

**CONFESSIONS
AND
JUVENILE PROCESSING
OFFICES**

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- @ The Juvenile Arrest Process; 14th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2001.**
- @ Juvenile Law 2000 Update; General Practice Seminar, Sponsored by the Mexican American Bar Association, Honolulu, Hawaii, June, 2000.**
- @ Juvenile Law 2000 Update; 37th Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, May, 2000.**
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- @ Juvenile Problems (Observations & Suggestions); 36th Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, May, 1999.**
- @ Juvenile Criminal Law and School Law Issues; 2nd Annual Bench-Bar Conference, co-presented with Nan P. Hundere, Sponsored by the San Antonio Bar Association and San Antonio Bar Foundation, Austin, Texas, March, 1999.**
- @ A Dedication to Volunteers In Probation: Volunteers in Probation Awards Banquet, Sponsored by the Bexar County Juvenile Probation Department, San Antonio, Texas, March, 1999.**
- @ Director; Juvenile Law Institute; Sponsored by the San Antonio Bar Association & the 73rd District Court, San Antonio, Texas, August, 1998.**
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- @ New Developments In Juvenile Law; 33rd Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, March, 1996.**
- @ Progressive Sanctions; 9th Annual Juvenile Law Conference, Sponsored by the Juvenile Law**

Section of the State Bar of Texas, Austin, Texas, February, 1996.

PUBLICATIONS

- @ **Doing the Right Thing.** The San Antonio Defender, Volume II, Issue 6, December 2000. An article regarding the rights of a juvenile during a confession.
- @ **Doing the Right Thing.** State Bar Section Report Juvenile Law, Volume 14, Number 4, December 2000. An article regarding the rights of a juvenile during a confession.
- @ **School Search and Seizure.** State Bar Juvenile Law Section Report, Volume 13, Number 2, June 1999. A legal article updating legal issues regarding the search of students in school, including consent, drug testing and dog sniffing.
- @ **The New Juvenile Progressive Sanctions Guidelines.** Texas Bar Journal, Volume 59, Number 5, May, 1996. A legal article analyzing the New Juvenile Progressive Sanction Guidelines.
- @ **Juvenile Punishments and the New Progressive Sanction Guidelines.** Voice For The Defense, Volume 24, Number 10, December, 1995. A legal article introducing the New Progressive Sanction Guidelines in the Juvenile Code.
- @ **Juvenile Punishments and the New Progressive Sanction Guidelines.** State Bar Juvenile Law Section Report, Volume 9, Number 5, December 1995. A legal article introducing the New Progressive Sanction Guidelines in the Juvenile Code.
- @ **We Must Be Conscientious In Our Juvenile Reform.** State Bar Juvenile Law Section Report, Volume 8, Number 3, September 1994. An article on being careful and conscientious in our zeal to reform juvenile law.
- @ **A Guide To The Bexar County Juvenile Court System.** September, 1994. A handbook for the lay-person, explaining terminology and procedures utilized by the juvenile court system in Bexar County.
- @ **School Searches.** Texas Bar Journal, Volume 57, Number 8, September, 1994. A legal article regarding the search of students in school, including drug testing and dog sniffing.
- @ **The Demise of In Loco Parentis.** Voice For The Defense, Volume 23, Number 7, September, 1994. A legal article high-lighting the change in search procedure by school personnel.
- @ **The Demise of In Loco Parentis.** State Bar Juvenile Law Section Report, Volume 8, Number 2, June 1994. A legal article high-lighting the change in judicial opinion regarding searches by school personnel.
- @ **Juvenile Law - Do Juvenile Detention Hearings Consider Rights of Juveniles?** Texas Bar Journal, Volume 56, Number 11, December, 1993. A legal article discussing the Family Codes shortcomings regarding Detention Hearings.
- @ **Balancing The Scales: A Look at the Over Representation of Minority Youth in the Texas Juvenile Justice System.** 1992, A report by the Office of the Governor, Criminal Justice Division.
- @ **The Juvenile Detention Hearing.** State Bar Juvenile Law Section Report, Volume 6, Number 3, September, 1992. A legal article discussing the Family Codes provision regarding Detention Hearings.

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CONFESSIONS AND JUVENILE PROCESSING OFFICES

by Pat Garza

I. INTRODUCTION

In the area of statement taking and confessions the legislature enacted a number of statutes which pertain exclusively to children. A child is expected to be treated differently than an adult and the courts expect law enforcement officers to know the difference. While a child may be taken into custody with less protections and less safeguards than an adult, once that child is in custody, he accorded special protections and safeguards that an adult could only dream about. Without a thorough knowledge of these provisions a law enforcement officer who attempts to take a child's confession will be as successful as trying to walk through a mud puddle wearing snow shoes. You can certainly do it, but things could get pretty messy.

Remember, the better a parent teaches his child to respect and cooperate with authority the more that child needs the protections of the Family Code. The legislature and the courts in recognizing the tenuous predicament that children are placed in, have attempted to protect them in their relationships with law enforcement. The provisions of the code should be treated as a road map, drawn by the legislature and laid out by the courts, to assist law enforcement and lawyers as they travel through the labyrinth known as juvenile confessions.

II. PREREQUISITES FOR JUVENILE STATEMENTS

A. Must be a Child

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

(2) "Child" means a person who is:

(A) ten years of age or older and under 17 years of age; or

(B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

A child under this section is any person who is under 17 years of age while being questioned. If the person being questioned is 17 years old, but is being investigated for an offense committed while younger than 17, the person is still a child and Section 51.095 applies. If the person was 17 years old when questioned and is being questioned about an offense committed while 17, the person is not considered a child and Section 51.095 does not apply, but Article 38.22 of the Code of Criminal Procedure does.¹

If the suspect's age cannot accurately be determined before questioning begins, the

safer course of action is to conduct the interrogation under the protections of ' 51.095. If a statement is taken in compliance with ' 51.095, it will also comply with the Code of Criminal Procedure Article 38.22. On the other hand, if the officer questions a person (who is a child) under adult rules, there is a substantial risk that the statement may be inadmissible in evidence under ' 51.095.²

B. Must Be Voluntary

All statements which the State attempts to use against a child (whether in custody or out, written or oral) must be voluntary. If the circumstances indicate that the juvenile defendant was threatened, coerced, or promised something in exchange for his confession, or if he was incapable of understanding his rights and warnings, the trial court must exclude the confession as involuntary.³ A statement is also not voluntary if there was "*official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.*"⁴ In judging whether a juvenile confession is voluntary, the trial court must look to the totality of circumstances.⁵

1. Totality of the Circumstances

The Supreme Court in *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560 (1979), noted that the courts are required to look at the totality of the circumstances to determine whether the government has met its burden regarding the voluntariness of a confession. It then applied the same standard to juveniles:

*The totality approach permits B indeed, it mandates B inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.*⁶

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

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

*waive her constitutional privilege against self-incrimination in the absence of the presence and guidance of a parent or other friendly adult, or of an attorney.*⁷

2. Factors

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

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

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

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

III. DETERMINING CUSTODY

Section 51.095(b),

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

(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or⁸

The code section specifically excludes statements given, either oral or written, from adherence to the provisions contained in ' 51.095 when the statements is not obtained pursuant to custodial interrogation. The only requirement for a statement which is not the result of custodial interrogation, is that the statement be voluntary (as discussed above). **Custody** is the switch that lights up the provisions of ' 51.095. Without custody you have no ' 51.095 requirements, no magistrate requirements, no Miranda requirements, and no juvenile processing office requirements. Whether the child is in custody is paramount in preparing the direction of your attack or defense regarding the admissibility of a child's statement.

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution impose restrictions on when a person may be taken into custody for a criminal offense. As we all know, probable cause is required for an arrest of an adult or for taking an adult into custody. For a temporary stop to investigate, the less stringent reasonable suspicion standard is sufficient.

These constitutional safeguards do not apply exclusively to adults, they are applicable to juvenile offenders as well.⁹ If that was it, this would be easy and you would be reading a paper on adult confessions. While constitutional safeguards apply to juveniles, they apply to a different degree. To better understand where the juvenile stands with respect to arrest, let's review the arrest of an adult.

A. Types of Arrest

1. Physical Force

When physical force to restrain a suspect's liberty or freedom of movement occurs.

2. Show of Authority

When it comes to an arrest of a juvenile, learning about this type of arrest requires the most focus. 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.¹⁰ It can also occur when the restriction of movement is occasioned by the suspect's response to an officer's show of authority.¹¹

B. Custody Defined by the Family Code

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

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

The paramount question in determining the admissibility of a juvenile's statement is whether or not the child was in custody when he gave the statement. If the child was not in custody, the requirements of ' 51.09 and ' 51.095 do not apply.¹² A law enforcement officer who takes a child to the police station to obtain that child's statement may or may not be taking that child into custody. By notifying the child (and hopefully his parent) that the child is not in custody and free to leave at any time and returns the child home when the

statement is completed, may be able to avoid the requirements of the section. The officer may have probable cause to arrest and the authority to arrest, yet still not have the child in custody. Without custody the statement may be used in court without the ' 51.095 requisites. However, even in the absence of custody, due process may be violated by confessions that are not voluntarily given.¹³

C. Custodial Interrogation

1. Custody

In *In the Matter of V.M.D.*, the Fourth Court of Appeals in San Antonio stated that any interview of one suspected of a crime by a police officer will necessarily have coercive aspects to it, but will not necessarily be considered custodial. Being the focus of a criminal investigation, or even having probable cause to arrest a person, also does not (necessarily) make a law enforcement contact custodial interrogation.¹⁴ A person is considered in custody only if, based upon the objective circumstances, a **reasonable person** would believe she was restrained to the degree associated with a formal arrest [emphasis added].¹⁵ Each case must be reviewed on its own merits and under the totality of the circumstances test.

a. By Law Enforcement

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

A statement is not elicited as a result of Acustodial interrogation@if the statement is not taken while the defendant is in custody. Thus, an unwarned oral statement will be admissible if made by a person who voluntarily comes to the police station.¹⁶

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

Practical reasons dictate that 52.02(b) should not be strictly applied to situations where police officers take a child to the station for questioning. When an officer takes a juvenile to the station for questioning, the officer does not have probable cause to believe that the juvenile has committed in a crime. At that point, what is the officer to tell the child's parent? Here, the officers testified that they told the child's parent they were taking him to the station for questioning. That was the truth. They did not charge him until he gave a statement implicating himself in the crime. We would hold that the mandate of section 52.02(b) was satisfied in this case.¹⁷

In *In the Matter of S.A.R.*, the Court held that a juvenile was in police custody at the time she gave her written statement when she was taken by four police officers

in a marked police car to a ten-by-ten office at the police station, informed that she was a suspect for an attempted capital murder and a capital murder and was photographed and fingerprinted while there. The Court held that a reasonable person would believe their freedom of movement had been significantly curtailed.¹⁸

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

b. By School Administrator

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

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

The court affirmed, holding that the child's interrogation by the assistant principal did not invoke his Miranda rights, and the statutory procedures for taking a juvenile into custody did not apply until appellant was actually arrested by the law enforcement officer.¹⁹

2. Interrogation

a. By Law Enforcement

The United States Supreme Court defined custodial interrogation in *Rhode Island v. Innis*. The court stated that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other

than those *normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect. ... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.²⁰

In *Roquemore v. State*, a police officer's reading of the Miranda warnings was not considered a statement designed to illicit an incriminating response and therefore did not constitute an interrogation. The officer had placed the appellant into the squad car, told the appellant that he was under arrest, and read him Miranda warnings. After hearing his Miranda warnings, the appellant said that he wanted to cooperate and then made the oral incriminating statements. The oral statements were not the result of any questions or conduct by the officer. The court found that the appellant made the statements spontaneously and voluntarily while en route to the juvenile division.²¹

b. By Probation Officer

In *Rushing v. State*, a Juvenile Probation Officer, was assigned to Rushing at the McLennan County Juvenile Detention Center where Rushing was being held. Part of the PO's regular duties was to visit with the juveniles on his case load, almost on a daily basis, to inform them of the status of their cases such as upcoming court proceedings, and to deal with any disciplinary or other problems the juveniles might be having. The PO testified at trial that during some of his conversations with Rushing, the juvenile volunteered highly incriminating statements describing the crime and Rushing's role in it. The issue under common law or the Texas statutes was whether Rushing was being "interrogated" by the Probation Officer when Rushing incriminated himself. The court found that the record reflected that the questions the PO may have asked Rushing concerned routine custodial matters such as how Rushing was getting along in detention, or whether Rushing had any questions about the status of his case amounted to questions, "*normally attendant to arrest and custody*," and was not "interrogation."²²

D. The Reasonable Juvenile Standard

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

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

of complying with Section 51.095. More importantly the court created a new standard for the determination of custody for a juvenile. It held that the objective standard for determining when a child is in custody must take into account the age of the child. :

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

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

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

After discussing the development of a reasonable juvenile standard in other jurisdictions, the Austin court adopted a standard which expressly provides for consideration of age under the reasonable-person standard. 993 S.W.2d at 288. I agree with the approach adopted in In re L. M. Accordingly, I would adopt the following standard for determining whether a juvenile is in custody,: "whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted." Id.; see also, Jeffley, 38 S.W.3d at 855 (adopting "reasonable child" standard for determining whether a juvenile is in custody).²³

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

IV. WRITTEN CONFESSIONS

Before the 1996 amendments to ' 51.095, in order to take a written statement from a child who was in custody the child would have to be brought before a magistrate and that magistrate had to

go over a very long detailed list of warnings prior to allowing the questioning of the child. The warnings included traditional Miranda warnings and warnings regarding Certification and Transfer and Determinate Sentencing offenses. The legislature simplified the provision.

' 51.095. Admissibility of a Statement of a Child

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

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

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

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

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

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

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

(B) and:

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

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

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

(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and

contents of the statement and has knowingly, intelligently, and voluntarily waived these rights;

The statute still requires an officer taking the child before a magistrate, prior to the taking of a statement, but only the Miranda warnings are necessary.²⁴ It no longer requires the detailed warnings related to certification and determinate sentencing offenses.

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

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

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

...that where, as here, the making of the new statement originated with Vega, and where that statement meets the admissibility requirements set forth in TEX. FAM. CODE ' 51.095, the statement is admissible even though the juvenile's attorney does not join in waiving the juvenile's rights.²⁵

B. The Neutral Magistrate

1. Magistrate Defined

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

Art. 2.09. Who Are Magistrates

**Each of the following officers is a magistrate within the meaning of this Code:
The justices of the Supreme Court, the judges of the Court of Criminal Appeals,**

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

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

2. Referee as Magistrate

The Juvenile Referee is not a magistrate as defined by Article 2.09 of the Texas Code of Criminal Procedure. In 1999, the legislature added ' 51.095(e), which allows referees to perform the duties of the magistrate if approved by the juvenile board in the county where the statement is being taken.²⁶

3. The Warnings

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

- (i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;**
- (ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;**
- (iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and**
- (iv) the child has the right to terminate the interview at any time;**

These are the same warnings required by the United States Supreme Court, in

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). The difference for a child is that these warnings must be given by a magistrate, whereas, for an adult the warnings can be given by either a magistrate or a law enforcement officer.

The magistrate must be sure that he gives the proper warnings. In *Diaz v. State*, the magistrate misstated the maximum range of punishment. He told sixteen year old Daniel Diaz that he "might get up to a year in confinement or up to a \$ 10,000 fine if he were tried as an adult." The actual maximum prison term in the adult system is up to 99 years for aggravated assault with a deadly weapon. Daniel was certified to stand trial as an adult, and the trial court overruled his objection to the introduction of his confession into evidence. Daniel was convicted on two counts of aggravated robbery and assessed two concurrent fifteen year sentences. The appeals court found that defendant's decision to give a statement following the misstatement regarding the possible punishment, rendered that decision involuntary.²⁷ The child's age at the time of his statement further emphasized its involuntary nature in viewing the totality of the circumstances. Since the statement was undoubtedly inculpatory, the court could not conclude that the admission of the statement did not contribute to his conviction.

Once the child has been given proper warnings by a magistrate, the child may not be questioned unless he or she has knowingly, intelligently, and voluntarily waived the rights he or she was informed of by the magistrate's warnings. The waiver must be made before and during the making of the statement.²⁸

4. Signing the Statement

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

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

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

The statement must be signed in the presence of the magistrate. It must be signed with no law enforcement officer or prosecuting attorney present. A bailiff may be allowed, but he may not carry a weapon in the presence of the child.

5. Findings of the Magistrate

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

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

Once the statement has been reduced to writing, it is the Magistrate, through his discussions with the child (outside the presence of the officer) who must be convinced that the child understands the nature and content of the statement. He must be convinced that the child is voluntarily given up his rights as he himself has explained them to him. The magistrate would then have the child sign the statement in his presence. The magistrate then certifies that he has examined the child independent of any law enforcement officer or prosecuting attorney, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights.²⁹

If the juvenile tells the magistrate that he or she wishes to remain silent, then there should be no questioning. If the child indicates that he or she wishes to consult with an attorney prior to questioning, then there must be no questioning until the juvenile has consulted with counsel. If the magistrate is unable to provide counsel for a juvenile who requests an attorney and cannot afford one, then there should be no questioning of the juvenile at all.³⁰

C. Parental Presence

There is no requirement that the Magistrate notify the juvenile's parent of his interrogation when the juvenile does not request the parent's presence. In *Glover v. State*, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935 (Tex.App. B Houston [14th Dist.] 1996), the court stated the following:

We first note that the Family Code does not require that a juvenile be allowed to speak with a parent or guardian prior to making a statement. See TEX. FAM. CODE ANN. ' ' 51.09 (Vernon 1986 & Supp. 1996). Also, Texas courts have held that a juvenile's request to speak to a parent is not a per se invocation of that individual's Fifth Amendment rights. In the Interest of R.D., 627 S.W.2d 803, 806 (Tex. App.--Tyler 1982, no writ). Here, a magistrate gave appellant all the proper warnings before he made his statement.³¹

While ' 51.095 does not require parental presence, be aware that ' 52.025(c) entitles the child to have a parent present in the juvenile processing office,³² and all interrogations and confessions conducted while in custody shall be done in a juvenile processing office.³³ (See Part VI, Section B, Subsection 3, of this paper)

V. ORAL CONFESSIONS

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

' 51.095. Admissibility of a Statement of a Child

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

(2) the statement is made orally and the child makes a statement of facts or circumstances that are found to be true and tend to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;

(3) the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;

(4) the statement is made:

(A) in open court at the child's adjudication hearing;

(B) before a grand jury considering a petition, under Section 53.045, that the child engaged in delinquent conduct; or

(C) at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing under Section 54.01; or

A. Statement Leads to Inculpatory Physical Evidence

Section 51.095(a)(2) allows for the admission of an oral statement if the statement is of facts or circumstances that are found to be true and tend to establish the child's guilt. This most commonly occurs when the child, while giving a statement to an officer, directs the officer to some inculpatory, physical evidence. It may be a weapon, or contraband, or any item that incriminates the child.

1. Must Lead to Evidence

An oral statement which inculpates the child or only corroborates that an offense occurred is not enough. It must lead to evidence that corroborates the statement that was unknown or undiscovered prior to the statement. In *Dixon v. State*, the court of appeals reversed a case, ruling that the admission of appellant's statement "*we stole a car and had an accident*" made to a nurse while he was in custody, recovering in the hospital, was prejudicial error.³⁴

2. Must Have Miranda Warnings

Although this section does not on its face require Miranda warnings before an oral confession leading to other evidence of the crime is admissible, the Court of Criminal Appeals in *Meza v. State*, held that the lack of such a requirement does not affect the applicability of Miranda.³⁵

*We hold that Sec. 51.09(b)(2) [now 51.095(a)(2)] does not dispense with Miranda warnings, and thus is constitutional in the face of such a challenge.*³⁶

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

B. Res Gestae Statements

Section 51.095(a)(3) allows for the admission of statements which are res gestae of the offense or arrest. Res gestae statements are statements that are made during or very near in time to the commission of the offense or the arrest. The theory is that the statements should be admitted into evidence because they are particularly reliable, since they were made without thought or reflection by the person making the statement, but instead were made because of the excitement of the moment. Courts sometimes speak of res gestae statements as excited utterances. It follows that a res gestae statement is not one that is made in response to official interrogation, since the questions destroys the spontaneity that is an essential ingredient of the statement.³⁷

As mentioned earlier, in *Roquemore v. State*, a police officer's reading of the Miranda warnings was not a statement designed to illicit an incriminating response and therefore did not constitute an interrogation.³⁸

C. Judicial Confession

Section 51.095(a)(4) allows for the admission of statement given by a child in open court at the child's adjudication hearing or before a grand jury considering a petition, under Section 53.045 (determinate sentence) or at a preliminary hearing held in compliance with this code (other than at a detention hearing³⁹).

D. Used For Impeachment

Section 51.095(b)(2) allows for the admission of a statement, whether or not it stems from custodial interrogation, if it is voluntary and has a bearing on the credibility of the child as a witness.⁴⁰ A child's (otherwise inadmissible) prior statement can be used for impeachment purposes if the child testifies in a juvenile proceeding and makes a statement that is inconsistent with that prior statement. This would be important in situations where the child has made prior statements that do not appear to be admissible for non-compliance

with the Family Code, and the child is considering testifying in the case contrary to the prior statements.

Section 54.01(g) provides:

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

Are ' 51.095(b)(2) and ' 54.01(g) in conflict? Can they be resolved? One appears to allow for the admission of a statement (whether or not the statement is from custodial interrogation) for the purpose of impeachment, while the other appears to not allow any statement given during a detention hearing to be used at any other hearing. So what happens if a child makes a statement in a detention hearings, then at the adjudication hearing takes the stand and contradicts the previous statement? A closer reading of ' 51.095(b)(2) may provide the answer.

Section 51.095(b)(2) provides:

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

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

While ' 54.01(g) specifically prohibits the use of a statement made at the detention hearings, ' 51.095(b)(2) does not specifically allow it. Section 51.095(b)(2) states that nothing in ' 51.09 or ' 51.095 can be used to preclude the admission of the statement being used to impeach. Let me put it another way:

...if otherwise admissible, this section and Section 51.09 do not preclude the admission of a statement made by the child if:

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

The two provisions are not in conflict. One provision deals with the non-admissibility of a statement, while the other deals with the non-applicability of a provision to a certain type of statement. It would appear therefore, that statements made at a detention hearing could not be used for impeachment at a later adjudication hearing.

E. Tape Recorded Custodial Statements

Section 51.095(a)(5) allows for the admission of an oral statement if the statement is

tape recorded (including video).

Section 51.095(a)(5) provides:

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

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

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

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

Section 51.095 (a)(5) provides for the admissibility of an oral statement if when the child is in a detention facility or other place of confinement or in the custody of an officer the statement is recorded and the child is given his warnings, as stated above (Miranda Warnings), *on the recording* and it appears that the waiver is made knowingly, intelligently, and voluntarily.⁴¹ The warnings still have to be given by a magistrate. The attorney representing the child must be given a complete and accurate copy of each recording not later than the 20th day before the date of the proceeding.

VI. POLICE DETENTION AND RELEASE DECISIONS

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

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

Once a law enforcement officer has taken a child into custody he is given very strict guidelines by the Family Code as to how he can proceed and a juvenile's statement will be inadmissible for violations of section ' 52.02(a) notwithstanding the fact that the statement was otherwise admissible under section ' 51.095.⁴² Every person who takes a child into custody must fully comply with ' 52.02 and ' 52.025 of the Family Code.

A. Release Or Delivery to Court.

52.02. Release or Delivery to Court

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

(1) release the child to a parent, guardian, custodian of the child, or

other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;

(2) bring the child before the office or official designated by the juvenile court if there is probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision;

(3) bring the child to a detention facility designated by the juvenile court;

(4) bring the child to a secure detention facility as provided by Section 51.12(j);

(5) bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or

(6) dispose of the case under Section 52.03.

The statute has three requirements once the juvenile is taken into custody: 1) the officer must do one of six enumerated acts; 2) without unnecessary delay; *and* 3) without first taking the child to any place other than a juvenile processing office. By the clear language of the statute, it is not merely a question of whether the officer does one of the six enumerated options without unnecessary delay, but also whether he took the juvenile to any other place first.⁴³

1. **Comer v. State**

Comer v State, 776 S.W.2d 191 (Tex. Crim. App. B1989).

Comer was arrested and taken to a magistrate for the Section 51.095 warnings. He was then questioned at the police station for almost two hours, where he confessed to murder. Upon return to the magistrate, he signed the written confession. The Court of Appeals upheld the admission of the written confession into evidence in the criminal trial on the grounds that compliance with Section 51.095 was all that was required.

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

...once he has a found cause initially to take a child into custody and makes the decision to refer him to the intake officer or other designated authority, a law enforcement officer relinquishes ultimate control over the investigative function of the case... In our view the Legislature intended that the officer designated by the juvenile court make the initial decision whether to subject a child to custodial interrogation. He can take a statement himself, consistent with ' 51.09(b)(1) ... at the detention facility, or, pursuant to ' 52.04(b), he can refer the child back to the custody of law enforcement officers to take the statement. This construction gives effect to the Legislature's revised attitude that a juvenile is competent to waive his privilege

against self incrimination without recourse to counsel, while preserving in full its original intention that involvement of law enforcement officers be narrowly circumscribed.

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

2. John Baptist Vie Le v. State

John Baptist Vie Le v. The State of Texas, 993 S.W.2d 650 (Tex. Crim. App. 1999).

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

In Le, the following occurred:

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

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

The court concluded that appellant's statement was taken in violation of the Family

Code, and reversed and remanded the case for the appeals court to consider whether admission of the improper statement had harmed appellant.

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

In Le the detective took the child to a city magistrate, which, according to testimony presented at the hearing, had been designated by the juvenile court as aAjuvenile processing office.@ He then took Le to the homicide division of the Houston police department to obtain a statement. The homicide division was not one of the five options listed in ' 52.02(a).

Upon leaving the juvenile processing office, the detective was required to do one of the five options listed in ' 52.02(a) Awithout unnecessary delay.@ Taking Le to the homicide division did not constitute any of these five options and as a result violated the Family Code by his actions. The Court stated that the detective could have obtained the statement at the processing office, but was not required to. The detective did not error by obtaining the statement at the homicide division. His mistake was in not complying with the statute and Awithout unnecessary delay,@taking Le to a juvenile officer or detention facility. A juvenile officer could have, at that point, referred the case back to the detective for the purpose of obtaining a statement.

The Court recognized in **Comer v. State**, ten years earlier, that the language of ' 52.02 dictated what an officer **must** do Awithout unnecessary delay@when he takes a child into custody. The Court concluded, then, that:

the clear intent of the statutory scheme as a whole... from this point on [is that] the decision as to whether further detention is called for is to be made, not by law enforcement personnel, but by the intake or other authorized officer of the court ... It appears that ... the legislature intends to restrict involvement of law enforcement officers to the initial seizure and prompt release or commitment of the juvenile offender.⁴⁴

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

A...we must not ignore the Legislature=s mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature=s clear intent to reduce an officer=s impact on a juvenile in custody. Today we remind police officers of the Family Code=s strict requirements.⁴⁵

3. Unnecessary Delay

In **Roquemore v. State**, a Court of Criminal Appeals opinion, the officer instead of taking the respondent directly to a juvenile processing office, at the respondent=s request

took him to the place where he had said stolen property was hidden. After quoting *Comer* and *Baptist Vie Le* the court stated:

*The procedure and options are clear in section 52.02(a), and first taking the juvenile, at his own suggestion, to the location of stolen property is not enumerated. Because the appellant was not transported to the juvenile division "without first being taken to any other place," the officers violated section 52.02(a). Comer, 776 S.W.2d at 196-97.*⁴⁶

In *In the Matter of D.M.G.H.*, it was an unnecessary delay to arrest a juvenile at 12:30 p.m., hold her at the police station before taking her before a magistrate at 7:25 p.m., and then taking her to the detention center at 10:20 p.m.. The State attempted to justify the delay on the grounds that it was necessary to complete the paperwork on the case before taking the child to juvenile detention. The court rejected the state's argument and reversed the adjudication of delinquency ruling that the child's statement should have been suppressed.⁴⁷

In *In re G.A.T.*, it was an unnecessary delay for the officer, after taking four juveniles into custody, to take them back to the scene of the crime for identification rather than taking them directly to a designated juvenile processing office.⁴⁸

4. Necessary Delay

*This section of the Family Code "by its very terms contemplates that 'necessary' delay is permissible." Whether the delay is necessary is "determined on a case by case basis."*⁴⁹

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

5. Notice To Parents

Section 52.02(b) states:

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

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

In *Gonzales v. State*, the court held that section 52.02(b)(1) was not satisfied where the evidence at the hearing on the juvenile's motion to suppress did not show that the

juvenile's parents had been notified at all.⁵¹

In *State v. Simpson*, the Tyler Court of Appeals affirmed the trial court's suppression of a juvenile's confession pursuant to section 52.02(b) when the juvenile's mother was not notified until the Sunday evening following his arrest at 11:00 a.m. on the preceding Friday.⁵²

In *In the Matter of C.R.*, Police failed to notify the respondent's mother that her son had been taken into custody and the reason for doing so. At a minimum, one hour elapsed from the time the respondent was taken into custody until the initial contact with his mother. In addition, police discouraged her from coming to the police station to see her son and ultimately notified her only when the respondent was taken to the juvenile detention facility. The Court held that the requirement of parental notice had been violated and that the written statement given during the period of violation should have been excluded from evidence.⁵³

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

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

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been obtained following his on-again off-again attempts to claim his constitutional rights. There was scant direct evidence in the record of any efforts to contact her or anyone else until after the confession was obtained. Under these circumstances the court held that this was not prompt notification under ' 52.02(b) of the Family Code.⁵⁵

6. DWI and the Intoxilyzer Room

When an officer has reasonable grounds to believe a child who is operating a motor vehicle has a detectable amount of alcohol in his system the officer can take a statutory detour to an intoxilyzer room. The officer does not have to have probable cause to believe a child is DWI to take that child to a place to obtain a breath sample. If the child is operating a motor vehicle and the officer detects *any amount of alcohol* in the child's system he can take the child to the adult intoxilyzer room.⁵⁶

Subsection (d) of 52.02, allows for a child to submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped.⁵⁷ An officer who follows the procedure for taking the breath test for an adult may not get it right. The statute requires that the request by the officer and the consent or refusal by the child must be on the videotape. If it is not on the videotape, the officer must have the concurrence of an attorney regarding the child's consent to the test.

B. Juvenile Processing Office

Section 52.02, however, does provide for an exception. The officer *may* first take the child to ~~A~~ a juvenile processing office designated under Section 52.025.[@] That is an option for the officer, not a requirement. It is, in essence, a seventh option (there is also an eighth option - See Subsection 6 below; DWI and the Intoxilyzer Room). The taking of a juvenile to a juvenile processing office, however, does not dispense with the requirement that, subsequently, the officer, ~~A~~ without unnecessary delay, ~~A~~ do one of the six possibilities listed in ' 52.02(a).⁵⁸

The processing office is a temporary location that allows an officer to do certain specific things. The options in ' 52.02(a) are permanent options, while the juvenile processing office is a temporary option (no longer than six hours). If the officer decides to take the child to a juvenile processing office, he must eventually take the child to one of the options in ' 52.02(a). One office cannot be both a juvenile processing office and one of options listed in ' 52.02(a).⁵⁹

52.025. Designation of Juvenile Processing Office

(a) **The juvenile court may designate an office or a room, which may be located in a**

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

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

(1) the return of the child to the custody of a person under Section 52.02(a)(1);

(2) the completion of essential forms and records required by the juvenile court or this title;

(3) the photographing and fingerprinting of the child if otherwise authorized at the time of temporary detention by this title;

(4) the issuance of warnings to the child as required or permitted by this title; or

(5) the receipt of a statement by the child under Section 51.095(a)(1), (2), (3), or (5).

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

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

There is no mandatory requirement that a child be taken to a juvenile processing office. It is only an option (to do certain specified tasks) before control of the child is permanently relinquished to another by the officer. The juvenile processing office is the only temporary option (other than a DUI suspect) an officer has before utilizing the six permanent options presented in ' 52.02(a).⁶⁰

In *Anthony v. State*, the 4th Court in San Antonio ruled that a statement was illegally obtained and could not be admitted to support a criminal conviction because the officers did not contact the juvenile officer or take the required step of processing defendant in an area specifically utilized for juveniles.⁶¹

In *In re R.R.*, a Corpus Christi Court of Appeals case, officers took the juvenile directly to the police station, but because no evidence showed that the juvenile was detained in an office designated as the "juvenile processing office," the confession was illegally obtained and, therefore, inadmissible.⁶²

But see also, *Williams v. State*, where the officer picked up Williams at the Bexar County jail because he had given a false name to the arresting officer. The officer who picked up Williams determined that he was a child and took the child to the homicide office to take the child's statement. The homicide office was not a designated juvenile processing office. The juvenile processing office that was normally used was being remodeled and under construction. A second juvenile processing office was locked and unavailable. The court stated that the purpose for requiring juveniles to be interrogated

in specially designated areas is to protect them from exposure to adult offenders and the stigma of criminality. Because no one else was in the homicide office at the time Williams made his statement, this purpose was fulfilled. To hold that Williams's statement was inadmissible under these circumstances would be to place form above substance. The court also noted...

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

1. Juvenile Court Designation

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

2. The Processing Office

There can be multiple juvenile processing office designations within each county.⁶³ Generally, every law enforcement agency which may take a child into custody should have a juvenile processing office. No special formality is required, but the best practice would have a representative of the juvenile court, if not the judge himself or herself, inspect the office or room for compliance with the provisions of this section. If the room or office is, and will be, in compliance with the provisions of this section, the court should issue an order certifying the room or office along with any other restrictions the court deems appropriate. The certification of the room or office should have some specificity.

A general designation such as **A**the police station**@**or **A**the sheriffs=office**@**located at 111 Main, is insufficient. Section 52.025(a) refers to ***an office or room*** which may be located in a police facility or sheriffs=office. Courts have held that a designation of the entire police station was unlawful and not in compliance with the statute.⁶⁴

3. Parental Presence

Section 52.025(c) states:

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

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

... If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the confession. n4 As in Comer, we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime.⁶⁵

In *In The Matter of C.R.*, the court held that by requiring the arresting authority to give notice of the arrest to a parent, the legislature gave the choice of whether or not to be present to the parent. The court further stated that the legislature may well have concluded that juveniles are more susceptible to pressure from officers and investigators and that, as a result, justice demands they have available to them the advice and counsel of an adult who is on their side and acting in their interest.⁶⁶ Section 52.025(c) takes that intent one step further. The entitlement to have a parent present in the processing office is not lessened because an officer is attempting to obtain a statement from a child. Section 51.095 governs how to proceed in the taking of a statement of a child in custody, but Section 52.025 governs how to proceed if the child is taken to a processing office, including if the child is being taken there for the purposes of obtaining a statement. An officer who has taken a child into custody and who wishes to take the child's statement must notify the child's parent of the arrest, fully comply with Section 51.095, and if the child is taken to a processing office, notify the child of his right to have his parent present. Even then, under *Li* the officer must be very careful to comply with Section 52.02 or the statement may be inadmissible.

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

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

there.

Many questions can be raised about the interpretation of this statute. Can the parent or guardian claim the right for the child? Can an officer refuse the child's request to have his parent or guardian present? I do not believe so. I have found no Texas authority which entitles a parent or guardian to be present during the taking of a statement. But, in some jurisdictions courts have held that a minor's request, made during custodial interrogation, to see his parents constituted an invocation of the minor's Fifth Amendment right to remain silent.⁶⁷ While a statement need not be taken at a juvenile processing office, if it is, the requirements of ' 52.025 must be complied with.

4. The Six Hour Rule

Texas Family Code ' 52.025(d):

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

Since the purpose of a juvenile processing office is to accomplish limited objectives a time limit was imposed. Six hours was selected since under Federal law a detention of a juvenile in an adult detention facility for less than six hours need not be reported to federal monitoring agencies.⁶⁸

In *In the Matter of C.L.C.*, the child was detained for nine hours in the Juvenile processing office, however, he had signed his statement only four hours after he had been detained. The Court said that the purpose of the six-hour restriction was to ensure that coercion, or even a coercive atmosphere, is not used in obtaining a juvenile's confession. Juveniles detained in excess of the parameters in ' 52.025 might be unduly taxed and willing to make a confession in order to escape the interrogation and without giving full consideration to the ramifications of their admissions.⁶⁹

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

*We believe that the record is unclear as to whether Vega was detained longer than six hours, but that the record reflects that Vega gave officers his statement within six hours from the time that he arrived at the juvenile detention area in the sheriff's office. Consequently, we conclude that Vega was lawfully detained at the time he made his statement.*⁷⁰

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

C. Taint Attenuation Analysis

In **Comer**, before reversing the case for failing to transport a juvenile "forthwith" to the custody of the juvenile custody facility, the Court of Criminal Appeals conducted a taint attenuation analysis, utilizing the four factors from **Bell v. State**, 724 S.W.2d 780 (Tex. Crim. App. 1986). **Comer**, 776 S.W.2d at 196-97.

Those factors are:

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

In **Pham**, the court also conducted the analysis and compared its analysis with the analysis utilized in **Comer**.

The court in **Comer** had concluded that the taint of the juvenile's unlawful detention had not dissipated by the time he gave his confession, noting that:

We cannot say with any degree of confidence that, had appellant been transported 'forthwith' to the custody of the juvenile detention facility, where he may have had access to, if not counsel, at least his parents ... he would still have chosen to confess his crime. Comer, 776 S.W.2d at 197.⁷¹

As stated previously the court in **Pham**, concluded that the taint of the juvenile's unlawful detention had not dissipated:

... If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the confession. n4 As in Comer, we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime. Accordingly, appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure.⁷²

D. Failure to Raise Error at Trial

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

1. Is Waiver

In order to preserve a complaint concerning the admission of evidence for appellate review, the complaining party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make and obtained a ruling.⁷³ A motion which states one legal theory cannot be used to

support a different legal theory on appeal.⁷⁴ In *Hill v. State*, the Appellant urged several grounds for the suppression of his confession. Neither his written motion and legal memoranda, nor the evidence adduced at the hearing included a motion for suppression on the basis that the confession was obtained while Appellant was detained at a place not designated a juvenile processing center under section 52.025.⁷⁵

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

*We hold that Appellant waived the issue of whether the Tyler Police Department was a designated juvenile processing office under sections 52.02(a) and 52.025 of the Family Code.*⁷⁶

In *Vega v. State*, an unpublished opinion from the Court of Appeals out of Corpus Christi, the court rejected respondent's argument that his parents were not notified as required by the statute because respondent did not urge any failure of his parents to be notified as a basis for his motion to suppress, either in writing or in argument, nor did he object to his statement's admission on that basis. The Court held that nothing was preserved for review as to that issue.⁷⁷

In *Childs v. State*, the child lied to the officers regarding his age. The court found that it was appellant's affirmative action in misleading officers as to his identity and age that led to the taint of his statement.⁷⁸ The court stated:

*A...the appellant's own action in expressly claiming that he was an adult, in deceiving the police and failing to inform them of his right name and age, affirmatively and expressly waived his rights to be treated as a juvenile during the taking of his second statement.*⁷⁹

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

*"Conformably, it cannot be reasonably said that one, who negates the operation of the Texas Family Code guarantees by misrepresenting his age, is entitled to claim the benefit of the guarantees during the period of his misrepresentation."*⁸⁰

2. Is Not Waiver

In *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. 1999), the court held that the failure of the juvenile court to provide statutorily required action may be raised for the first time on appeal unless the juvenile expressly waived the statutory requirements. The court held that there are three categories of rights and requirements used in determining whether error may be raised for the first time on appeal. The first set of rights are those that are considered so fundamental that implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties. The second category of rights are those that must be implemented by the system unless expressly waived. These rights are "not forfeitable," meaning they cannot be lost by inaction, but are "waivable" if the waiver affirmatively, plainly, freely, and intelligently made. These include rights or requirements embodied in a statute that direct a trial court in a specific manner. The third set of rights are those that the trial court has no duty to enforce unless requested. The law of procedural default applies to this last category.⁸¹

In *G.A.T.*, the court found that a juvenile suspect's inaction in not asserting his right to be taken to a juvenile processing area does not waive the right.⁸²

VII. CONCLUSION

Children, beginning at a very young age, are instructed and taught to listen and cooperate with people who stand in authority over them. To respect their elders and always tell the truth. As a society, we attempt to teach these principles to our children. We do so by design, to allow people in authority to control and discipline them in our absence. For a child who has learned respect, an unpretentious request by a person in authority in a situation of great consequence may be as effective as a direct order. We as parents are aware of it, teachers and school administrators are aware of it, and law enforcement is aware of it. The legislature and the courts have attempted to keep us from taking advantage of it. They require parental notification when a child is taken into custody. The child also has the right to have a parent present if the child is not immediately released or placed in detention. He has a right to have a neutral magistrate review and explain to him, outside the presence of an officer, the child's constitutional rights, prior to giving a written statement when the child is in custody.

What the legislature started over a decade ago, the Court of Criminal Appeals continues today. The courts are requiring strict adherence to the protections set out by the Family Code. Through case law the courts have also attempted to send (not so subtle) messages to law-enforcement. They expect and remind officers through their opinions that the provisions of the Family Code regarding children are to be strictly followed and that contact between law-enforcement and children after arrest should be kept at a minimum. Complying with the requirements of the Family Code and case-law authority will take a knowledgeable and skilled officer and prosecutor. Anything less may be an embarrassment and fatal to an otherwise successful prosecution.

Guidelines for Written Statement While In Custody

1. Once the child is in custody, the officer must promptly give notice to the child's parent or guardian of the arrest and the reason for the arrest (reasonable attempts). [' 52.02(b)(1)]
2. If the arrest is for suspicion of DWI, the officer may take the child to a place to obtain a specimen of the child's breath or blood (as provided by Ch. 724, Transportation Code), and perform intoxilyzer processing and videotaping in an adult processing office. [' 52.02(a) & ' 52.02(c)]

The child may refuse or consent (without an attorney), but the request and the child's response must be videotaped. [' 52.02(d)]
- 2a. If the arrest is not for suspicion of DWI, the officer may temporarily take the child to an approved Juvenile Processing Office (JPO). [' 52.02(a)]

While there, the officer may complete essential forms and records and may also photograph and fingerprint the child (must have probable cause the child has committed an offense). [' 52.025(b)(2) & ' 52.025(b)(3)]

The child must not be left alone and is entitled to having his parent present (if requested) [52.025(c)].

The child may not remain in a JPO for longer than 6 hours. [52.025(d)]
3. Before interviewing the child concerning an offense, in the JPO the magistrate must warn the child of his rights outside the presence of any officer or prosecutor. [' 51.095(a)(1)(A) & ' 51.095(a)(1)(B)(i)]

The magistrate must be sure that the child's waiver is voluntary. [' 51.095(a)(1)(B)(ii)]
4. After the magistrate determines that the child wants to give a statement, the officer in a JPO may interview the child and reduce his statement to writing. Do not have the child sign the statement.
5. The officer must return the child to the Magistrate (in a JPO). Once again, outside the presence of any officer or prosecutor the magistrate must determine that the child understands the contents of the statement and that he still wishes to give the statement.

The child must sign the statement in the presence of the magistrate and the magistrate must certify that the child is doing so voluntarily. [' 51.095(a)(1)(B)(i) & ' 51.095(a)(1)(B)(ii) & ' 51.095(a)(1)(D)]
6. The officer must then do one of the following:
 - (1) Release the child to the parent or guardian. [' 52.02(a)(1)]
 - (2) Release the child to the Juvenile Court or official designated by the Juvenile Court if there is PC that the child committed an offense. [' 52.02(a)(2)]
 - (3) Release the child at a detention facility designated by the juvenile board. [' 52.02(a)(3)]
 - (4) Release the child to a secure detention facility designated for temporary detention of juvenile offenders. [' 52.02(a)(4)]
 - (5) Take the child to a medical facility if the child is in need of prompt treatment. [' 52.02(a)(5)]
 - (6) Release the child without a referral to juvenile court if the law enforcement agency has established guidelines for such a disposition. [' 52.02(a)(6) & ' 52.03]

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