# ADVANCED SEARCH & SEIZURE

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## EDUCATION

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## PROFESSIONAL

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## SPEECHES AND PRESENTATIONS

- Juvenile Search & Seizure, Live Nationwide Broadcast via Webinar, Sponsored by LegalSpan, January 10, 2008.
- Legislative Updates; Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Arrests, Searches, Confessions, Juvenile Processing Offices, and Waiver of Rights. Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Caselaw Updates; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Caselaw Update; Fall Judicial Education Session, Sponsored by The Texas Association of Counties, Austin, Texas, November, 2006.
- Arrest, Searches, Confessions, Juvenile Processing Offices & Waiver of Rights, Nuts and Bolts of Juvenile Law 2006, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, Texas, August, 2006.
- Caselaw Update; 32nd Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, Dallas, Texas, July, 2006.
- Caselaw Updates; 19th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2006.

## PUBLICATIONS

- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation . State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think . State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- 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.

**Table of Contents**

# JUVENILE SEARCH AND SEIZURE
**by Pat Garza**

## I. CONSTITUTIONAL PROTECTIONS

### A. The Fourth Amendment, United States Constitution

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

### B. Article I, Section 9, Texas Constitution

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

As you can see nowhere in the 4th Amendment or Article I, Section 9, does it specifically include "a child" or "a minor." Nor does it specifically exclude them. Both provisions talk of "the people." Whether or not a child or a minor is a part of "the people" has been the subject of debate.

Texas courts have long held that a minor has the same constitutional right to be secure in his person from unreasonable seizures as an adult, and the Fourteenth Amendment and the Bill of Rights protect minors as well as adults.[1] The key is in the interpretation of "unreasonable". To the courts what is "unreasonable" to an adult, may not be "unreasonable" to a child, especially in a school environment.

## II. THE EXCLUSIONARY RULE

### A. The Exclusionary Rules

As with the discussions regarding the variance in the specific interpretations of the federal and state constitutions, there is a variance in the interpretations of federal and state exclusionary rules.

1. The Federal Exclusionary Rule

The Supreme Court established the Federal Exclusionary rule in *Weeks v. United States (1914),*[2] in which the Court held that evidence obtained in violation of the Fourth Amendment was inadmissible. *Mapp v. Ohio* (1961),[3] applied the Exclusionary rule to the states: "Courts which sit under our Constitution cannot and will not be made a party to the lawless invasions of the Constitutional rights of citizens by permitting use of the fruits of such invasions." As a result of these decisions, evidence obtained by the government in violation of the United States Constitution is inadmissible and excluded.

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

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

***In holding that the search of T. L. O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.***[4]

2. The Texas Exclusionary Rule

Texas codified the exclusionary rule for criminal prosecution in Article 38.23 of the Code of Criminal Procedure:

**"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."**[5]

3. The Family Code Exclusionary Rule

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

**"Evidence illegally seized or obtained is inadmissible in an adjudication hearing."**[6]

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

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

**"to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing *and their constitutional and other legal rights recognized and enforced*." (emphasis added)**[7]

Note: Violating the purposes section of the Juvenile Justice Code has been found to create a viable ground for appellate review.[8]

## B. Governmental Action

Normally, the federal Exclusionary rule protects against governmental interference and does not apply to searches or seizures made by private individuals not acting as agents of the government.[9] However, the Fourth Amendment will apply to evidence obtained by a private party if government agents were sufficiently involved in the acquisition of the evidence.[10]

The Texas Exclusionary Rule, Art. 38.23(a), V.A.C.C.P., applies to both private citizen and government agent actions and provides greater protections than its federal counterpart. Article 38.23(a) provides that

no evidence obtained by "an officer or other person" in violation of the law is admissible against an accused in a criminal trial.

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

## III. CONSENT

### A. 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.[11]

1. 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.[12]

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.[13]

2. Search Must Not Exceed Scope of Consent

The scope of a consensual search will be limited by the terms of its authorization.[14]

3. 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.[15] The third party may consent if that person has equal authority over and control of the premises or effects.[16] A child may have no reasonable expectation of privacy in his room when his parent routinely enters his room, and a parent may be able to vicariously consent to a search of her child's room.[17]

### B. Consent by Children

1. Competent to Consent

A child can be too young to consent. In *Bilbrey v. Brown* (1984),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."[18]

2. Coercive Atmosphere (Schools)

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

In an Eastern District of Texas case, children accustomed to receiving orders and obeying instructions from school officials, were considered incapable of exercising unconstrained free will when asked to open their pockets and open their vehicles to be searched. Moreover, the children 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.[19] The court held that the consent was given in a "coercive atmosphere". These were not elementary or middle school students, these were high school students giving consent.

## C. The Family Code and Consent

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?

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

However, many cases have been upheld where a juvenile consents to a search. In March, 2006, the Austin Court of Appeals held that a request by a law enforcement officer to remove items from a juvenile's pockets was considered consensual and not an acquiescence to official authority.[20]

## D. Factors

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.[21]

In *In the Matter of R.S.W.*, a request by a law enforcement officer that a juvenile, who had been temporarily detained and patted down, to remove items from his pockets was considered consensual and not an acquiescence to official authority.[22]

However, in *In the Matter of R.J.*, consent was not voluntary where a juvenile consented to the search of his car after being written a traffic citation. The juvenile initially refused to allow the search, then changed his mind when the officer told him that a canine officer was being called to the location and if there was a "hit" the car would be searched anyway.[23]

In *Illinois v. Caballes*, the Supreme Court held that a dog sniff conducted during a lawful traffic stop that reveals no information other than the location of a substance (marijuana) 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).[24]

## D. As a Condition of Probation

1. Random Searches
   a. Adults

With respect to adult probationers, the United States Supreme Court addressed the issue in *U.S. v. Knights (2001)*[25], and held that a state's operation of its probation system presented a "special need" for the exercise of supervision to assure that probation restrictions are in fact observed.

In *Knights*, a California court sentenced respondent Mark James Knights to summary probation for a drug offense. The probation order included the following condition: that Knights would ***"submit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."*** Knights signed the probation order, which stated immediately above his signature that "I

HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME." Subsequently, a sheriff's detective, with *reasonable suspicion*, searched Knights's apartment. Based in part on items recovered, a federal grand jury indicted Knights for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition.

The District Court granted the motion to suppress on the ground that the search was for "investigatory" rather than "probationary" purposes. The Court of Appeals for the Ninth Circuit affirmed.

In reversing the Supreme Court stated that 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.

The Court found that probation diminishes a probationer's reasonable expectation of privacy -- so that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only reasonable grounds (not probable cause) to believe that contraband is present.[26]

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

b. Juveniles

In *State of Utah in the Interest of A.C.C. (2002)*, the juvenile court's probation order mandated that the juvenile "submit to search and seizure from law enforcement for detection of drugs, weapons or other illegally possessed items." [27]

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

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

The Utah Supreme Court concluded that the minor had no reasonable expectation of privacy regarding the drug paraphernalia seized by the probation officer. The minor lacked such an expectation of privacy because the express terms of his probation permitted random searches and invalidating such

terms would be inconsistent with the fundamental objective of Utah's juvenile probation system. Additionally, the juvenile court's greater power to place the minor in secure confinement and negate his right to privacy included the lesser power to release him into society subject to a probation condition authorizing his belongings to be searched randomly.

The reasoning of the court seemed to be that (1) by notifying the juvenile that he was subject to search at 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!

2. DNA Testing

In In the *Matter of D.L.C. (2003)*[28], a Texas Court of Appeals decision, appellant juvenile was adjudicated for indecency with a child and aggravated sexual assault of a child. The juvenile was required to register in the sex offender registration program.

Citing two United States Supreme Court decisions, *Ferguson v. City of Charleston (2001),* and *City of Indianapolis v. Edmond (2000),* the Texas court viewed the traditional evaluation of reasonableness of a search or seizure as it applied to classic Fourth Amendment "balancing" analysis as flexible.[29]

In both these cases the Supreme Court began with the premise that warrantless searches or seizures not based upon an individualized suspicion of wrongdoing violate the Fourth Amendment. The Court recognized that it had, however, in limited circumstances upheld the constitutionality of certain regimes of warrantless, suspicionless searches where the program compelling the search or seizure was designed to serve "special needs, beyond the normal need for law enforcement." Concluding that the programs had as their primary purpose the discovery of evidence against particular individuals suspected of committing a specific crime--an ordinary or normal law enforcement function--the Supreme Court declared the searches and seizures in both *Ferguson* and *Edmond* unreasonable under the Fourth Amendment.[30]

The Texas court held that the Texas DNA statute is not designed to discover and produce evidence of a specific individual's criminal wrongdoing. The purposes of the Texas DNA statute serve "special needs," not "normal" or "ordinary" purposes of law enforcement. The physical intrusion of providing a blood sample for DNA testing is minimal. Additionally, a juvenile's expectation of privacy is significantly diminished by the fact that he or she has been adjudicated delinquent for committing a sexual offense. We balance the fairly minimal intrusiveness of the sampling and a juvenile's reduced privacy expectations against the public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit sex offenses and conclude that the governmental interest promoted by the DNA statute rightfully outweighs its corresponding minimal physical intrusion and encroachment upon a juvenile's privacy. Consequently, under either existing federal case law in Texas applying the traditional balancing analysis or under the *Ferguson* and *Edmond* special needs analysis, we hold that the search and seizure occasioned by the DNA statute does not violate the Fourth Amendment to the United States Constitution. In their facial Fourth Amendment challenge, Appellants have failed to establish that the Texas DNA statute operates unconstitutionally. The Appellate Court overruled Appellants' issue.[31]

## IV. SCHOOL SEARCHES

## A. In Loco Parentis

When minor children are entrusted by parents to a school, the parents delegate to the school certain responsibilities for their children, and the school has certain liabilities. In effect, the school and the teachers take some of the responsibility and some of the authority of the parents. The young child must obey the teacher, and the teacher may use the methods expected and tolerated in the community to control the child's behavior. Furthermore, the child's physical safety is entrusted to the school and to the teacher, who thus become legally liable for the child's safety, insofar as negligence can be proved against them.[32]

1. The Doctrine

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

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

2. The Erosion

More recent decisions have applied the rule that the Fourth Amendment is applicable to school officials acting alone, but have required a less-than-probable cause standard in determining the reasonableness of the search.

"Reasonableness" is "the touchstone of the constitutionality of a governmental search,"[33] and the relevant constitutional question in school search cases is "whether the search was reasonable in all the circumstances."[34]

3. Expected Right of Privacy vs. Governmental Intrusion

In determining whether a particular type of school search is constitutionally reasonable, the court will engage in a fact-specific "balancing" inquiry, under which the magnitude of the government's need to conduct the search at issue is weighed against the nature of the invasion that the search entails. " On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."[35]

## B. *New Jersey v. T.L.O.*

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

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

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

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

1. The search must be justified at its inception. Reasonable grounds must show that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

2. It must be reasonably related in scope to the circumstances at hand. Why do you believe the item or items you are looking for will be found where you are looking.

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

The requirement that a search of a student be "justified at its inception" does not mean that a school administrator has the right to search a student who merely acts in a way that creates a reasonable suspicion that the student has violated some regulation or law but, rather, the search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of that violation.[36] *T.L.O.*, also held that lack of individual suspicion does not *ipso facto* render a search unreasonable.[37]

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

> ***"This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools."***[38]

1. Special Needs

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

Generally, public officials can justify warrantless searches with reference to a "special need" [if] "divorced from the State's general interest in law enforcement."[39] For juveniles, “special needs” can also occur, with respect to a probation officer's warrant less search of a probationer's home[40]; a schools' random drug testing of student athletes,[41] and drug testing of all public school students participating in extracurricular activities.[42] 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.[43] 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."[44]

The Supreme Court did recognize limits on the "special needs" exception in *Chandler v. Miller* (1997).[45] *Chandler* involved a Georgia statute which required candidates for state office to submit to urine testing for drugs. There was, however, no showing of any drug problem among Georgia state officials.[46] The Court found that the statute was only symbolic and served no need. "However well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action."[47]

*Chandler* restrained the growth of "special needs" because the Court looked to the asserted "special need" of the State and found it wanting. The State argued that the Tenth Amendment gave it sovereign power to set qualifications for candidates, but the Court held that "in setting such conditions of candidacy for state office, but in setting such conditions, they may not disregard basic constitutional protections."[48] There, thus, was judicial review of the legislative choices of special needs.

In *Roe v. Strickland* (2002), 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.”***[49]

2. Individualized Suspicion

Before *T.L.O.* was decided, it had been held that individualized reasonable suspicion was required for a school search.[50] *T.L.O.*, however, left open the question of whether individualized reasonable suspicion is required under the Fourth Amendment.

> **''We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] ... the Fourth Amendment imposes no irreducible requirement of such suspicion.' .... Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is ''not subject to the discretion of the official in the field.'''**[51]

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

In *DesRoches v. Caprio*, (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.[52]

3. School Officials v. Law Enforcement Officers

Generally, as long as searches are directed by school officials, they do not require the higher law enforcement standard of probable cause. However, the lower standard was not created to allow police to circumvent probable cause requirements in their investigation of criminal activity simply because the activity occurred on a school campus. Most cases that address the issue of police involvement in a search apply the more customary probable cause test rather than the *T.L.O.* reasonable suspicion standard.[53] When law enforcement officers act independently of school officials they are required to follow a probable cause standard. Law enforcement officers, however, can participate in searches based on reasonable suspicion as long as the direction to search comes from school officials.[54]

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.[55]

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.[56]

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.[57]

4. Public Schools v. Private Schools

Private institutions are given significantly more authority over their students than public ones, and are generally allowed to arbitrarily dictate rules.

Public school officials are subject to Fourth Amendment limitations on searches because public schools are government entities and those officials are government employees. Because a private school is not a government entity, private school students have no constitutional protection against unreasonable searches by private school teachers or administrators. Private school personnel may search a student's person, his or her belongings, locker or field trip hotel room even if they have no basis for reasonable suspicion. A police officer may assist in such a suspicionless search with the private school's consent.

An ostensibly private entity acts under color of state law "when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control.'"[58] Entwinement doctrine identifies state action in situations where neither the government nor the private entity controls a given sphere of activity, but both are so involved in that activity that the actions of the private actor in that sphere are "fairly attributable" to the state.[59]

Besides the entwinement test (and the related symbiotic relationship test), there are two main tests of state action relevant to this case: the public function test and the nexus test.[60] Public function doctrine permits a finding of state action when a "private entity [has] assumed powers "'traditionally exclusively reserved to the State.'"'[61]

Under the "public function" doctrine, the Supreme Court has identified certain functions which it regards as the sole province of government, and it has treated ostensibly private parties performing such functions as state actors.

A private entity may be classed as a state actor "when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control.'"[62] In Brentwood, the defendant was a non-profit association that set and enforced standards for athletic competition among schools both private and public. At issue was the association's enforcement of recruitment rules alleged by a member school to violate the First and Fourteenth Amendments.[63]

A closely divided Supreme Court applied the state action label to the association. The opinion stressed two points: that the membership of the association was comprised overwhelmingly (84 percent) of "public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling" and that in substance the association (replacing previous state school board regulation) set binding athletic standards for state schools, including the recruiting standards at issue in the case.[64]

5. Texas Adoption of T.L.O.

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

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

Appellant was a high school student who informed the assistant principal's secretary that he was leaving campus to attend his grandfather's funeral. The school had received a complaint a week before that the

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

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

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

### C. Drug Testing and T.L.O.

Mandatory urinalysis as part of a physical examination for all students constitutes a "search" within the meaning of the Fourth Amendment to the U.S. Constitution and must be predicated on the "reasonable cause" standard as set out in *T.L.O.*.[65]

1. All Students

When it comes to mandatory drug testing of all students for drugs the Courts have said no.[66] 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.[67] Such testing is prohibited under the Fourth Amendment. When it comes to a school drug policy, it must be reasonably related to maintenance of order and security in the school or to the preservation of the educational environment.

2. Athletes

In *Vernonia School District v. Acton (1995),* the Supreme Court reversed a 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.[68]

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

Under this analysis the Court examined

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

Prong 1: What is the reasonable expectation of privacy by the individual?
Students as a whole have a lesser expectation of privacy, given the school's custodial responsibilities. Athletes' expectation of privacy is reduced even more because of the use of locker rooms and athletes voluntarily subject themselves to preseason physicals, insurance requirements, minimum grades, and other rules. School athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Prong 2: Is the procedure used for the search reasonable?
The manner in collecting of urine samples was nearly identical to [conditions] typically encountered in public restrooms, which ... schoolchildren use daily. Also, the disclosure of the tests is limited to "school personnel who have a need to know." The Court concluded that the nature of the intrusion was not great, and thus this prong also weighed in favor of testing.

Prong 3: Is there a legitimate governmental interest to protect and does the search protect it?
The Court concluded that the government had a "compelling" interest in "deterring drug use by our Nation's schoolchildren. The Court also emphasized that the Vernonia School District had an immediate concern since a large segment of the student body, and especially athletes, were involved in the school's drug culture. The Court held that the school district was justified in testing only athletes because using drugs posed an injury risk to athletes.

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

Interestingly, Justice Ginsburg, in concurring stated:

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

3. Extracurricular Activities

On June 27, 2002, seven years after *Vernonia*, the Supreme Court re-visited the issue of suspicion less drug testing of students. In *Board of Education v. Earls* (2002),[69] the School District adopted a policy which required all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. Under the Policy, students were required to take a drug test before participating in an extracurricular activity (not just athletics), must submit to random drug testing while participating in that activity, and must agree to being tested at any time upon reasonable suspicion.

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

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

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

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

> ***testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use... ...Vernonia did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.***[70]

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

> ***This policy was not shown to advance the special needs [existing] in the public school context [to maintain] . . . swift and informal disciplinary procedures . . . [and] order in the schools, What is left is the School District's undoubted purpose to heighten awareness of its abhorrence of, and strong stand against, drug abuse. But the desire to augment communication of this message does not trump the right of persons -- even of children within the schoolhouse gate -- to be secure in their persons . . . against unreasonable searches and seizures.***
>
> ***It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting the schools' custodial and tutelary responsibility for children. In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial obligations may permit***

***searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary obligations to their students require them to teach by example by avoiding symbolic measures that diminish constitutional protections. That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.***[71]

While *Earls* involved extracurricular activities, the arguments made can certainly be envisioned to apply to a policy requiring all students to submit to a drug test and not just those involved in extracurricular activities. As the court stated the policy is not to test the group of students most likely to use drugs, but rather to consider the "reasonableness" of the program in the context of the public school's custodial responsibilities.

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

T.L.O.'s holdings:

Balancing individual's legitimate expectations of privacy and personal security against the government's need for effective methods to deal with breaches of public order."[72]

Individualized suspicion present, but not required

Reasonable at Inception: Must receive information about illegal activity (drugs) or violation of school rule.

Reasonable in Scope: Search must be related to information received.

Reasonable under all the circumstances: Reasonable suspicion of cigarettes in purse warranted search.

Vernonia's holdings:

Generalized Suspicion (small group)

Reasonable at Inception: Evidence of a drug problem among school athletes.

Reasonable in Scope: Drug testing considered minimally intrusive to athletes

Reasonable under all the circumstances: Court found schools need to protect its students.

Three prong test:

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

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

Earls holdings:

Generalized Suspicion (larger group)

Reasonable at Inception: no real information about students in extra-curricular activities being more susceptible to drugs

Reasonable in Scope: Drug testing considered minimally intrusive.

Reasonable under all the circumstances: Court found schools duty to protect its students.

Three prong test:

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

It would appear that when one makes the jump from the schools need to protect its students to the schools duty to protect its students (against national dangers such as drugs), the first prong of *T.L.O.* and the 3rd prong of *Vernonia* is minimized. If a duty to protect exists, because of a national epidemic, will every drug testing policy, at every school, be considered "reasonable at it's inception." Justice Thomas in *Earl* stated that "a policy may exist based on a School District's interest in protecting the safety and health of its students."[73] Are all the other students less deserving of the School District's interest in protection? Why is protecting the safety and health of students involved in extracurricular activities or athletics more deserving than students as a whole? Where does the school district's duty to protect its students end?

## D. Other School Search Situations

1. Locker Searches

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

Who supplies the lock on the locker? If the student supplies the lock, must the combination or a duplicate key be provided to the school authorities? What is the effect on the student's expected right of privacy if the school also has a key? Are there detailed rules and regulations governing what may be kept in desks or lockers, and are random searches being made to determine compliance? Is the student's control over the locker or desk limited to excluding other students, or does it extend to school officials? Some cases have distinguished between the student's control of the locker as against fellow students and the status of the youth's control vis-à-vis the school authorities.[74]

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

a. No Expectation of Privacy by Students

Where a school system has a written policy regarding lockers stating that the school system retains ownership and possessory interest in the lockers and the students have notice of the policy, the students have no reasonable expectation of privacy in the lockers.[75] Without a legitimate expectation of privacy, the random search of a locker is not a search under the Fourth Amendment.

In one case where the school was allowed access to the lockers, it had given notice at the beginning of the school year that lockers were subject to being opened and that the school and student possessed the lockers jointly. The court held that the school administration's duty to maintain an educational atmosphere in the school necessitated a reasonable right of inspection, even though the inspection might infringe upon students' rights under the Fourth Amendment.[76]

Courts have also concluded that students do not have reasonable expectations of privacy in their lockers where school officials have the master combinations to open them.[77]

b. Some Expectation of Privacy by Students

If a school district does not have a policy indicating that the district retains ownership of lockers and/or that lockers may be searched at any time, and nothing else is done to diminish the students expected

right of privacy, then students may be able to establish a reasonable expectation of privacy that cannot be violated without reasonable suspicion.[78] A student's locker by some is considered a "home away from home" and, therefore, the subject of a reasonable expectation of privacy.[79]

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.

2. Off Campus Searches

The only case I found on off-campus searches comes from the Southern District of New York. In *Rhodes v. Guarricino* (1999)[80], during a class trip, defendant principal searched the hotel rooms of students and found marijuana and alcohol. The students were sent home early from the trip and ultimately suspended from school for three days. As a result of the search and the ensuing punishment, plaintiffs sued defendant principal and defendant school district under 42 U.S.C.S. § 1983, claiming a violation of their constitutionally protected U.S. Const. amend. IV right to be free from unreasonable searches and seizures.

The court stated that *T.L.O.*'s diminished Fourth Amendment protection applies whether or not the student is on or off the school grounds, as long as the off-campus search is conducted by a school employee on a school-sponsored excursion or trip. The mere setting of the search does not erase the well-established constitutional standard for searches of students and replace it with the more stringent probable cause standard, nor does it erase the *T.L.O.* standard. Instead, the setting of the search should merely be one of the many factors used in assessing the reasonableness of the search.[81]

3. Random Searches

In *Doe v. Little Rock Sch. Dist. (2004)*[82], plaintiff secondary public school student appealed a decision of the United States District Court for the Eastern District of Arkansas, which rendered judgment in favor of defendant school district in the student's class action suit, filed pursuant to 42 U.S.C.S. § 1983, alleging that the district's practice of conducting random, suspicionless searches of students and their belongings by school officials violated their Fourth Amendment rights.

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

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

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

Likewise, in *Desroches II v. Caprio*, the search of the backpacks of 19 students was ruled unreasonable without the presence of individualized suspicion when the stolen property sought was a pair of sneakers.[83]

4. 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.[84]

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.[85] There is no reasonable expectation of privacy in the odors emanating from inanimate objects such as cars or lockers.[86]

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.[87]

b. Sniffs of Children

A sniff of a child's person by a dog is a "search" and the reasonable suspicion standard applies.[88]

The Court in *Horton vs. Goose Creek* (1982), reasoned that the intensive smelling of people, even if done by dogs, is indecent and demeaning.[89] 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.[90]

Some Courts have prevented School Districts from using dogs to sniff both students and automobiles.[91] 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.

5. 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.

The 6th Circuit held, in *Beard v. Whitmore* (2005), that a strip search to find money was unconstitutional. The highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money, the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable. Accordingly, under *T.L.O.* and *Vernonia*, the searches violated the Fourth Amendment.[92]

In *Oliver by Hines et al. V. McClung (1995),* the federal district court held that strip searching seventh grade girls to recover $4.50 allegedly stolen was not reasonable under the circumstances. The principals and teachers involved were not entitled to qualified immunity.[93]

In *Jenkins v. Talladega City Board of Education (1996),* the court held strip searches by two teachers of two eight-year-olds to be unreasonable and unconstitutional when predicated on a classmate's accusation that they had stolen $7.[94]

However, in *Widener v. Frye (1992),* a strip search of a high school student conducted by a school official was reasonable where the school official detected what he believed to be the odor of marijuana emanating from the child and that the child was acting "sluggish" and "lethargic" manner or otherwise consistent with marijuana use. The child was removed from the classroom and the presence of his classmates. He was asked to remove his jeans only, not his undergarments, and only in the presence of two male security guards. The court considered the search to be reasonable in its scope in light of the age and sex of the child, and the nature of the infraction.[95]

   b. Detention Strip Searches

In *Smook v. Minnehaha County* [96](2006), plaintiff detainee alleged that the policy of the Juvenile Detention Center to "strip search minors without probable cause" was a violation of her right against unreasonable search and seizure. In light of the State's legitimate responsibility to act in loco parentis with respect to juveniles in lawful state custody, the court concluded, after weighing the special needs for the search against the invasion of personal rights, that the balance tipped towards reasonableness. Thus, the individual defendants did not violate her constitutional rights. Next, assuming there was a direct causal link between the search of the detainee and municipal policy, the County did not violate her constitutional rights. Alternatively, as of 1999, there was no appellate decision from the U.S. Supreme Court or federal circuit ruling on the reasonableness of strip searches of juveniles in lawful state custody. Moving on, the court declined to pass on the merits of the constitutional claims of the unnamed class members that had to be resolved as a first step in determining whether the individual defendants had qualified immunity. Finally, it concluded that plaintiffs lacked standing to seek injunctive relief.

In *S.C. v. Connecticut* (2004), the 2nd Circuit ruled that strip searches of those arrested for misdemeanors require reasonable suspicion of possession of contraband. The Court stated that while there was no doubt a state has a legitimate interest in confining juveniles, it does not follow that by placing them in an institution where the state might be entitled to conduct strip searches of those convicted of adult-type crimes, that a state may then use those standards to justify strip searches of runaways and truants.[97] 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.

6. The Juvenile Justice Alternative Education Programs and Mandatory Searches

Juvenile Justice Alternative Education Programs (JJAEP) are statutory creations developed to provide an education for students who are expelled from school or who were adjudicated by a court order to attend an alternative school. In this context, jurisdictions operate these schools for youths who have been expelled from school for committing certain criminal offenses.

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.[98] (emphasis added)

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.[99] 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,[100] courthouse security measures,[101] license and registration vehicle stops,[102] and border-patrol checkpoints.[103] 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.[104]

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;***[105]

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 *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.[106]

## E. Appeals

1. Establishing Evidence You Tried to Suppress

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

In June, 2005, the El Paso Court of Appeals held that under the principle known as curative admissibility, the admission of improper evidence cannot be asserted as grounds for reversal on appeal where the defendant, on direct examination, gives testimony establishing the same facts as those to which an objection was raised. In this case appellant testified at trial regarding the information and evidence he attempted to suppress with his motion. Appellant testified that he was in fact in possession of the marijuana on the night of June 7, 2002 and October 10, 2002, and that he was in possession of the alleged stolen items on October 10, 2002. In providing such testimony, Appellant established facts consistent with those he tried to suppress. Thus, we hold that Appellant has waived such issues on appeal. [107]

2. Objection Must be Timely to Preserve Error

In *In the Interest of R.A.*, the Houston Court of Appeals [14th Dist.], held that respondent failed to preserve error by failing to obtain a timely ruling on his motion to suppress or properly and timely object to the admission of the evidence made the subject of his motion. Defendant had argued that the trial court erred by denying his motion to suppress because the marijuana found on his person was based on illegal search and seizure grounds, and that, without the marijuana evidence, the trial court's adjudication could not withstand a challenge to the legal and factual sufficiency of the evidence. The record showed that defendant failed to obtain a timely ruling on his motion to suppress, and that although he made objections to the admission of the marijuana, his objections came too late because the officer already had testified by the time defendant objected on the second day. Also the court found that defendant's "chain of custody" objection made at trial differed from the complaint on appeal; thus it was not sufficient to preserve his claims of error on appeal. The court did not address the merits of defendant's claims.[108]

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

Juvenile cases, although quasi-criminal in nature, are civil proceedings that are governed by the Texas Family Code and not the Texas Code of Criminal Procedure. Texas Family Code § *56.01* provides that the right to appeal in a juvenile case rests solely with the child, leaving the State without any statutory or common-law authority to appeal from an adverse ruling.[109]

In 2003, the Texas Legislature, through § 56.03 of the Texas Family Code, expressly authorized the State to appeal an order of a court in a juvenile case that grants a motion to suppress evidence.[110] However, § 56.03 only applies to State's appeals in cases involving violent or habitual juvenile offenders.[111] As a result, § 56.03 does not authorize the State to appeal from a trial court's order granting a motion to suppress in cases other than those requesting a determinate sentence.[112]

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

2. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)

3. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)

4. *New Jersey v. T.L.O.*, 469 U.S. 325 at 333, 105 S. Ct. 733; 83 L. Ed. 2d 720; 1985 U.S. LEXIS 41; 53 U.S.L.W. 4083 (1985).

5. **Art. 38.23, V.A.C.C.P.**

6. **Texas Family Code §54.03(e).**

7. **Texas Family Code §51.01(6).**

8. *In the Matter of S.A.G.*, ___S.W.3d.___, MEMORANDUM, No. 04-06-00503-CV, 2007 Tex.App.Lexis 1929, Tex.Juv.Rep. Vol.21, No. 2, ¶ 07-2-13 (Tex.App.— San Antonio, 3/14/07), rel. for pub. 7/26/07.

9. *United States v. Jacobson*, 466 U.S. 109, 104 S.Ct. 1652 (1984).

10. *Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372 (1949).

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

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

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

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

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

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

17. *Sorensen v. State*, 478 S.W.2d 532 (Tex. Crim. App. 1972) at 534.

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

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

20. *In the Matter of R. S. W.*, MEMORANDUM, No. 03-04-00570-CV, 2006 Tex.App.Lexis 1925 (Tex.App.— Austin, 3/9/06).

21. *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).

22. *In the Matter of R. S. W.*, MEMORANDUM, No. 03-04-00570-CV, 2006 Tex.App.Lexis 1925, Tex.Juv.Rep. ¶ 06-2-6 (Tex.App.— Austin, 3/9/06).

23. *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).

24. 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.

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

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

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

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

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

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

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

32. Britannica.com

33. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (2002).

34. *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 982 (8th Cir. 1996).

35. *New Jersey v. T.L.O.*, 469 U.S. 325 at 337, 105 S. Ct. 733; 83 L. Ed. 2d 720; 1985 U.S. LEXIS 41; 53 U.S.L.W. 4083 (1985).

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

37. *T.L.O., Id.* at 342.

38. *T.L.O., Id*. at 342-43.

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

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

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

42. *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).

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

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

45. *Chandler v Miller*, 520 US 305, 137 L Ed 2d 513, 117 S Ct 1295 (1997).

46. *Chandler*, *Id.*, 520 US at 319-20.

47. *Id.* at 322

48. *Id.* at 317.

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

50. *Kuehn v Renton School Dist.*, 103 Wash 2d 594, 694 P2d 1078 (1985).

51. *T.L.O., Id* at 342.

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

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

54. *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987)

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

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

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

58. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)).

59. *Brentwood Acad.*, *Id*. 531 U.S. at 295

60. *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999).

61. *Rockwell v. Cape Cod Hosp*., 26 F.3d 254, 258 (1st Cir. 1994) (quoting Rodrigues v. Furtado, 950 F.2d 805, 813 (1st Cir. 1991) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974))).

62. *Brentwood*, 531 U.S. at 296 (quoting Evans v. Newton, 382 U.S. 296, 299, 301, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)).

63. *Id.*, 531 U.S. at 291-93.

64. *Id.*, 531 U.S. at 299-300

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

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

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

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

69. *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).

70. *Id*, 122 S. Ct. at 2569.

71. *Id*,122 S.Ct. at 2578.

72. *T.L.O.*, 469 U.S. at 337.

73. *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).

74. *State v. Stein*, 203 Kan. 638, 456 P.2d 1 (1969).

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

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

77. *State v. Stein*, 456 P.2d 1 (Kan. 1969); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

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

79. *State v. Engerud*, 463 A.2d 934 (N.J. 1983)

80. *RHODES v. GUARRICINO*, 54 F. Supp. 2d 186; 1999 U.S. Dist. LEXIS 6945, U.S. Dist. Ct. Southern District of New York, 1999.

81. *RHODES v. GUARRICINO*, 54 F. Supp. 2d 186, 192; 1999 U.S. Dist. LEXIS 6945, U.S. Dist. Ct. Southern District of New York, 1999.

82. *Doe v. Little Rock Sch. Dist.*, No. 03-3268, 380 F.3d 349, 2004 U.S. App. Lexis 17144 (8th Cir. 2004).

83. *Desroches II v. Caprio*, 974 F.Supp. 542 (E.D.Va. 1997)

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

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

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

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

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

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

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

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

92. *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.

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

94. *Jenkins v. Talladega City Board of Education*, 95 F.3d 1036 (11th Cir. 1996)

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

96. *Smook v. Minnehaha County*, 457 F.3d 806, 2006 U.S. App. LEXIS 20382 (2006) rehearing en banc, denied by Smook v. Minnehaha County, 2006 U.S. App. LEXIS 24352 (8th Cir., Sept. 27, 2006), US Supreme Court certiorari denied by, Motion granted by Smook v. Minnehaha County, 2007 U.S. LEXIS 3762 (U.S., Mar. 26, 2007)

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

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

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

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

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

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

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

104. *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).

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

106. *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).

107. *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).

108. *In the Interest of R.A.*, MEMORANDUM, No. 14-04-00863-CV, 14-04-01180-CV, 2006 Tex.App.Lexis 5441 (Tex.App.— Houston [14th Dist.], 6/27/06).

109. **Texas Family Code § 56.01 (Vernon 2002);** see also *C.L.B. v. State*, 567 S.W.2d 795, 796 (Tex. 1978); *In re S.N.*, 95 S.W.3d 535, 537 (Tex. App.--Houston [1st Dist.] 2003, pet. denied).

110. **Texas Family Code § 56.03(b)(5) (Vernon Supp. 2006).**

111. **Texas Family Code §§ 53.045, 56.03(b) (Vernon Supp. 2006).**

112. *In the Matter of F.G.*, MEMORANDUM, No. 13-06-216-CV, 2007 Tex.App.Lexis 4887, Juv. Law Rep. Vol. 21, No. 3, ¶ 07-3-8. (Tex.App.— Corpus Christi, 6/21/07).