Texas Juvenile Law, 5th Edition,** Dr. Robert O. Dawson (Published by Texas Juvenile Probation Commission, September 2000) pg. 294

103. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354; 158 L.Ed.2d 177 (2004).

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

105. **Texas Family Code §54.01(g).**

106. **Texas Family Code §51.095(b)(2).**

107. **Texas Family Code §51.095 (a)(5).**

108. *Avila v. State*, No. 11-03-00255-CR, 2004 Tex.App.Lexis 5549 (Tex.App.– Eastland [11th Dist.] June, 2004).

109. **Texas Family Code §51.095 (f).**

110. *In the Interest of Jerrell C.J.*, No. 2002AP3423, 2005 WI 105, 2005 Wisc. Lexis 344 (Sup.Ct.– Wisc., 7/7/05).

111. *Brown v. State*, 890 S.W.2d 546, 549 (Tx.App. – Beaumont 1994). ***Reyes v. State***, 741 S.W.2d 414, 430 (Tex.Crim.App. 1987) en banc.

112. *Goines v. State*, 888 S.W.2d 574, (Tex.App. – Houston [1st Dist.] 1994).

113. *Scneckloth v. Bustamonte*, 93 S.Ct. 2041 (1973).

114. *In The Matter Of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 Tex. App. Lexis 9672, (Tex.App.– Tyler October, 2004).

115. *Gonzales v. State*, 869 S.W.2d 588 (Tex.App. --Corpus Christi 1993, no pet.).

116. *Garcia v. State*, 887 S.W.2d 846, (Tex.Cr.App. 1994) en banc., reh. den. Sept. 21, 1994.

117. *Becknell v. State*, 720 S.W.2d 526 (Tex.Cr.App. 1986), cert. denied 107 S.Ct. 2455, 95 L.Ed.2d 865 (1987).

118. *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984).

119. *Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980).

120. *In the Matter of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 WL 2422954, 2004 Tex.App.Lexis 9672 (Tex.App.– Tyler 10/29/04).

121. *In the Matter of R.J.*, UNPUBLISHED, No. 12-03-00380-CV, 2004 WL 2422954, 2004 Tex.App.Lexis 9672 (Tex.App.– Tyler 10/29/04).

122. Illinois v. Caballes, No. 03-923, Supreme Court of the United States , 125 S. Ct. 834; 160 L. Ed. 2d 842; 2005 U.S. Lexis 769; 73 U.S.L.W. 4111; 18 Fla. L. Weekly Fed. S 100, November 10, 2004, Argued, January 24, 2005, Decided.

123. *Vasquez v. State*, 739 S.W.2d 37 (Tex.Cr.App. 1987) en banc.

124. **Texas Family Code §51.09 (1)(4).**

125. *U. S. v. Knights*, 534 U.S. 112; 122 S. Ct. 587; 151 L. Ed. 2d 497; 2001 U.S. LEXIS 10950; December, 2001.

126. *State of Utah in the Interest of A.C.C.* 2002 UT 22, 44 P.3d 708 (March, 2002).

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

128. *Sloboda v. State*, 747 S.W.2d 20 (Tex.App. – San Antonio 1988, no writ).

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

130. *Salazar v. Luty*, 761 F.Supp. 45 (S.D.Tex. 1991).

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

132. *New Jersey v. T.L.O.*, 469 U.S. 325 at 342, (1985).

133. *DesRoches v. Caprio*, 156 F.3rd 571 (4th Cir. 1998).

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

135. *State of Utah in the Interest of A.C.C.* 2002 UT 22, 44 P.3d 708 (March, 2002).

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

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

138. *S.C. v. State Of Connecticut*, No. 02-9274, 382 F.3d 225; 2004 U.S. App. LEXIS 18834 (2nd Cir. 2004).

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

140. *Roe v. Strickland***,** 299 F.3d 395, 406 (5th Cir. 2002).

141. *Stewart v. State*, 22 S.W.3d 646, 648 (Tex. App.– Austin 2000, pet. ref'd);

142. *In the Matter of K. C. B.*, 141 S.W.3d. 303, No. 03-03-00228-CV, 2004 Tex.App.Lexis 6256 (Tex.App.– Austin, 2004).

143. *In the Matter of A.T.H.*, 106 S.W.3d 338, 2003 Tex. App. LEXIS 3971 (Tex.App.– Austin, 2003).

144. *In re Isaiah B.*, 500 N.W.2d 637 (1993).

145. *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

146. *Shoemaker v. State*, 971 S.W.2d 178 (Tex.App.–Beaumont 1998).

147. *Anable v. Ford*, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).

148. *Anable v. Ford*, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).

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

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

151. *Todd v. Rush County Schools***,** 133 F.3d 984 (7th Cir. 1998).

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

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

154. *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).

155. *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).

156. *Jennings v. Joshua ISD*, 877 F.2d 313 (5th Cir. 1989).

157. *Illinois v. Caballes*, No. 03-923 , 2005 U.S. LEXIS 769, U.S. Sup. Ct. 1/24/05.

158. *Horton v. Goose Creek Ind. School Dist.***,** 690 F.2d 470 (5th Cir. 1982).

159. *Horton v. Goose Creek Ind. School Dist.***,** 690 F.2d 470 (5th Cir. 1982).

160. *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982).

161. *Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D.Tex. 1980).

162. *Beard v. Whitmore Lake School District*, 402 F.3d 598, 2005 U.S. App. Lexis 5323, 2005 Fed. App. 0155P (6th Cir.) 4/4/05.

163. *Oliver by Hines et al. v. McClung*, 919 F.Supp 1206 (N.D.Ind. 1995).

164. *Widener v. Frye*, 809 F.Supp. 35 (S.D.Ohio 1992), aff'd 12 F.3d 215.

165. *S.C. v. State Of Connecticut*, No. 02-9274, 382 F.3d 225; 2004 U.S. App. Lexis 18834 (2nd Cir. 2004).

166. *T. L. O.*, 469 U.S. at 342, n.8 (internal quotations and alterations omitted).

167. *U.S. v. $ 124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989).

168. *Commonwealth v. Vecchione*, 327 Pa. Super. 548, 476 A.2d 403 (1984).

169. *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978).

170. *Commonwealth v. Blouse***,** 531 Pa. 167, 611 A.2d 1177 (1992).

171. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).

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

173. **Texas Administrative Code, Title 37, Part 11, Chapter 348, Subchapter A, Rule §348.110 (g)**

174. *In The Matter of D.D.B.***,** 2000 Tex. App. Lexis 2222 (Tex. App. –Austin) 2000.

175. *In the Matter of O.E.*, (Memoranda Opinion) No. 03-02-00516-CV, 2003 Tex.App.Lexis 9586, (Tex.App.– Austin [3rd Dist.] November, 2003).

176. *In the Matter of R.J.R.*, UNPUBLISHED, No. 08-03-00392-CV, 2005 Tex.App.Lexis 4416, (Tex.App.— El Paso 6/9/05).