JUVENILE LAW SEARCH & SEIZURE
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I. INTRODUCTION

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II. THE AUTHORITY

A. The Fourth Amendment, United State 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."

Neither the 4th Amendment nor Article I, Section 9, make any reference to a Achild@ or a Aminor.@ Both provisions talk of Athe people.@ Whether or not a child or a minor is a part of Athe 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 Aunreasonable@. To the courts what is Aunreasonable@ to an adult, may not be Aunreasonable@ to a child, especially in a school environment.

C. Expected Right of Privacy v. Intrusion

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

1. Casual Encounter

The first and least intrusive encounter is the casual encounter. A law enforcement officer does not violate the Fourth Amendment by merely approaching an individual on the street or in a public place and asking if the person is willing to listen to questions or by offering in evidence his voluntary answers to such questions.[2] An officer is entitled to approach an individual in public to ask questions without the encounter raising Fourth Amendment considerations. If the officer places no restraints on the person and seeks the person's voluntary cooperation through non-coercive questions, no "seizure"(Terry stop) or Aarrest@ takes place and the Fourth Amendment does not apply.[3]

2. Seizure (Terry Stop)

The second type of intrusion is the seizure or ATerry stop@. In order to justify an initial stop under both federal and state law, an officer must have specific, articulable facts which, in light of their experience and personal knowledge, together with inferences which arise from those facts, would warrant the detention.[4] This is a greater intrusion than the casual encounter. Probable cause is not required to justify an investigatory detention, since such a detention effects a lesser intrusion than does an arrest. Each case must be considered on its facts to determine whether the officer had "reasonable grounds to believe" the stop was justified.[5] Interestingly, the language is the same that is required by school administrators in justifying a search of a student at school.

3. Arrest

The third and most intrusive encounter is the arrest. An arrest can occur if physical force to restrain a suspect's liberty or freedom of movement occurs or when the restriction of movement is occasioned by the suspect's response to an officer's show of authority which would constitute a "constructive arrest."[6]

Texas law contains a statutory definition of "arrest." According to Art. 15.22, V.A.C.C.P., a person is arrested under state law when he has been "actually placed under restraint" or taken into custody. A constructive arrest can occur, if, from the perspective of the arrestee, there has been such a display of official authority that a reasonable person would not have felt that he was free to leave.[7]

Conversely, an individual is not in custody or under arrest when he acts on the "invitation, urging or request of a police officer, and [is] not being forced, coerced or threatened."[8]

When a defendant seeks to suppress evidence because of an illegal arrest that violates the federal or state constitution, the defendant bears the initial burden to rebut the presumption of proper police conduct. The defendant meets this burden by proving that police seized him without a warrant. Once the defendant establishes that a warrantless search or seizure occurred, the burden shifts to the State either to produce evidence of a warrant or to prove the reasonableness of the search or seizure pursuant to one of the recognized exceptions to the warrant requirement.[9]

III. THE EXCLUSIONARY RULE

A. The Federal Exclusionary Rule

The Supreme Court established the Exclusionary rule in Weeks v. United States, in which the Court held that evidence obtained in violation of the Fourth Amendment was inadmissible.[10] The Federal exclusionary rule applies 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 or Art. I, Sec. 9 of the Texas Constitution is inadmissible and excluded.[11]

B. 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."**[12]

C. The Juvenile Code Exclusionary Rule

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

> **"Evidence illegally seized or obtained is inadmissible in an adjudication hearing."**[13]

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)**[14]

D. 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.[15] 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.[16]

The Texas exclusionary rule applies to both private citizen and government agent actions and provides greater protections than its federal counterpart. It 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.[17] By adding Aor other person@ Texas has expanded the rule expounded by the federal courts.

The Family Code's exclusionary rule would appear to apply to both private citizens and government agent actions, much like the Texas exclusionary rule.

E. School Officials are Representatives of the State

The Supreme Court held that while conducting searches on school property, school officials act as representatives of the State and the constraints of the Fourth Amendment apply to their actions.[18]

IV. SCHOOL SEARCH

A. In Loco Parentis

In search and seizure, a main issue is the Aexpectation of privacy@ by the individual being searched or whose property is being searched. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *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.

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

However, recently the Supreme Court has backtracked a little regarding the expected right of privacy for schoolchildren. As Justice Thomas stated in ***Board of Education v. Earls:***

> ***A student=s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. See id., at 656. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See T._L._O., supra, at 350 (Powell, J., concurring) (AWithout 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@).***[19]

B. School Officials v. Law Enforcement Officers

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

Probable cause was necessary for searching the car of a man arrested for possession of beer on school property when police opened the door to check for more beer and smelled marijuana smoke in the car.[20]

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.[21]

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.[22]

C. The Balancing Test

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

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

The Supreme Court rejected the *In Loco Parentis Doctrine* and ruled that the Fourth Amendment prohibition against unreasonable searches and seizures applies to pupils in the public schools. The court stated:

> ***"In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and cannot claim the parents' immunity from the strictures of the Fourth Amendment."***[23]

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.

a. 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.

b. 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:

(1) Student's age, history, and school record;
(2) Prevalence and seriousness of the problem in the school to which the search is directed;
(3) Necessity for making the search without delay; and,
(4) 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.[24] Individualized suspicion is not a firm requirement for a search to be reasonable.

In ***DesRoches v. Caprio***, 156 F.3rd 571 (4th Cir. 1998), a teacher and principal determined that a search was necessary of all students who had been in a classroom from which a student=s shoes had disappeared during the lunch break. Each of the students consented to the search except DesRoches. After searching the students who consented and discovering nothing, the principal took DesRoches to the office, where he again refused to consent to the search. DesRoches was suspended for his refusal. The search of DesRoches was to be conducted only after all other students in the room consented to a search, and nothing had been found. Utilizing ***T.L.O.***, the court held that the search must be judged by whether it was reasonable at its inception. In that the search of DesRoches was reasonable because it began after all of the other students had been searched.[25]

2. ***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.

D. Special Needs

The Aspecial needs exception@ (less than probable cause) standard as set out by ***T.L.O.*** applies only to searches made by school authorities without the inducement or involvement of police. Generally, public officials can justify warrantless searches with reference to a "special need" [if] "divorced from the State's general interest in law enforcement."[26] For juveniles, Aspecial needs@ can also occur, with respect to a probation officer's warrantless search of a probationer's home[27]; a schools' random drug testing of student athletes,[28] and drug testing of all public school students participating in extracurricular activities.[29] 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."[30]

In ***Roe v. Strickland***, the 5th Circuit emphasized the importance of strict restrictions in Aspecial need@ cases.

> ***AWhere 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.@***[31]

E. Locker Searches

1. 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.[32] Without a legitimate expectation of privacy, the random search of a locker is not a search under the Fourth Amendment.

2. 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.[33]

F. 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 Areasonable@.

1. All Students

When it comes to mandatory drug testing of all students for drugs the Courts have said no.[34] 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.[35] 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.***.[36] However, be aware of ***Board of Education v. Earls***, a U.S. Supreme Court decision discussed below for an erosion of the reasonable cause standard in drug testing cases.

2. 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.[37] The Areasonableness@ of a search is judged by balancing the intrusion against the promotion of legitimate governmental interests. The Court held that student athletes have a less legitimate privacy expectation than regular students, for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct.

In 1998***,*** the 7th Circuit in ***Todd v. Rush County Schools,*** held that a suspicionless drug testing program of students voluntarily wishing to participate in extracurricular activities was consistent with the Fourth Amendment. The court looked at the government interest to be furthered in ***Vernonia,*** the health and well-being of athletes, and determined that the same interest applied to all students participating in extracurricular activities.[38]

On June 27, 2002, seven years after ***Vernonia,*** the Supreme Court re-visited the issue of suspicionless drug testing of students in extracurricular activities. In ***Board of Education v. Earls***,[39] 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...

Atesting students who participate in extracurricular activities is a reasonably effective means of addressing the School District=s legitimate concerns in preventing, deterring, and detecting drug use. While in Vernonia there might have been a closer fit between the testing of athletes and the trial court=s finding that the drug problem was Afueled by the >role model= effect of athletes= drug use,@ such a finding was not essential to the holding. 515 U.S., at 663; cf. id., at 684C685 (O=Connor, J., dissenting) (questioning the extent of the drug problem, especially as applied to athletes). Vernonia did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school=s custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District=s interest in protecting the safety and health of its students.@[40]

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 A**reasonableness**@ of the program in the context of the public school=s custodial responsibilities.

G. 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.

1. Sniffs of Property

A person's reasonable expectation of privacy does not extend to the airspace surrounding that person's property.[41]

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.[42] There is no reasonable expectation of privacy in the odors emanating from inanimate objects such as cars or lockers.[43]

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.[44]

2. Sniffs of Children

A sniff of a child's person by a dog is a "search" and the reasonable suspicion standard applies.[45]

The Court in ***Horton vs. Goose Creek***, reasoned that the intensive smelling of people, even if done by dogs, is indecent and demeaning.[46] 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.[47]

Some Courts have prevented School Districts from using dogs to sniff both students and automobiles.[48] 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.

H. Strip Searches

Strip searches have almost universally been disapproved. While the reasonableness of scope standard articulated in ***T.L.O.*** stops short of forbidding strip searches, it warns against them. Justice Stevens, wrote in ***T.L.O.***:

"one thing is clear under any standard--the shocking strip searches that are described in some cases have no place in the schoolhouse. . . . To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm."[49]

In 1993, the Seventh Circuit held:

"a nude search of a student by an administrator or teacher of the opposite sex would obviously violate [the T.L.O.] standard. Moreover, a highly intrusive search in response to a minor infraction would similarly not comport with the sliding scale advocated by the Supreme Court in T.L.O."[50]

The Seventh Circuit has further stated that:

"as the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search."[51]

In ***Oliver by Hines et al. V. McClung,*** the federal district court in the Northern District of Indiana held that strip searching seventh grade girls to recover $4.50 allegedly stolen was not reasonable under the circumstances. Further, the principals and teachers involved were not entitled to qualified immunity.[52]

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.[53]

I. The Juvenile Justice Alternative Education Schools

Although some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, the Fourth Amendment imposes no irreducible requirement of such suspicion. As a result, suspicionless searches have been permitted in some circumstances.[54]

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.[55] 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 Aspecial need@ searches in airport searches,[56] courthouse security measures,[57] license and registration vehicle stops,[58] and border-patrol checkpoints.[59] Under the Aadministrative@ or Aspecial 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.[60]

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 37.0078). 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.[61] (emphasis added)

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

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

> ***School checks are a reasonable intrusion into student probationers' privacy because they are attending a public school, and the need to protect the other students justifies this intrusion. See Tamez, 534 S.W.2d at 692. Given the amount of time participants spend in school, the only way to monitor a probationer's compliance with the program designed for his rehabilitation is to monitor school attendance and performance. Id. School searches present special circumstances under which neither probable cause nor a warrant may be required. See New Jersey v. T.L.O., 469 U.S. 325, 340-41, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985); Shoemaker v. State, 971 S.W.2d 178, 181-82 (Tex. App.--Beaumont 1998, no pet.). The legality of such a search depends on its reasonableness [*10] under all the circumstances surrounding the search. See T.L.O. at 341;***[62]

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.

V. 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. Either one by him or herself can not waive the child=s right. The waiver of a child=s right to remain silent, trial (either with or without a jury), confrontation of witnesses, all must be agreed to by the child and the attorney. The waiver must 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.

VI. CONSENT

So what does the Family Code say about the consent of a child. The Family Code does not address consent specifically. It discussed 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 constitutional rights by the courts. The protections afforded by the Fourth Amendment and Article I, ' 9 of the Texas Constitution may be waived by an individual consenting to a search.[63] The consenting of a search is a waiver of an individual=s rights against unreasonable search and seizure. A child can waive a constitutional right as provided by '51.09 of the Texas Family Code.

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.[64]

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.[65]

2. Search Must Not Exceed Scope of Consent

The scope of a consensual search will be limited by the terms of its authorization.[66]

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.[67] The third party may consent even if that person has equal authority over and control of the premises or effects.[68]

B. Consent by Children

1. 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."[69]

2. Coercive Atmosphere

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.[70] 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. A Child=s Consent To Search

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

Actions (arrests and searches) that occur prior the initiation of juvenile proceedings have to comply with the provisions of the Family Code[71]

The right against unreasonable search and seizure under both the Fourth Amendment and Article I Section 9, applies to juveniles.[72] 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.[73]

D. Random Searches as a Condition of Probation

1. 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.[74]

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.

2. 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.***[75], the juvenile court's probation order mandated that the juvenile

> **"submit to search and seizure from law enforcement for detection of drugs, weapons or other illegally possessed items."**

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

A.C.C.-s probation officer searched his backpack and seized drug paraphernalia. The officer filed a delinquency charge against the minor, who moved to suppress the evidence. The Juvenile Court, denied the motion and the Utah Court of Appeals reversed. Petitioner-State, sought certiorari review. The Utah Supreme Court concluded that the minor had no reasonable expectation of privacy regarding the drug paraphernalia seized by the probation officer. The minor lacked such an expectation of privacy because the express terms of his probation permitted random searches and invalidating such terms would be inconsistent with the fundamental objective of Utah's juvenile probation system. Additionally, the juvenile court's greater power to place the minor in secure confinement and negate his right to privacy included the lesser power to release him into society subject to a probation condition authorizing his belongings to be searched randomly.

The reasoning of the court seemed to be that (1) by notifying the juvenile that he was subject to search at anytime, his reasonable expectation of privacy would be diminished, and (2) since the juvenile court could have committed him, where he would have been subject to search at anytime (while in lockup), the court, could order a less restrictive disposition, but include a condition the court could have ordered had the restriction been greater. Interesting!

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, 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 _____, 2003, 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 _____, 2003, 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 _____, 2003.

_____
Judge Presiding

1. ***Vasquez v. State***, 739 S.W.2d 37 (Tex.Cr.App. 1987) en banc.
2. ***Florida v. Royer***, 460 U.S. 491, 497-502, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); ***Terry v. Ohio***, 392 U.S. 1, 13, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); ***Francis v. State***, 896 S.W.2d 406, 408 (Tex. App.-Houston [1st Dist.] 1995), pet. dism'd, 922 S.W.2d 176 (Tex. Crim. App. 1996); ***State v. Simmang***, 945 S.W.2d 219, 222 (Tex. App. -San Antonio 1997, no writ) 103 S.Ct. 1319, 1324 (1983).
3. ***United States v. Withers***, 972 F.2d 837, 841 (7th Cir. 1992).
4. ***Terry v. Ohio***, 88 S.Ct.1868 (1968); ***Anderson v. State***, 701 S.W.2d 868 (Tex.Cr.App. 1985).
5. ***Alabama v. White***, 496 U.S. 325, 110 S.Ct. 2412 (1990), ***Adams v. Williams***, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).
6. ***California v. Hodari D.,*** 111 S.Ct. 1547 (1991).
7. ***Shelby v. State***, 888 S.W.2d 231, (Tex.App. BHouston [1st Dist.] 1994).
8. ***Chambers v. State***, 866 S.W.2d 9, 19 (Tex. Crim. App.1993), cert. denied, 511 U.S. 1100, 114 S. Ct. 1871, 128 L. Ed. 2d 491 (1994).
9. ***McGee v. State,*** 23 S.W.3d 156, 161, 2000 Tex. Lexis4071 (Tex. App. BHouston [14th Dist.] 2000).
10. ***Weeks v. United States***, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).
11. ***Mapp v. Ohio***, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).
12. **Art. 38.23, V.A.C.C.P.**
13. **Texas Family Code '54.03(e).**
14. **Texas Family Code '51.01(6).**
15. ***United States v. Jacobson***, 466 U.S. 109, 104 S.Ct. 1652 (1984).
16. ***Lustig v. United States***, 338 U.S. 74, 69 S.Ct. 1372 (1949).
17. **Art. 38.23(a), V.A.C.C.P.**
18. ***New Jersey v. T.L.O.***, 469 U.S. 325, 336-37, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).
19. ***Board of Education v. Earls***, 122 S. Ct. 2559; 153 L. Ed. 2d 735; 2002 U.S. LEXIS 4882; 70 U.S.L.W. 4737; (June, 2002).
20. ***Sloboda v. State***, 747 S.W.2d 20 (Tex.App. --San Antonio 1988, no writ).
21. ***Wilcher v. State***, 876 S.W.2d 466 (Tex.App. --El Paso 1994) 91 Ed.Law Rep. 719.
22. ***Salazar v. Luty***, 761 F.Supp. 45 (S.D.Tex. 1991).
23. ***New Jersey v. T.L.O.,*** 105 S.Ct. 733, 469 U.S. 325, 83 L.Ed.2d 720 (1985).
24. ***Cornfield by Lewis v. Consolidated High School District No. 230***, 991 F.2d 1316, 7th Cir. (Ill. 1993).
25. ***DesRoches v. Caprio***, 156 F.3rd 571 (4th Cir. 1998).
26. ***Ferguson v. City of Charleston***, 532 U.S. 67, 79, 149 L. Ed. 2d 205, 121 S. Ct. 1281 (2001)
27. ***State of Utah in the Interest of A.C.C.*** 2002 UT 22, 44 P.3d 708 (March, 2002).
28. ***Vernonia School Dist. 47J v. Acton et ux.*****,** 515 U.S. 646, 651-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).
29. ***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).
30. ***O'Connor v. Ortega***, 480 U.S. 709, 725-26, 94 L. Ed. 2d 714, 107 S. Ct. 1492.

31. ***Roe v. Strickland,*** 299 F.3d 395, 406 (5th Cir. 2002).
32. ***In re Isaiah B.***, 500 N.W.2d 637 (1993).
33. ***Shoemaker v. State***, 971 S.W.2d 178 (Tex.App.–Beaumont 1998).
34. ***Anable v. Ford***, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).
35. ***Anable v. Ford***, 653 F.Supp. 22, 663 F.Supp. 149 (W.D. Ark. 1985).
36. ***Odenheim v. Caristadt - East Rutherford Regional School District***, 510 A.2d 709 (N.J. Super Ct. 1985).
37. ***Vernonia School Dist. 47J v. Acton et ux.*,** 515 U.S. 646, 651-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).
38. ***Todd v. Rush County Schools,*** 133 F.3d 984 (7th Cir. 1998).
39. ***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).
40. ***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).
41. ***Horton v. Goose Creek Ind. School Dist.***, 690 F.2d 470 (5th Cir. 1982).
42. ***Horton v. Goose Creek Ind. School Dist.***, 690 F.2d 470 (5th Cir. 1982).
43. ***Jennings v. Joshua ISD***, 877 F.2d 313 (5th Cir. 1989).
44. ***Zamora v. Pomeroy***, 639 F.2d 662 (10th Cir. 1981).
45. ***Horton v. Goose Creek Ind. School Dist.*,** 690 F.2d 470 (5th Cir. 1982).
46. ***Horton v. Goose Creek Ind. School Dist.*,** 690 F.2d 470 (5th Cir. 1982).
47. ***Horton v. Goose Creek Ind. School Dist.*,** 690 F.2d 470 (5th Cir. 1982).
48. ***Jones v. Latexo Independent School District***, 499 F.Supp. 223 (E.D.Tex. 1980).
49. ***New Jersey v. T.L.O.,*** 105 S.Ct. 733, 469 U.S. 325, 83 L.Ed.2d 720 (1985).
50. ***Cornfield by Lewis v. Consolidated High School Dist. No. 230***, 991 F.2d 1316, 1320 (7th Cir. 1993).
51. ***Id.*** at 1321.
52. ***Oliver by Hines et al. v. McClung***, 919 F.Supp 1206 (N.D.Ind. 1995).
53. ***Widener v. Frye***, 809 F.Supp. 35 (S.D.Ohio 1992), aff'd 12 F.3d 215.
54. ***T. L. O.,*** 469 U.S. at 342, n.8 (internal quotations and alterations omitted).
55. ***U.S. v. $ 124,570 U.S. Currency***, 873 F.2d 1240, 1243 (9th Cir. 1989).
56. ***Commonwealth v. Vecchione,*** 327 Pa. Super. 548, 476 A.2d 403 (1984).
57. ***McMorris v. Alioto***, 567 F.2d 897 (9th Cir. 1978).
58. ***Commonwealth v. Blouse,*** 531 Pa. 167, 611 A.2d 1177 (1992).
59. ***United States v. Martinez-Fuerte,*** 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).
60. ***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).
61. **Texas Administrative Code, Title 37, Part 11, Chapter 348, Subchapter A, Rule '348.110 (g)**
62. ***In The Matter of D.D.B.,*** 2000 Tex. App. Lexis 2222 (Tex. App. –Austin) 2000.
63. ***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.

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

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

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

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

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

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

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

71. ***In Re R.E.J.***, 511 S.W.2d 347, (Tex.Civ.App. [1st Dist.] 1974), reh.den. 1974, second reh. den. 1974.

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

73. **Texas Family Code '51.09 (1)(4).**

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

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