

## JUVENILE ARREST AND CONFESSIONS

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## TAKING A CHILD INTO CUSTODY TFC § 52.01(a)



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### A CHILD MAY BE TAKEN INTO CUSTODY:

- (1) pursuant to an order of the juvenile court;
- (2) pursuant to the laws of arrest;
- (3) by a law-enforcement or school district peace officer, if there is probable cause to believe that the child has engaged in:
  - (A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or
  - (B) delinquent conduct or conduct indicating a need for supervision;
  - (C) conduct that violates a condition of probation;

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**TAKING A CHILD INTO CUSTODY  
CONT'D**

(4) by a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court; or

(5) pursuant to a directive to apprehend; or

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

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**OTHER CUSTODY SITUATIONS**

**1. Bench Warrant  
TFC § 52.0151**

- the court may issue a bench warrant or direct that an attachment issue to require a peace officer or probation officer to secure custody of the person at the placement and produce the person in court.
- If the person is at least 17 years of age, the court may order that the person be detained without bond in an appropriate county facility for the detention of adults accused of criminal offenses.

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**SCHOOL DISTRICT PEACE OFFICERS JURISDICTION**  
TEC § 37.081

(a) The jurisdiction of a peace officer or security personnel under this section shall be determined by the board of trustees and may include all territory in the boundaries of the school district and all property outside the boundaries of the district that is owned, leased, or rented by or otherwise under the control of the school district and the board of trustees that employ the peace officer or security personnel.

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**SCHOOL DISTRICT PEACE OFFICERS JURISDICTION  
CONT'D**

(b) In a peace officer's jurisdiction, a peace officer commissioned under this section: (1) has the powers, privileges, and immunities of peace officers; (2) may enforce all laws, including municipal ordinances, county ordinances, and state laws; and (3) may, in accordance with Chapter 52, Family Code, take a juvenile into custody.

(c) A school district peace officer may provide assistance to another law enforcement agency. A school district may contract with a political subdivision for the jurisdiction of a school district peace officer to include all territory in the jurisdiction of the political subdivision.

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**2. TYC ESCAPE AND APPREHENSION  
WHEN CAN YOU ARREST?**



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**Escape and Apprehension  
HRC § 61.093**

(a) If a child who has been committed to the commission and placed by it in any institution or facility has escaped or has been released under supervision and broken the conditions of release:

- (1) a sheriff, deputy sheriff, constable, or police officer may, without a warrant, arrest the child; or
- (2) a parole officer or other commission employee designated by the executive director may, without a warrant or other order, take the child into the custody of the commission.

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**Release or Delivery to Court  
TFC § 52.02(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;
- (2) bring the child before the office or official designated by the juvenile court;
- (3) bring the child to a detention facility designated by the juvenile court;
- (4) bring the child to a secure detention facility as provided by Section 51.12(j);
- (5) bring the child to a medical facility; or
- (6) dispose of the case under a first offenders program.
- (7) if school is in session and the child is a student, bring the child to the school campus to which the child is assigned if the principal, the principal's designee, or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day.

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**NOTICE TO PARENTS  
TFC § 52.02(b)**



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**NOTICE TO PARENTS  
TFC § 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.

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**UNJUSTIFIABLE DELAYS  
IN NOTIFYING PARENTS**

In *Mavoides v. State*, it was an unjustifiable delay in notifying juvenile's parents two days after arrest, even though child's information about parent's whereabouts were not specific.

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

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**UNJUSTIFIABLE DELAYS  
IN NOTIFYING PARENTS**

In *Hill v. State*, the child was arrested, but his mother was not contacted for 4 hours and 20 minutes. The detective never attempted to contact anyone, testifying he was busy working the crime scenes, collecting evidence, and taking the child's statement.

The court found that the impact of the delay was enhanced by the fact that the juvenile was in the process of deciding whether or not to waive important constitutional rights.

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**DWI AND THE INTOXILYZER Room  
TFC § 52.02(c)(d)**

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.

A child may submit 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 and the child's response to that request is videotaped .

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**ACTIONS IN A JUVENILE PROCESSING OFFICE  
TFC § 52.025**

A child may be detained in a juvenile processing office only for the following:

- (1) the return of the child to the custody of a parent;
- (2) the completion of essential forms and records;
- (3) the photographing and fingerprinting of the child;
- (4) the issuance of warnings to the child; or
- (5) the receipt of a statement by the child.

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**JUVENILE PROCESSING OFFICE  
*IN THE MATTER OF U.G.***

The Alamo police department has a specially designated area where juvenile suspects are taken in order to be kept separate from adult suspects; however, according to one of the police officers involved, appellant was never taken to that area. Instead, appellant was kept in the general waiting area of the station where adult suspects are detained.

No reason or excuse for this deviation from procedure was offered at trial by the police officers or magistrate judge. As a result, the court found that the confession was taken in violation of § 52.02 of the Family Code and should have been suppressed.

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**JUVENILE PROCESSING OFFICE  
RIGHT OF CHILD TO HAVE PARENT PRESENT**



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JUVENILE PROCESSING OFFICE  
RIGHT OF CHILD TO HAVE PARENT PRESENT  
TFC § 52.025(c)

(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.

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RIGHT OF ACCESS TO CHILD BY PARENT  
TFC § 61.103

(a) The parent of a child taken into custody... has the right to communicate in person privately with the child for reasonable periods of time while the child is in:

(1) a juvenile processing office;

(b) The time, place, and conditions of the private, in-person communication may be regulated to prevent disruption of scheduled activities and to maintain the safety and security of the facility

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RIGHT OF ACCESS TO CHILD DENIED  
Right to Appeal  
TFC §61.106

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

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**CAUSAL CONNECTION**

In Gonzales v. State, police failed to notify the child's parents of his custody as required by § 52.02(b). The Court of Appeals disallowed the confession, but the Court of Criminal Appeals, reversed and remanded for consideration of a causal connection between the failure to notify the parent (upon taking a child into custody) and the receipt of the confession.

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**JUVENILE CONFESSIONS**



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**Must Be Voluntary**

The Supreme Court in discussing the dangers of a child's statement has stated:

“the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”

*In re Gault*

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**Totality of the Circumstances**

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

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**Texas Family Code §51.095  
Admissibility of a Statement of a Child**

This section does not apply unless there is

**Custodial Interrogation**

1. **Custody**

Being the focus of an investigation and having a person's freedom of movement restricted, will not be considered custody, unless the freedom of movement is restricted to the degree associated with formal arrest.

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2. **Interrogation**

Interrogation 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.

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**WRITTEN CONFESSIONS**  
TFC §51.095

1. The child must receive the traditional Miranda warnings from a magistrate.
2. 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.

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**THE MAGISTRATE**

1. must be fully convinced and certify that the child understands the nature and contents of the statement and that the child is signing the same voluntarily.
2. must be fully convinced and certify that the child knowingly, intelligently, and voluntarily waives his rights before and during the making of the statement.
3. Child must sign in his presence.

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**WARNINGS MUST BE RIGHT**

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. The appeals court found that defendant's decision to give a statement following the misstatement regarding the possible punishment, rendered that decision involuntary.

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**Examination of the respondent by the Magistrate required**

In Reta v. State (2008), the video recording of the confession demonstrated that upon his return from making the confession the magistrate made no inquiry or examination of the respondent with regard to the nature and content of his statement.

The failure by the magistrate to determine whether the child understood the nature and content of his statement warranted reversal.

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**ORAL CONFESSIONS  
§51.095(a)(2)**



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**An oral statement is admissible if:**

1. the statement provides facts or circumstances that are found to be true and tend to establish the child's guilt;

The Court of Criminal Appeals has held that Miranda warnings are still required.

2. the statement was res gestae;

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**JUDICIAL CONFESSIONS**

**Statements are admissible if made:**

- at the child's adjudication hearing;
- before a grand jury; or
- at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing.

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**Used For Impeachment**

• **Section 51.095(b)(2) provides:**

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

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.

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**Tape Recorded Custodial Statements**

(A) the child is given the warnings by a magistrate, the warnings are a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warnings;

(B) the device operates properly, 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.

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# **ARREST AND CONFESSIONS**

**22<sup>nd</sup> ANNUAL JUVENILE LAW CONFERENCE**

**PROFESSOR ROBERT O. DAWSON**

**JUVENILE LAW INSTITUTE**

**February 18–21, 2009**

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EDUCATION

Board Certified B Juvenile Law B by the Texas Board of Legal Specialization

1980: Admitted to the Texas Bar.

1977 - 1980: Jurist Doctor, South Texas College of Law, Houston, Texas.

1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

Fellow of the Texas Bar Foundation

Editor - State Bar Juvenile Law Section Report.

1999 - Present, Juvenile Court Associate Judge/Referee, 386<sup>th</sup> Judicial District Court.

1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.

1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.

Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

SPEECHES AND PRESENTATIONS

- School Searches and Confessions; 4<sup>th</sup> Annual Collin County Juvenile Law Seminar, Sponsored by Juvenile Law Section of the CCBA, and 417<sup>th</sup> Judicial District Court, Plano, Texas, October, 2008.
- School Search & Seizure; 34<sup>th</sup> Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, San Antonio, Texas, July, 2008.
- Juvenile Search & Seizure; Texas College for Judicial Studies, Sponsored by the Texas Center for the Judiciary, Richardson, Texas, April, 2008.
- Caselaw Updates; 21<sup>st</sup> Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2008.
- Advanced Search and Seizure; 21<sup>st</sup> Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2008.
- Juvenile Search & Seizure, Live Nationwide Broadcast via Webinar, Sponsored by LegalSpan, January 10, 2008.
- Legislative Updates; Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Arrests, Searches, Confessions, Juvenile Processing Offices, and Waiver of Rights. Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Caselaw Updates; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Police Interactions with Juveniles - Arrest, Confessions, and Search and Seizure; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Caselaw Update; Fall Judicial Education Session, Sponsored by The Texas Association of Counties, Austin, Texas, November, 2006.

- Arrest, Searches, Confessions, Juvenile Processing Offices & Waiver of Rights, Nuts and Bolts of Juvenile Law 2006, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, Texas, August, 2006.
- Caselaw Update; 32<sup>nd</sup> Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, Dallas, Texas, July, 2006.
- Caselaw Updates; 19th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2006.
- Police Interactions with Juveniles - Arrest, Confessions, and Search and Seizure; 19th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2006.
- Juvenile Law: Arrest & Confessions; Texas District and County Attorneys Association 2005 Annual Criminal & Civil Law Update; Corpus Christi, Texas, January, 2006.
- Juvenile Law, Including Arrest and Confession Issues; 31<sup>st</sup> Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, Corpus Christi, Texas, July, 2005.
- Police Interactions with Juveniles - Arrest, Confessions, and Search and Seizure; 18th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2005.
- Juvenile Law: Police Interactions With Juveniles - Arrest, Confessions, Search and Seizure; South Texas Juvenile Law Conference; Edinburg, Texas, December 10, 2004.
- Juvenile Law: Police and Their Interactions With Juveniles - Arrest, Confessions, and Search and Seizure; Texas District and County Attorneys Association 2004 Annual Criminal & Civil Law Update; South Padre Island, Texas, September 22-24, 2004.

## PUBLICATIONS

- School Searches and the Return of the Crazy Parent Doctrine . The San Antonio Defender, Volume X, Issue 2, July/August 2008. An article discussing the Supreme Court's rulings in school search cases.
- TYC and Proposed Legislation . State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think . State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July/August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.

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## ARRESTS AND CONFESSIONS

by Pat Garza

### I. ARREST

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution impose restrictions on when a person may be taken into custody for a criminal offense. Probable cause is required for an arrest of a person or for taking a person into custody, while reasonable suspicion is sufficient for a temporary stop for investigation. These constitutional safeguards are applicable to juvenile offenders.<sup>1</sup>

### A. CUSTODY DEFINED

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

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

Handcuffing of suspect during a temporary investigative detention does not always amount to an arrest.

In *In the Matter of J.D.B.*<sup>2</sup>, a 2006 case out of Houston, the Baytown Police Department received a suspicious activity call from a trailer park that two white males, driving a white pickup truck, were parked behind her neighbor's trailer and were in the process of removing the license plate of the truck and replacing it with a different one. En route, the dispatched officer passed a white truck with two white males, matching the descriptions of the truck and the occupants, coming from the area of the trailer park. A second officer stopped the truck and questioned the driver. The officer believed the driver was being evasive and requested he exit the truck and he then handcuffed him to wait for positive identification. The court found the temporary investigative detention reasonable and did not amount to an arrest.

### B. TAKING A CHILD INTO CUSTODY

#### 1. Texas Family Code ' 52.01

##### ' 52.01. Taking into Custody

(a) A child may be taken into custody:

- (1) **pursuant to an order of the juvenile court under the provisions of this subtitle;**
- (2) **pursuant to the laws of arrest;**
- (3) **by a law-enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe that the child has engaged in:**
  - (A) **conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or**
  - (B) **delinquent conduct or conduct indicating a need for supervision;**

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

**(1) Pursuant to an order of the juvenile court under the provisions of this subtitle:**

- (a) The juvenile court may require that a child be taken into custody when an adjudication or transfer petition and summons is served on him.
- (b) The juvenile court may issue an order to take the juvenile into custody to answer a motion to modify probation under Section 54.05.
- (c) The juvenile court may require that a child be taken into custody when he is a witness to an offense. Section 53.07(e) allows for witnesses to be subpoenaed under the rules set out by the Texas Code of Criminal Procedure.

**(2) Pursuant to the laws of arrest**

The Texas Code of Criminal Procedure, Article 14 (arrest without a warrant), and article 15 (arrest with a warrant), applies to juveniles. In any situation that an adult can be taken into custody, a child can also be taken into custody. Other statutory authority for the arrests of adults is contained in Chapter 14 and Article 18.16 of the Code of Criminal Procedure and Civil Practices and Remedies Code Section 124.001.

**(3) By a law-enforcement officer, including a school district peace officer commissioned under Section 37.081, Education Code, if there is probable cause to believe the child has engaged in:**

- (A) conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state; or**
- (B) delinquent conduct or conduct indicating a need for supervision;**
- (C) conduct that violate a condition of probation imposed by the juvenile court.**

The Family Code defines “a law-enforcement officer” as “a peace officer as defined by Article 2.12, Texas Code of Criminal Procedure.”<sup>3</sup> A Juvenile probation officer is not a law-enforcement officer, as the concept is used in the Family Code.

The statute requires AProbable Cause,@ but does not require a warrant under this section. The rule favoring arrest with a warrant is not constitutionally mandated, but is a product of legislative action. Article I, Section 9 of the Texas Constitution merely requires that an arrest conducted pursuant to a warrant be based upon probable cause.<sup>4</sup>

In *Chaves v. State (Dec/2008)*, a black male went into a dry cleaners four days after a robbery and asked for change, the complainant recognized his voice as that of the black male from the robbery. The police were called and the man was arrested. He admitted he was at the scene, but told the Officer that he was not involved in the robbery, but was merely a witness. He identified appellant as the person responsible for both the robbery and a sexual assault. He described appellant, saying that he was Hispanic and had a tattoo on his arm that said "ES." The officer went to the school where both boys were classmates and took appellant into custody. The officer based his probable cause on the offense report, talking with the complainant, and talking with the co-actor. Following his arrest, appellant wrote

a statement that admitted his involvement in the aggravated robbery and sexual assault. The Houston Court of Appeals (1<sup>st</sup> Dist), conclude that the co-actor's statement was a statement against his self-interest and therefore inherently credible and thus could be used to establish probable cause to take appellant into custody.<sup>5</sup>

**(4) By a probation officer if there is probable cause to believe that the child has violated a condition of probation imposed by the juvenile court; or**

A probation officer can arrest a child, without a warrant, upon probable cause to believe that the child has violated his probation.

**(5) Pursuant to a directive to apprehend issued as provided by Section 52.015  
This section is the equivalent to the arrest warrant for adults.**

(a) On the request of a law-enforcement or probation officer, a juvenile court may issue a directive to apprehend a child if the court finds there is probable cause to believe the child committed an offense or violated his probation.<sup>6</sup>

(b) A juvenile may be arrested as a witness in a case. Section 53.07 provides that a witness may be subpoenaed in accordance with the Texas Code of Criminal Procedure. Article 24.12 of the Texas Code of Criminal Procedure authorizes the issuance by the court of an attachment for the witness.

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

If a probation officer has probable cause to believe that the child has violated a condition of release from detention they are authorized to place the child into custody and take them to the detention center. Under the Family Code, the only conditions allowed are those reasonably necessary to insure the child's appearance at later proceedings or to attend a juvenile justice alternative education program.<sup>7</sup> Conditions of release should not be used as conditions of probation.

## **2. Bench Warrant**

### **Sec. 52.0151. Bench Warrant; attachment of witness in custody.**

**(a) if a witness is in a placement in the custody of the Texas Youth Commission, a juvenile secure detention facility, or a juvenile secure correctional facility, the court may issue a bench warrant or direct that an attachment issue to require a peace officer or probation officer to secure custody of the person at the placement and produce the person in court. Once the person is no longer needed as a witness, the court shall order the peace officer or probation officer to return the person to the placement from which the person was released.**

**(b) the court may order that the person who is the witness be detained in a certified juvenile detention facility if the person is younger than 17 years of age. If the person is at least 17 years of age, the court may order that the person be detained without bond in an appropriate county facility for the detention of adults accused of criminal offenses.**

This section authorizes a court to issue a bench warrant or direct that an attachment issue to require a peace officer or probation officer to secure custody of a youth witness (in juvenile or adult court) who is in TYC or another secure juvenile detention or correctional facility.<sup>8</sup> When a youth is brought back to be a witness, the youth may be held in the county juvenile detention facility or if the youth is 17 or older, in the county jail.<sup>9</sup>

### 3. Human Resources Code ' 61.093

#### HRC ' 61.093. Escape and Apprehension

**(a) If a child who has been committed to the commission and placed by it in any institution or facility has escaped or has been released under supervision and broken the conditions of release:**

**(1) a sheriff, deputy sheriff, constable , or police officer may, without a warrant, arrest the child; or**

**(2) a parole officer or other commission employee designated by the executive director may, without a warrant or other order, take the child into the custody of the commission.**

**(b) A child who is arrested or taken into custody under Subsection (a) may be detained in any suitable place, including an adult jail facility if the person is 17 years of age or older, until the child is returned to the custody of the commission or transported to a commission facility.**

A plain reading interpretation of the statute is that the arresting person must be correct in his or her belief that the person is an escapee or parole violator. But, under this interpretation, if the arresting person is incorrect about the escape or parole violation, the arrest is illegal, even if the arresting person had probable cause that the person is an escapee or parole violator.

If a child is younger than 17, and is detained under this provision, detention hearings are required as in any other juvenile case.<sup>10</sup>

#### 4. School District Officer

##### a. Jurisdiction

A school district peace officer has limited territorial jurisdiction, although he or she has the full powers of a peace officer within that territory. The territorial jurisdiction of a school district peace officer is fixed by the board of trustees and “may include all territory in the boundaries of the school district and all property outside the boundaries of the district that is owned, leased, or rented or otherwise under the control of the school district.”<sup>11</sup>

The school district may expand the territorial jurisdiction of school district peace officers beyond school property by contracting with a political subdivision “for the jurisdiction of a school district peace officer to include all territory in the jurisdiction of the political subdivision.”<sup>12</sup> Thus, the territory might be expanded to encompass the entire county if the commissioners agree. A school district police department and law enforcement agencies with overlapping jurisdiction are required to enter into a memorandum of understanding “that outlines reasonable communication and coordination efforts between the department and the agencies.”<sup>13</sup> Truancy laws are enforced by school district attendance officers as well as by peace officers. Attendance officers are prohibited from taking a truant into custody. However, at the request of a parent, an attendance officer may escort a truant child to campus.<sup>14</sup>

##### b. Return to School

TFC ' 52.01(e) provides:

**(e) A law-enforcement officer who has probable cause to believe that a child is in violation of the compulsory school attendance law under Section 25.085, Education Code, may take the child into custody for the purpose of returning the child to the school campus of the child to ensure the child’s compliance with compulsory school attendance requirements.<sup>15</sup>**

c. Notification to Schools

Article 15.27 of the Code of Criminal Procedure requires in certain circumstances that schools be notified of arrests and adjudications of students for specified offenses. The statute applies to all students, whether juveniles or adults.<sup>16</sup>

The article applies to any felony offense and the following misdemeanors:

**(1) an offense under Section 20.02 [false imprisonment], 21.08 [indecent exposure], 22.01 [assault], 22.05 [deadly conduct], 22.07 [terroristic threat], or 71.02 [engaging in organized criminal activity], Penal Code;**

**(2) the unlawful use, sale, or possession of a controlled substance, drug paraphernalia, or marihuana, as defined by Chapter 481, Health and Safety Code; or**

**(3) the unlawful possession of any of the weapons or devices listed in Sections 46.01(1) - (14) or (16), Penal Code, or a weapon listed as a prohibited weapon under Section 46.05, Penal Code.<sup>17</sup>**

There are two notification requirements relating to arrests: oral notice within 24 hours and written notice within the following seven days.<sup>18</sup>

## **C. POLICE RELEASE AND DETENTION DECISIONS**

Once a law enforcement officer has taken a child into custody, failure to properly handle and transport that child may render his confession inadmissible, even if the officer has fully complied with ' 51.095 (confession statute) of the Juvenile Code. The proper handling and delivery of the child during custody (and in compliance with the code) may be key in establishing that the confession is voluntary.

### **1. Release or Delivery to Court.**

#### **52.02. Release or Delivery to Court**

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

**(1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;**

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

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

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

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

**(6) dispose of the case under Section 52.03.**

**(7) if school is in session and the child is a student, bring the child to the school campus to which the child is assigned if the principal, the principal's designee, or a peace officer assigned to the campus agrees to assume responsibility for the child for the remainder of the school day.**

This statute is an expression of the legislature's intent to restrict involvement of law enforcement officers to the initial seizure and prompt release or commitment of the juvenile offender. It mandates that an officer (after taking a child into custody) must without unnecessary delay, and without first taking the child to any place other than a juvenile processing office take the child to any one of six enumerated places. It is not merely a question of whether the officer does one of the six enumerated options without unnecessary delay, but also whether he takes the juvenile to any other place first.<sup>19</sup>

Number (2) above is not a mandatory provision where the child must be taken to the official designated by the juvenile court if there is probable cause the child engaged in delinquent conduct or conduct indicating a need for supervision. Taking the child to a juvenile processing office is still an option for the officer.<sup>20</sup>

Number (7) was added by the legislature in 2007 to allow municipal peace officers the authority to transfer a juvenile from a location where the juvenile was taken into custody to their assigned school after the juvenile has been taken into custody for certain reasons, including delinquent conduct. Because ' 52.02 speaks of any person, I believe a juvenile probation officer can also take a child to the child's school campus under this provision.

a. *Comer v. State*

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. The Court of Criminal Appeals however, reversed, rejecting the argument that full compliance with ' 51.09(b) [now ' 51.095] would trump any ' 52.02 violation.<sup>21</sup> At the time that *Comer* was decided, ' 52.025 (juvenile processing office exception) did not exist.

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.

In 1991 Section 52.025 was enacted to authorize each juvenile court to designate a juvenile processing offices for the warning, interrogation and other handling of juveniles. Section 52.02 was also amended to authorize police to take an arrested juvenile to a juvenile processing office designated under Section 52.025 of the Family Code. The statute was enacted to give law enforcement more options after *Comer*.

b. *John Baptist Vie Le v. State*

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

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

The Court citing *Comer v. State*, stated that the language of ' 52.02 dictated what an officer *must* do Awithout unnecessary delay@ when he takes a child into custody.

*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.*<sup>22</sup>

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.*@<sup>23</sup>

c. Unnecessary Delay

In *Roquemore v. State*, a Court of Criminal Appeals opinion, the officer instead of taking the respondent directly to a juvenile processing office, at the respondent's request took him to the place where he had said stolen property was hidden.<sup>24</sup>

Although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating section 52.02(a) and indeed would not have been obtained at that time if section 52.02(a) had not been violated. There is clearly a causal connection between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed.<sup>25</sup>

In *In the Matter of D.M.G.H.*, it was an Aunnecessary 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.<sup>26</sup>

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.<sup>27</sup>

d. Necessary Delay

In *Contreras v. State*, a Court of Criminal Appeals opinion, it was a Necessary delay to hold a child in a patrol car at the scene of an offense for 50 minutes before bringing her to the juvenile processing office to obtain a statement. The court accepted the state's argument that the delay was necessary because police were attending to the victim and interviewing witnesses to the offense.<sup>28</sup> The delay was considered de minimus.

e. Office or Official Designated by the Juvenile Court

The plain language of this section does not require that the child must be taken before an official designated by the juvenile board, but rather that he be brought before the office *or* an official designated by the juvenile board. When a child is taken to a juvenile processing office within the meaning of the statute, the magistrate who admonishes the child prior to the taking of a confession, need not be an official designated by the juvenile board.<sup>29</sup>

f. 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 *Mavoides v. State*, it was an unjustifiable delay in notifying juvenile's parents two days after arrest, even though child's information about parent's whereabouts were not specific. Detectives testified that after appellant was arrested they asked him for information regarding his parents' whereabouts. Appellant told them he was unaware of his parents' specific whereabouts. He told the magistrate, who admonished and gave him his rights, that his father was somewhere in Corpus Christi, and his mother lived in New York but he was unsure as to how to contact her. Approximately three hours after appellant was taken into custody, and prior to any parental notification by authorities, he signed a statement admitting his involvement in the crime, but denying the murders. Approximately two days later, authorities located and notified his father concerning the charges against appellant.<sup>30</sup>

The court took a very strict view of ' 52.02(b) finding that the detective made no attempt to contact appellant's mother, nor did he ask appellant whether he desired to contact his mother. Additionally, he did not try to contact appellant's father between the time of appellant's arrest and when he provided them with a statement. Appellant's parents testified that had they been properly notified, they would have insisted that appellant consult an attorney prior to being interviewed by police.<sup>31</sup>

In *Pham v. State*, a two hour delay in notification of parents by officers who took the child to a processing office to take statement invalidated the confession.<sup>32</sup>

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.<sup>33</sup>

In *Hill v. State*, the child was arrested shortly before 9:25 a.m., but his mother was not contacted until 1:45 p.m., 4 hours and 20 minutes later. The detective never attempted to contact anyone, testifying he was busy working the crime scenes, collecting evidence, and taking the child's statement. The court found that while the four hour and twenty minute delay standing alone might not warrant reversal pursuant to section 52.02(b), the impact of the delay was enhanced by the fact that the juvenile was in the process of deciding whether or not to waive important constitutional rights. It is also noteworthy that his mother was reached by telephone on the very first attempt immediately after the child's confession had been obtained following his on-again off-again attempts to claim his constitutional rights. There was scant direct evidence in the record of any efforts to contact her or anyone else until after the confession was obtained. Under these circumstances the court held that this was not prompt notification under ' 52.02(b) of the Family Code.<sup>34</sup>

However, in *Ray v. State*, the notification was considered "prompt," despite the eight and one-half hours that defendant was in custody before her mother was notified and despite the fact that her statement was taken before notification. Of particular importance was the fact that officers made diligent efforts to notify the mother, despite defendant's initial failure to give them her mother's phone number. A detective tried, without success, to obtain from appellant a telephone number for her mother. Appellant did not provide the authorities with a number until two hours after arrival at the detention center. Efforts were then made to notify appellant's mother of her daughter's arrest and whereabouts. Although continuing attempts were made to call the mother, the authorities did not reach her until four and a half hours later, two hours after the respondent received the magistrate's warnings and gave a tape recorded statement.<sup>35</sup>

However, in *Weir v. State (2008)*, the Tyler Court found that prompt notice to the parent of the arrest of the child and the taking of the child's confession by police are not directly related. If the notice is deemed to be prompt the fact that a confession has been taken from the child would not necessarily effect that

determination.<sup>36</sup>

g. **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.<sup>37</sup>

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.<sup>38</sup> An officer who follows the procedure for taking the breath test for an adult may not get it right. The statute requires that the request by the officer and the consent or refusal by the child must be on the videotape. If it is not on the videotape, the officer must have the concurrence of an attorney regarding the child's consent to the test.

## **2. Juvenile Processing Office**

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).<sup>39</sup>

### **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).

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).<sup>40</sup>

In *Anthony v. State*, the 4<sup>th</sup> 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.<sup>41</sup>

In *In The Matter Of U.G.*, the Corpus Christi Court of Appeals also found that a juvenile's confession was illegally obtained. The Alamo police department has a specially designated area where juvenile suspects are taken in order to be kept separate from adult suspects; however, according to one of the police officers involved, appellant was never taken to that area. Instead, when he was not before the magistrate judge or the investigating officer, appellant was kept in the general waiting area of the station where adult suspects are detained. No reason or excuse for this deviation from procedure was offered at trial by the police officers or magistrate judge. As a result, the court found that the confession was taken in violation of ' 52.02 of the Family Code and should have been suppressed.<sup>42</sup>

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.<sup>43</sup>

a. Juvenile Court Designation

Under ' 52.025, the juvenile board has the responsibility for designating the juvenile processing office. Whether such a designation has been made and, if so, whether the police have remained within the bounds of the designation, can determine the admissibility of any statements obtained. If the juvenile board has not designated a juvenile processing office or an office or official under ' 52.02(a)(2), the police, unless they immediately release the child to parents, must bring the child directly to the designated detention facility and may not take him or her to the police station for any purpose. The juvenile board has the responsibility to specify the

conditions of police custody and length of time a child may be held before release or delivery to the designated place of detention. However, under ' 52.025 the maximum length of detention in a juvenile processing office is six hours. If a child is taken to a police facility that has not been designated as a juvenile processing office, or if the terms of the designation are not observed, the detention becomes illegal and any statement or confession given by the child while so detained may be excluded from evidence.

A general designation such as Athe police station@ or Athe 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 sheriff's office. Courts have held that a designation of the entire police station was unlawful and not in compliance with the statute.<sup>44</sup>

b. Right of Child to Have Parent Present  
Section 52.025(c) states:

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

In *In The Matter of C.R.*, the court held that by requiring the arresting authority to give notice of the arrest to a parent, the legislature gave the choice of whether or not to be present to the parent. The court further stated that the legislature may well have concluded that juveniles are more susceptible to pressure from officers and investigators and that, as a result, justice demands they have available to them the advice and counsel of an adult who is on their side and acting in their interest.<sup>45</sup>

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

c. Right of Parent to Be Present

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

**Texas Family Code ' 61.103. Right of Access To Child.**

**(a) The parent of a child taken into custody for delinquent conduct, conduct**

**indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court has the right to communicate in person privately with the child for reasonable periods of time while the child is in:**

- (1) a juvenile processing office;**
- (2) a secure detention facility;**
- (3) a secure correctional facility;**
- (4) a court-ordered placement facility; or**
- (5) the custody of the Texas Youth Commission.**

**(b) The time, place, and conditions of the private, in-person communication may be regulated to prevent disruption of scheduled activities and to maintain the safety and security of the facility.<sup>46</sup>**

The provision clearly gives the parent the right to be with and speak with his or her child, in private, after he has been taken into custody and while he is in the juvenile processing office (where confessions are taken from a child in custody). Law enforcement may, however, limit the parents right of access based on the reasonable time, place and conditions restrictions.<sup>47</sup> While a statement need not be taken at a juvenile processing office, if it is, the requirements of '52.025 and '61.103 should be complied with.

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

#### **Texas Family Code '61.106. Appeal or Collateral Challenge**

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

Section 61.106, specifically forbids the child or any party the right to use the failure to provide a parental right as a defense in the trial, appeal or collateral attach in the child's case.<sup>48</sup> The rights provided by this subchapter belong to the parent, not the child, and as a result, violations of said rights cannot be used by the child in a motion to suppress a confession or an appeal.

#### **d. The Six Hour Rule**

**Texas Family Code '52.025(d):**

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

Since the purpose of a juvenile processing office is to accomplish limited objectives a time limit was imposed. Six hours was selected since under Federal law a detention of a juvenile in an adult detention facility for less than six hours need not be reported to federal monitoring agencies.<sup>49</sup>

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.<sup>50</sup>

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.*<sup>51</sup>

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

### **3. The Federal Juvenile Delinquency Act**

When a child is in federal custody, the officers who took the child into custody must comply with the requirements of the Juvenile Delinquency Act. A juvenile is entitled to relief when the government violates the requirements of the statute and causes the juvenile constitutional or statutory harm. Where the government's violations deprive the juvenile of his or her constitutional rights, reversal is required. *See RRA-A, 229 F.3d at 744*. If the violations result in statutory prejudice, and irrespective of whether they amount to a constitutional deprivation, this Court has the "discretion to reverse the conviction so as to ensure that the prophylactic safeguard for juveniles not be eroded or neglected." *Id.* (internal quotation marks and citation omitted).<sup>52</sup>

18 U.S.C. ' 5033 of the Juvenile Delinquency Act provides in relevant part:

**Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.**

**The juvenile shall be taken before a magistrate judge forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate judge.**<sup>53</sup>

In *U.S. v. C.M.*, the 9<sup>th</sup> U.S. Circuit held that title 18 U.S.C. ' 5033 of the Juvenile Delinquency Act, prescribes that an arresting officer must advise the parents of their child's *Miranda* rights contemporaneously with advising them of their child's custody, and may not unreasonably refuse a request by either the juvenile or the parent to communicate with one another before the juvenile is interrogated.<sup>54</sup>

## **D. CAUSAL CONNECTION AND TAIN T ATTENUATION ANALYSIS**

### **1. Causal Connection**

In *Gonzales v. State*,<sup>55</sup> police complied with all the requirements of ' 51.095 [requirement for admissibility of confessions] and ' 52.02(a) [restrictions for law enforcement officer to the initial seizure and prompt release or commitment of the juvenile offender], but failed to notify the child's parents of his custody as required by ' 52.02(b). The Court of Appeals disallowed the confession for failure to promptly notify the parents of the child's arrest as required. The Court of Criminal Appeals, however, reversed and remanded for consideration of a causal connection between the failure to notify the parent (upon taking a child into custody) and the receipt of the confession.<sup>56</sup>

The Court held that ' 51.095 is considered an independent exclusionary statute. It sets out what must be done before the statement of a juvenile will be admissible. The reasonable inference is that if the stated conditions are not met, the statement of the child will not be admissible.<sup>57</sup> However, the violation of ' 52.02(b) does not implicate the provisions of ' 51.095 and there is no clear legislative intent to suppress a statement under that section when a violation is detected. The Court through ' 51.17 of the Family Code, invoked Chapter 38 of the Code of Criminal Procedure and found that if evidence is to be excluded because of a ' 52.02(b) violation, it must be excluded through the operation of Article 38.23(a) of the Code of Criminal Procedure.

Article 38.23(a) C.C.P. is an exclusionary rule and provides:

***no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas ...shall be admitted in evidence.***

The Court of Criminal Appeals has previously established:

***evidence is not Aobtained ...in violation@ of a provisions of law if there is no causal connection between the illegal conduct and the acquisition of the evidence.***<sup>58</sup>

While the juvenile's parents were not timely notified of respondent's custody, the lower court failed to conduct a causal connection analysis to determine its affect upon the taking of the statement. Utilizing the standard set out in *Comer*, the Court of Criminal Appeals remanded the case to the lower Court so that it may ascertain Awith

any degree of confidence that, @ had the appellant's parents been notified timely... A he would still have chosen to confess his crime. @<sup>59</sup>

In *Roquemore v. State*, another Court of Criminal Appeals opinion, an officer instead of taking the respondent directly to a juvenile processing office, at the respondent's request took him to the place where he had said stolen property was hidden in violation of ' 52.02(a). The Court stated that although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating ' 52.02(a) and indeed would not have been obtained at that time if ' 52.02(a) had not been violated. There is clearly a causal connection between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed.<sup>60</sup>

In *Hartmangruber v. State (2008)*, Hartmangruber claimed that if his father had been promptly notified, his father "very likely . . . would have advised [him] not to talk" with the police. The Court stated that nothing in the record, however, demonstrates that this advice would have deterred Hartmangruber from making his statement. Hartmangruber never asked to speak with his father at any time while he was in custody. In addition, the record indicates that Hartmangruber was very eager to speak to the police about his crime, having had to be told by officers on multiple occasions to refrain from discussing his offense until the judge could magistrate him. Because there was no causal connection between the failure to notify juvenile's father of arrest in accordance with *section 52.02(b) of the family code* and juvenile's decision to give his statement to police, no error was shown.<sup>61</sup>

In *Vega v. State*, (Tex.App--Corpus Christi, 8/9/07), Vega contended that her statement should be suppressed because the Illinois authorities violated section 52.025 of the Family Code. Specifically, she contends that she was detained more than six hours before the conclusion of her statement,<sup>20</sup> and that she was improperly left unattended in the interview room.<sup>21</sup> The court of criminal appeals agreed that these circumstances violated provisions of Title 3, specifically those found in section 52.025.<sup>62</sup>

Here, Vega had the burden to prove that the violations of ' 52.025 caused her to make her statement. Although Vega acknowledged the causal connection requirement, she did not claim that these violations caused her to give her statement. Further, even had she raised this contention, Vega points to no evidence in the record demonstrating a causal connection between the violations and her decision to give a statement to the police. The Corpus Christi Court of Appeals also held that the statement taken in Illinois, achieved a fitting and right balance of considerations such that both parties were assured a fair hearing.

## **2. Taint Attenuation Analysis**

Along with the causal connection analysis a court should also conduct a separate

taint attenuation analysis before excluding a confession because of a ' 52.02 violation. The causal connection analysis precedes the attenuation-of-the-taint analysis.

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

Those factors are:

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

### **3. The Burdens of Proof**

#### **Juvenile's Burden - raise and establish non-compliance**

When a juvenile defendant seeks to suppress a confession for violations of ' 52 the burden is initially upon the defendant to raise the issue by producing evidence of a violation of the statutory requirement.<sup>63</sup> It is incumbent upon the defendant to raise and produce evidence initially, because failure to do so would waive any error.<sup>64</sup> As a result, it is important that the defendant juvenile's motion to suppress specifically state which statutory requirements were not followed. Testimony regarding non-compliance may be presented by the respondent, his parent, or from the officer himself.

#### **State's Burden - establish compliance**

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

#### **Juvenile's Burden - establish causal connection**

However, should the state fail to show compliance with the statute and because a violation of the statute is not alone sufficient to require exclusion of the confession, the burden then reverts to the defendant to produce evidence of a causal connection between the statutory violation and the ensuing confession.<sup>65</sup>

#### **State's Burden - disprove causal connection or attenuation of the taint**

Once the defendant meets this burden, the burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken.<sup>66</sup>

On December 8, 2005, the Corpus Christi Court of Appeals, in *Adams v. State*, affirmed the denial of a Motion to Suppress because the record did not demonstrate the respondent had established his burden of a causal connection between a *section 52.02(a)* violation and his statement, nor did he show a causal connection between his

complained of unnecessary delay by arresting officer and the evidence sought to be suppress.<sup>67</sup>

#### 4. Failure to Raise Error at Trial

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

##### a. Is Waiver

In order to preserve a complaint concerning the admission of evidence for appellate review, the complaining party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make and obtained a ruling.<sup>68</sup> A motion which states one legal theory cannot be used to support a different legal theory on appeal.<sup>69</sup>

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.<sup>70</sup> The court held that the State had no burden to establish that fact since Appellant did not include such contention in his motion to suppress.<sup>71</sup>

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.<sup>72</sup>

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.<sup>73</sup>

##### b. Is Not Waiver

In *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. 1999), the court held that the failure of the juvenile court to provide statutorily required action may be raised for the first time on appeal unless the juvenile expressly waived the statutory requirements. The court held that there are three categories of rights and requirements used in determining whether error may be raised for the first time on appeal. The first set of rights are those that are considered so fundamental that implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties. The second category of rights are those that must be implemented by the system unless expressly waived. These rights are "not forfeitable," meaning they cannot be lost by inaction, but are "waivable" if the waiver affirmatively, plainly, freely, and intelligently made. These include rights or requirements embodied in a

statute that direct a trial court in a specific manner. The third set of rights are those that the trial court has no duty to enforce unless requested. The law of procedural default applies to this last category.<sup>74</sup>

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.<sup>75</sup>

## **II. JUVENILE CONFESSIONS**

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

### **A. CONFESSIONS GENERALLY**

#### **1. Must be a Child**

The requirements of the ' 51.095 of the Texas Family Code apply only to the admissibility of a statement given by a child. The term 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.**

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.<sup>76</sup>

#### **2. Must Be Voluntary**

All statements which the State attempts to use against a child (whether in custody or out, written or oral) must be voluntary. The due process clause of the fourteenth amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law" (*U.S. Const., amend. XIV*). The United States Supreme Court has held that by virtue of the clause, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned."<sup>77</sup> "In addition

to these Federal voluntariness principles, a confession must also be voluntary in a State-law sense."<sup>78</sup>

Being injured or attacked while in police custody may have a bearing on whether or not a statement is voluntary. If a defendant establishes that he was injured while in police custody suggesting that the confession was involuntarily given, the State must show by clear and convincing evidence that the injuries were not inflicted as a means of obtaining the confession. In a case out of Illinois evidence did not show that juvenile knowingly waived his Miranda rights after being physically abused while in police custody even though the abuse was not by police.<sup>79</sup>

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.*"<sup>80</sup> The Supreme Court in *In re Gault*, discussed the dangers of a child's statement, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."<sup>81</sup>

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

If a child is taken before a magistrate in accordance with ' 51.095 of the Family Code, the issue of voluntariness of his statement becomes moot, or becomes res judicata, because the very reason there is a requirement for a magistrate to admonish and speak with the child at the time of his confession is to have him (rather than an officer) make that determination at the best possible time, during the confession.<sup>82</sup>

a. Totality of the Circumstances

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.<sup>83</sup> In determining the voluntariness of a confession, the court considers the totality of the circumstances, including the defendant's age, intelligence, background, experience, mental capacity, education, physical condition, and experience with the criminal justice system, the legality of the detention, the duration of the detention, the duration of questioning, and any promises, threats, deceit, and physical or mental abuse by police. When the defendant is a juvenile, additional factors such as whether a parent or other interested adult was present is a consideration in determining the voluntariness of a confession, but no one fact is dispositive.

The question of whether an accused has waived his rights is not one of form, but

rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. A judicial inquiry into a valid waiver has "two distinct dimensions":

First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.<sup>84</sup>

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 A indeed, it mandates@ inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.***<sup>85</sup>

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, Aknowingly, 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.***<sup>86</sup>

b. Factors

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.<sup>87</sup>

Many courts have emphasized the importance of an interested adult to help the child, stating that notice to a parent, guardian, or custodian and a child's opportunity to confer with such persons are significant factors in evaluating the voluntariness of a statement or confession under the totality of the circumstances.<sup>88</sup>

In **Vargas v. State**, the Houston Court of Appeals (1<sup>st</sup> Dist.) held that a trial court did not abuse its discretion in finding appellant's statement "I don't want to do this," to be an ambiguous request to terminate interview in light of the totality of the circumstances surrounding appellant's interrogation. At the time, appellant was 15 years old, an average to good student in the ninth grade, with good communication skills and an IQ of over 100. The detective, an experienced investigator with more than 17 years of service to the department, testified that he understood the statement to mean only that appellant did not want to re-live the "gruesome details" of the complainant's death. The detective even asked appellant to clarify what he did not want to "do," thereby demonstrating that the meaning of appellant's statement was unclear at the time.<sup>89</sup>

### 3. The Reasonable Juvenile Standard

a. Texas Standard

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

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).@<sup>90</sup>**

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 Avoluntary@ waiver may be suspect.

**b. U.S. Supreme Court Standard**

In 2004, the Supreme Court addressed the standard necessary for custodial interrogation. In *Yarborough v. Alvarado*, a 17 year old boy was taken to a police station by his parents at the request of police. He was separated from his parents (against their wishes), placed in a small interrogation room and questioned for two hours. The custody issue revolved around whether he felt he was free to leave and terminate the interview at any time and whether or not his age should be a consideration in that evaluation. In a five to four decision the Supreme Court held that the objective Areasonable person@ standard continues to apply to custody cases. The court reasoned that the objective test ensures that the police do not need to make guesses as to the circumstances at issue before deciding how they may interrogate a suspect.<sup>91</sup>

**B. CUSTODIAL INTERROGATION**

Section 51.095(b),

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

**(1) the statement does not stem from interrogation of the child under a circumstance described by Subsection (d); or<sup>92</sup>**

**1. Custody**

Being the focus of an investigation and having a person's freedom of movement restricted, will not be considered custody, unless the freedom of movement is restricted to the degree associated with formal arrest.<sup>93</sup>

In *In the Matter of F.C.W.*, respondent was summoned to the principal's office where two investigators were waiting with the school principal. The two investigators were wearing polo-style golf shirts with the word "Arson" on them, and their firearms were visible on their waistbands. Respondent testified that the office doors locked automatically from the outside, but that he knew he could open the doors from the inside. The interview by the officer lasted twenty or twenty-five minutes. The investigators did not inform the child of his right to remain silent, consult an attorney, or have a parent or other adult present. Respondent was told he was not under arrest and was free to leave; however, he testified that he was never told he was free to leave. At trial, respondent stated he felt scared during the interview, and cried briefly. After the interview ended, he returned to class. The court concluded that, although a reasonable fifteen-year-old in this situation could have felt his freedom of movement was restricted,

he would not have felt that his freedom of movement was restrained to the degree associated with a formal arrest.<sup>94</sup>

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.<sup>95</sup> 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].<sup>96</sup> Each case must be reviewed on its own merits and under the totality of the circumstances test.

The mere fact that an interrogation begins as non-custodial, does not prevent custody from arising later. Police conduct during an encounter (such as a suspect being pressed by a questioning officer for a truthful statement) may cause a consensual inquiry to escalate into custodial interrogation.<sup>97</sup>

a. By Law Enforcement

In *In the Matter of M.A.O. (Dec/2008)*, two officers called over two minors, including appellant, who were walking at night in the street in an area which is known for gangs and violence. The individuals walked over to the officers, who asked for their names and ages. The officers learned the two individuals were minors and lived nearby. They were not handcuff nor were they placed in the back of the patrol car. The officer did ask, "Do you guys have anything on you that you are not supposed to have?" In response, M.A.O. stated, "I have some pills in my pocket that I found." The Officer then searched M.A.O.'s front pocket and retrieved nine pills. The pills were identified and contained drugs that were unlawful to possess without a prescription. M.A.O. was then arrested. The trial court denied the motion to suppress and the San Antonio Court of Appeals, held that when the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time. To create "custody" for custodial interrogation purposes, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention.<sup>98</sup>

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.<sup>99</sup>

The willingness of police to permit the juvenile to return home is substantial evidence he or she was not in police custody.

Being told he is not free to leave does not automatically create custody with respect to this provision. In *In the Matter of R.A.*, a school security officer while questioning a child, told the child that he was not free to leave. The Dallas Court of Appeals held that under the totality of the circumstances, appellant was not in custody during questioning. The child was free to leave and did leave after being questioned by the officer.<sup>100</sup>

In *In the Matter of R.A.* (this one out of Austin), a routine traffic stop was Apresumptively temporary and brief@ and as a result, non-custodial, and questions asked by the officer were not considered custodial interrogation. R.A. had been pulled over for a minor traffic violation. The officer smelled marihuana and discussed what he smelled with R.A.. R.A. gave up his drugs with very little prompting by the officer. The court found that a reasonable, innocent person in R.A.'s position would not believe that he was restrained to the degree of an actual arrest; and accordingly, fount that R.A. was not in custody when he produced the drugs.<sup>101</sup>

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.<sup>102</sup>

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.<sup>103</sup>

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

In *In the Matter of R.E.A.*, officers responded to a call that people were smoking marihuana. Upon arrival, an officer recognized R.E.A. from previous encounters and recalled that a felony arrest warrant had been issued for him. The officer handcuffed R.E.A. and asked him to identify himself. The officer then ran a warrant check, confirmed there was a warrant for R.E.A.'s arrest, and arrested R.E.A. After arresting him, the officer asked R.E.A. if he had "anything illegal on him." R.E.A. responded that he had a blunt of marihuana in his pocket. The officer retrieved the

marihuana, and the State subsequently filed a petition alleging delinquent conduct for the offense of possession of marihuana. It is standard procedure by the Austin Police Department to search all suspects legally in police custody. R.E.A. was about to be searched by the officer as a routine and lawful search incident to arrest. The record therefore establishes that the custodial question of whether R.E.A. "had anything illegal on him" and R.E.A.'s affirmative response were ultimately irrelevant to the lawful search incident to arrest. R.E.A.'s sole point of error is overruled.<sup>104</sup>

## 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.<sup>105</sup>

In *Cortez v. State*, evidence shows that after being advised of his rights by the magistrate, appellant was taken to the juvenile processing office. He refused to give the officers a statement and asked to speak to his parents. There was no telephone in the room, so an officer dialed the number on his cell phone, gave the phone to appellant, and stepped outside. Through a microphone located in the room, the officer heard appellant tell his mother that he had fired two shots but had not hit anyone, and that co-defendant had fired the fatal shots. The Austin Court of Appeals held that appellant did not have a reasonable expectation of privacy in the juvenile processing office, and the officer did not violate the Fourth Amendment by listening to the statements appellant made to his mother during their telephone conversation. Also, because the statements appellant made to his mother during the conversation were consistent with appellant's trial testimony, any error in the admission of the statements was considered harmless.<sup>106</sup>

### 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."<sup>107</sup>

c. By Psychologist

A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if the defendant's statements may be used against the defendant at a criminal proceeding. *Id. at 468*. Unless they are preceded by a *Miranda* warning, the statements to the psychiatrist will be inadmissible when offered against the defendant to prove the defendant's future dangerousness.<sup>108</sup>

In *Simpson v. State*, a diagnostic examination (for discretionary transfer to adult criminal court) which exceeded its intended purpose and became a source of incriminating evidence constituted a custodial interrogation to which fifth amendment protections applied. In this case the psychologist examination was used as the basis of her testimony in the guilt/innocence phase of Appellant's trial. As such, the examination served a "dual purpose." Thus, the examination was a "critical stage" of the adversarial proceedings against appellant and also warranted Sixth Amendment protections.<sup>109</sup>

In *In the Matter of C.E.*, C.E.'s disclosure of his previous sexual assaults on two other children was included in the juvenile probation department's predisposition investigation report. In reaching its disposition, the court was entitled to consider the juvenile probation department's predisposition report, independent of the Psychologist's testimony about what C.E. disclosed during his therapy session. Accordingly, any error in the court's ruling concerning the admissibility of Morris's testimony about C.E.'s previous sexual assaults was harmless.<sup>110</sup>

d. By Texas Department of Family and Protective Services

If a Texas Department of Family and Protective Services representative questions a child on behalf of, or along with, a law enforcement officer, the questioning will be considered interrogation.

In *Wilkerson v. State*, the Texas Court of Criminal Appeals held that "only when a CPS investigator (or other non-law enforcement state agent) is acting in tandem with police to investigate and gather evidence for a criminal prosecution are [*Miranda*] warnings required" because only then has a custodial interrogation occurred.<sup>111</sup> To determine if this type of tandem relationship exists, we consider: (1) information about the relationship between the police and the CPS worker; (2) the CPS worker's actions and perceptions; and (3) K.H.'s perceptions of the encounter.<sup>112</sup>

### C. WRITTEN CONFESSIONS

**' 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;**

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

The statute appears to allow the taking of a statement of a child even when he is represented by an attorney. While ' 51.09 (Waiver of Rights) requires that a child can not waive a right without the agreement of his attorney, ' 51.095 begins...

**ANotwithstanding 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.<sup>113</sup>*

In *In the Matter of H.V (2008)*, a juvenile's request to have his mother contact an attorney was considered an unambiguous request for counsel during the magistrate's admonishments. He was a sixteen-year-old junior in high school from Bosnia. During the ten minutes that he received warnings from the magistrate, he specifically asked to talk with his mother and said he wanted her to ask for an attorney. When the magistrate tried to explain to H.V. that he himself could ask for an attorney, he said, "But I am only sixteen," clearly indicating that he did not understand how a sixteen-year-old person could ask for and go about contacting an attorney. The court held that by looking at the totality of the circumstances surrounding the interrogation, H.V. was requesting an attorney. As a result, the child's statement was inadmissible.

However, be aware, after giving the statement, the child also told police where a gun used in the offense was located. The Supreme Court held that the gun was admissible because while the child's statement was taken in violation of Miranda, it was not taken in violation of the Fourth Amendment. Miranda is a Fifth Amendment protection not a Fourth Amendment protection. Since the statement regarding the location of the gun was voluntary and its admission did not infringe on H.V.'s Fifth Amendment rights, and no Fourth Amendment violation was alleged, the gun was admissible.<sup>114</sup>

## **2. The Magistrate**

### **a. Magistrate Defined**

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

In a nutshell they are : The justices of the Supreme Court, the judges of the Court of Criminal Appeals, the justices of the Courts of Appeals, the judges of the District Court, some magistrates appointed by District and County Courts, some criminal law

hearing officers (Harris County), county judges, judges of the county courts at law, judges of the county criminal courts, the judges of statutory probate courts, the masters appointed by the judges of the statutory probate courts, justices of the peace, mayors and recorders and judges of the municipal courts of incorporated cities or towns.

b. Referee as Magistrate

The Juvenile Referee is not a magistrate as defined by Article 2.09 of the Texas Code of Criminal Procedure. In 1999, the legislature added ' 51.095(e), which allows referees to perform the duties of the magistrate if approved by the juvenile board in the county where the statement is being taken.<sup>115</sup>

c. The Warnings

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

These are similar warnings as are 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.<sup>116</sup> 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.

The magistrate should be made aware of any oral statements already given by the child.

In *In the Matter of J.A.B (2008)*., it was suggested that when a written statement is given after an inadmissible oral statement, the magistrate should explain to the juvenile that his prior oral statements may not be used against him as part of the admonishments for the written statement. However, the juvenile must additionally show that the written statement was involuntarily given, and the admissibility of the written confession is determined based upon the totality of the circumstances under which the statement was made. While, Miranda warnings preceding a subsequent

statement ordinarily should suffice to remove the conditions that precluded admission of an earlier (unwarned) statement, it may not, should the initial (unwarned) statement also be involuntary.<sup>117</sup>

d. Signing the Statement

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

The statement must be signed in the presence of the magistrate and it must be signed with no law enforcement officer or prosecuting attorney present. A bailiff may be allowed, but he may not carry a weapon in the presence of the child. Should the child sign the statement outside the presence of the magistrate, the error may be corrected if the magistrate follows the proper procedure and has the child re-sign the statement in his presence.<sup>118</sup>

If the statement was electronically recorded, the statute allows the magistrate the option to request that the videotape be brought to him, along with the child.<sup>119</sup> Since, in most of these incidents there will not be a written statement, it is advisable that the magistrate view the recording along with the child and have the child sign a statement that he has viewed the recording and that it is his statement. The magistrate could then, on the same document, sign, and state (if he so feels) that the statement is being voluntarily given.

e. Findings of the Magistrate

Once the statement has been reduced to writing, it is the Magistrate, through his discussions with the child (outside the presence of the officer), must be convinced that the child understands the nature and content of the statement. He must be convinced that the child is voluntarily giving 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.<sup>120</sup>

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.<sup>121</sup>

It is not enough for the magistrate to sign the proper forms. It is incumbent upon the magistrate to determine whether or not the child understands the nature and content of his statement by discussing the statement with the child.

In *Reta v. State* (2008), a video recording of respondent's encounter with the magistrate was introduced into evidence. The video showed that prior to giving his statement, the respondent was given the warnings required by Section 51.095 of the Texas Family Code by the magistrate. The respondent was then transported to the Police Department, where he gave his written statement. The video recording then demonstrated that upon his return the magistrate made no inquiry or examination of the respondent with regard to the nature and content of his statement. The failure by the magistrate to determine whether the child understood the nature and content of his statement warranted reversal.<sup>122</sup>

It would seem that if the magistrate does everything right and determines that the child voluntarily gave his statement, the issue of voluntariness becomes moot or is res judicata? The very reason this requirement exist is to have a judge admonish and speak with the child, at the time of the confession, to make a Judicial determination of whether or not the confession is voluntary. Is there then still an issue of voluntariness during a subsequent Motion to Suppress the Confession?

Physical evidence obtained in violation of this provision does not necessarily deem the evidence inadmissible. In *In the Matter of H.V (mentioned above)*, a juvenile's request to have his mother contact an attorney was considered an unambiguous request for counsel during the magistrate's admonishments. The court held that by looking at the totality of the circumstances surrounding the interrogation, H.V. was requesting an attorney. The violation of Miranda, however, only goes to the child's Fifth Amendment right against self-incrimination. Although the statement made by the child was without a lawyer, it was voluntary. The court held that Miranda was a Fifth Amendment protection not a Fourth Amendment protection. Since no Fourth Amendment violation was alleged with respect to the physical evidence, the physical evidence (obtained as a result of the child's un-counseled statement) was admissible.<sup>123</sup>

### 3. Parental Presence

There is no requirement that the Magistrate notify the juvenile's parent of his interrogation when the juvenile does not request the parent's presence.

In *Glover v. State*, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935 (Tex.App. B Houston [14<sup>th</sup> 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.<sup>124</sup>

#### D. ORAL CONFESSIONS

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

##### ' 51.095. Admissibility of a Statement of a Child

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

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

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

(4) the statement is made:

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

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

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

##### 1. Facts or Circumstances that are Found to be True

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

###### a. Found to be True

The phrase "found to be true," means something "the police are unaware [of] at the time of the confession [and is] later, after the confession, found to be true."<sup>125</sup> Additionally, if any one of the assertions the defendant makes is found to be true and establishes guilt, then the oral statement is admissible in its entirety.<sup>126</sup> An oral statement which inculpates the child or only corroborates that an offense occurred is not enough.

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.<sup>127</sup>

###### b. Must Have Miranda Warnings

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

affect the applicability of Miranda.<sup>128</sup>

***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.***<sup>129</sup>

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

## **2. Res Gestae Statements**

Section 51.095(a)(3) allows for the admission of statements which are res gestae of the offense or arrest. Res gestae statements are statements that are made during or very near in time to the commission of the offense or the arrest. The theory is that the statements should be admitted into evidence because they are particularly reliable, since they were made without thought or reflection by the person making the statement, but instead were made because of the excitement of the moment. Courts sometimes speak of res gestae statements as excited utterances.

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.<sup>130</sup>

## **3. Judicial Confession**

Section 51.095(a)(4) allows for the admission of statement given by a child in open court at the child's adjudication hearing or before a grand jury considering a petition, under Section 53.045 (determinate sentence) or at a preliminary hearing held in compliance with this code (other than at a detention hearing<sup>131</sup>).

In *Chaves v. State*, appellant pleaded guilty to the offense of aggravated robbery and aggravated sexual assault and received a 35-year sentence. Appellant later argued at a writ of habeas corpus hearing that his plea was involuntary due to erroneous advice from his attorney that he had to plead guilty or the sentences would be stacked. The Court of Criminal Appeals agreed, and the aggravated robbery case was remanded for a new trial. At trial, appellant objected to the State's use of appellant's habeas corpus testimony on the ground that the testimony was not an admission, but merely appellant's acknowledgment of the State's evidence. Appellant also objected that it would confuse the jury and, under Rule 403, it would be more prejudicial than probative. He likened the testimony given at the habeas hearing to testimony given at a suppression hearing for a limited purpose, which is inadmissible at trial. On appeal, appellant argues that his Fifth Amendment right against self-incrimination was violated. Appellant's trial objection does not comport with his objection on appeal. The Houston Court of Appeals (1 Dist), held that inculpatory statements made during an earlier writ of habeas corpus hearing were admissible at subsequent trial where objection at the time of the statement did not correspond with the objection made on appeal.<sup>132</sup>

#### 4. Used For Impeachment

Section 51.095(b)(2) provides:

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

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

Section 51.095(b)(2) allows for the admission of a statement, whether or not it stems from custodial interrogation, if it is voluntary and has a bearing on the credibility of the child as a witness.<sup>133</sup> 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.

#### 5. Tape Recorded Custodial Statements

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

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

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

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

**(D) not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child made under this subdivision.<sup>134</sup>**

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.<sup>135</sup> The warnings still have to be given by a magistrate and the magistrate can (but is not required to) have the officer return, with the child and the videotape, for a determination of voluntariness. If the magistrate uses this procedure, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily. The attorney representing the child must be given a complete and accurate copy of each recording not later than the 20th day before the date of the proceeding.

The giving of a video taped statement does not automatically implicate this provision nor does it automatically mean that the statement is being made during custodial interrogation. In *Avila v. State*, the juvenile gave a video taped statement and drew officers a map regarding his involvement in a murder. The child stated on the video that he understood that he was not in custody and that he was free to leave at any time. The court ruled (in an unpublished opinion) that the child was not in custody and as a result the statutory warning were not necessary.<sup>136</sup>

a. Return of Videotape to Magistrate  
Section 51.095(a)(5)(f).

**(f)A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.**<sup>137</sup>

Section (f) allows for the magistrate to request to view the recording with the child or have the child view the recording to determine whether the child's statements were given voluntarily. Since, in most of these incidents there will not be a written statement, it is advisable that the magistrate view the recording along with the child and have the child sign a statement that he has viewed the recording and that it is his statement. Even for a recorded statement, the magistrate must, in writing, sign, date, and certify (if he so feels) that the statement is being voluntarily given.

b. Wisconsin and Mandatory Electronic Recordings.

In 2005, in *In the Interest of Jerrell C.J.*, the Wisconsin Supreme Court exercised its supervisory power to require that all custodial interrogation of juveniles be electronically recorded (where feasible), and without exception, when questioning occurred at a place of detention. The Court felt that because of his young age of 14, his limited education and low average intelligence he was susceptible to police pressure. The child had been arrested twice for misdemeanor offenses prior to his interrogation for armed robbery. In both instances, he answered police questions, admitted to involvement, and was allowed to go home. The police specifically denied defendant's requests to call his parents and not only did the detectives refuse to believe defendant's repeated denials of guilt, but they also joined in urging him to tell a different "truth," sometimes using a "strong voice" that "frightened" him. The Wisconsin Supreme Court held that the written confession was involuntary under the totality of the circumstances and in addition, the it exercised its supervisory power to require that all custodial interrogations of juveniles be electronically recorded where

feasible, and without exception when questioning occurred at a place of detention.<sup>138</sup>

## *Endnotes*

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1. *Lanes v. State*, 767 S.W.2d 789 (Tex.Crim.App. 1989).
  2. *In the Matter of J.D.B.*, 209 S.W.3d 708, Nos. 14-05-00659-CV & 14-05-00660-CV, 2006 Tex.App.Lexis 9601, Tex.Juv.Rep. Vol. 21 No. 1 & 07-1-3B [Tex.App.C Houston (14th Dist), 11/7/06].
  3. *Texas Family Code* '51.02(7).
  4. *Vasquez v. State*, 739 S.W.2d 37, (Tex.Cr.App. 1987).
  5. *Chaves v. State*, No. 01-07-00563-CR, MEMORANDUM, 2008 WL 5263404, Tex.Juv.Rep. Vol. 23, No. 1, ¶ 09-1-5A (Tex.App.-Hous. (1 Dist.) 12/18/08).
  6. *Texas Family Code* '52.015(a).
  7. *Texas Family Code* '54.01(f).
  8. *Texas Family Code* '52.0151(a). *Texas Code of Criminal Procedure Art. 24.011(c)*.
  9. *Texas Family Code* '52.0151(b). *Texas Code of Criminal Procedure Art. 24.011(d)*.
  10. *Only persons who have escaped from a TYC facility or who have violated a condition of release from TYC, and who are over seventeen years of age, are excluded from regular detention hearings while in detention. Texas Family Code* '53.02 (a) & *Texas Family Code* '51.12(a) & (h).
  11. *Texas Education Code Section 37.081(a)*
  12. *Texas Education Code Section 37.081(c)*.
  13. *Education Code Section 37.081(g)*.
  14. *Education Code Section 25.091(b)*.
  15. *Amended by 80th Legis., Reg. Sess. (2007), H.B. 2237, eff. Sept. 1, 2007.*
  16. *Tex. Crim. Proc. Art. 15.27(a)*
  17. *Tex. Crim. Proc. Art. 15.27(h)*.
  18. *Tex. Crim. Proc. Art. 15.27(a)*.
  19. *Roquemore v. State*, 60 S.W.3d 862, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).

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20. *Gamboa v. State*, MEMORANDUM, No. 14-05-00942-CR, 2007 Tex.App.Lexis 405, Tex.Juv.Rep. Vol. 21 No. 1 & 07-1-13A. (Tex.App.C Houston [14th Dist.], 1/3/07).
  21. *Comer v State*, 776 S.W.2d 191 (Tex. Crim. App. 1989).
  22. *Comer v. State*, 776 S.W.2d 191 (Tex. Crim. App. 1989).
  23. *Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999).
  24. *Roquemoire v. State*, 60 S.W.3d 862, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).
  25. *Roquemoire*, at 870.
  26. *In the Matter of D.M.G.H.*, 553 S.W.2d 827 (Tex. App.-El Paso 1977).
  27. *In re G.A.T.*, 16 S.W.3d 818, 825 (Tex.App.--Houston [14th Dist.] 2000, pet. denied).
  28. *Contreras v. State*, 67 S.W.3d 181, No. 1682-99-CR, 2001 Tex. Crim. App. LEXIS 58 (Tex.Crim.App. June 27, 2001). [Motion for rehearing on petition for discretionary review denied, (Sep. 12, 2001)].
  29. *Gamboa v. State*, MEMORANDUM, No. 14-05-00942-CR, 2007 Tex.App.Lexis 405, & 07-1-13A. (Tex.App.- Houston [14th Dist.], 1/3/07).
  30. *Mavoides v. State*, MEMORANDUM, No. 13-04-00079-CR, 2006 Tex.App.Lexis 6089 (Tex.App.- Corpus Christi, 7/13/06).
  31. *Mavoides v. State*, MEMORANDUM, No. 13-04-00079-CR, 2006 Tex.App.Lexis 6089 (Tex.App.- Corpus Christi, 7/13/06).
  32. *Pham v. State*, 36 S.W.3d 199, (Tex. App.-Houston [1st Dist.] Dec., 2000).
  33. *State v. Simpson*, 105 S.W.3d 238 (Tex. App.-Tyler April, 2003).
  34. *Hill v. State*, 78 S.W.3d 374 (Tex.App.- Tyler 2001, pet. ref=d).
  35. *Ray v. State*, 176 S.W.3d 544, No. 01-03-01011-CR, (Tex.App.--Houston [1st Dist.] Dec., 2004) *Texas Juvenile Law* (6th Ed. 2004).
  36. *Weir v. State*, MEMORANDUM, No. 12-06-00408-CR, 2008 WL 2358219, Tex.Juv.Rep. Vol. 22, No. 3 & 08-3-8 (Tex.App.-Tyler, 6/11/08).
  37. *Tex. Fam. Code Ann.* ' 52.02(c) (West 2002).

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38. *Id. at ' 52.02(d).*
  39. *Le, 993 S.W.2d at 656.*
  40. *Le, 993 S.W.2d at 656.*
  41. *Anthony v. State, 954 S.W.2d 132, 135 (Tex. App.-San Antonio 1997, no pet.).*
  42. *In re U. G., 128 S.W.3d 797; 2004 Tex. App. Lexis 1854 (Tex. App.- Corpus Christi 2004, pet denied).*
  43. *Williams v. State, 995 S.W.2d 754; 1999 Tex.App.Lexis 3866(Tex.App.C San Antonio, 1999)*
  44. *Anthony v. State, 954 S.W.2d 132 (Tex. App.-San Antonio 1997).*
  45. *In re C. R., 995 S.W.2d 778 at 784, 1999 Tex. App. Lexis 3979 (Tex. App.- Austin 1999).*
  46. *Tex. Fam. Code Ann. '61.03. Effective September 1, 2003 and applicable to conduct occurring on or after effective date.*
  47. *Tex. Fam. Code Ann. '61.103(b).*
  48. *Tex. Fam. Code Ann. '61.106.*
  49. *Robert O. Dawson, Tex. Juv. Law (5th ed. 2000) (published by Tex. Juv. Probation Comm'n).*
  50. *In the Matter of C.L.C., No. 14-96-00105-CV,(Tex. App.-Houston [14th District] 1997) (unpublished) (also available at 1997 Tex. App. Lexis 5011).*
  51. *Vega v. State, No. 13-99-435-CR, (Tex. App.- Corpus Christi 2001) (unpublished) (also available at 2001 Tex. App. Lexis 7364).*
  52. *U.S. v. C.M., \_\_F.3d\_\_, No. 05-50585, 2007 U.S.App.Lexis 10858, Tex.Juv.Rep. Vol. 21, No. 3, & 07-3-1. (9th Cir., 5/8/07).*
  53. *18 United States Code ' 5033.*
  54. *U.S. v. C.M., \_\_F.3d\_\_, No. 05-50585, 2007 U.S.App.Lexis 10858, Tex.Juv.Rep. Vol. 21, No. 3 & 07-3-1. (9th Cir., 5/8/07).*
  55. *Gonzales v. State, 67 S.W.3d 910, 912 (Tex. Crim. App. 2002)*
  56. *Gonzales, 67 S.W.3d at 914.*

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57. *Gonzales*, 67 S.W.3d at 914.
  58. *Gonzales*, 67 S.W.3d at 914.
  59. *Gonzales*, 67 S.W.3d at 913 n.8.
  60. *Roquemore v. State*, 60 S.W.3d 862, 871, No. 722-00, 2001 Tex.Crim.App. LEXIS 106 (Tex.Crim.App. 9/14/01).
  61. *Hartmangruber v. State*, MEMORANDUM, No. 04-07-00213-CR, 2008 Tex.App.Lexis 1956, Tex.Juv.Rep. Vol. 22, No. 2 & 08-2-10 (Tex.App.--- San Antonio, 3/19/08).
  62. See *Vega*, 84 S.W.3d at 619
  63. *Roquemore*, 60 S.W.3d at 869.
  64. *Tex. Rules of Appellate Procedure 33.1* (West 2002).
  65. *Pham v. State*, 125 S.W.3d 622, No. 01-99-00631-CR, 2003 WL 22807944, 2003 Tex. App. Lexis 10073 (Tex. App. -Houston [1st Dist.] 11/26/03).
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  67. *Adams v. State*, \_\_\_ S.W.3d \_\_\_, No. 13-04-028-CR, 2005 Tex.App.Lexis 10253, *Juvenile Law Newsletter* & 06-1-9 (Tex.App.C Corpus Christi) 12/8/05.
  68. *Tex. Rules of Appellate Procedure 33.1* (West 2002).
  69. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).
  70. *Hill v. State*, 78 S.W.3d 374 (Tex. App.-Tyler 2001, pet. ref=d).
  71. *Hill*, 78 S.W.3d at 387.
  72. *Vega v. State*, No. 13-99-435-CR,(unpublished) 2001 Tex. App. Lexis 7364, (Tex. App.- Corpus Christi, 2001) . See also *Lopez v. State*, No. 14-01-01235-CR, (unpublished) 2003 Tex.App.Lexis 584 (Tex.App.- Houston [14th Dist.] January, 2003).
  73. *Childs v. State*, 21 S.W.3d 631, (Tex.App.- Houston [14th Dist] June, 2000).
  74. *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. Sup. Ct, 1999).
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76. *Texas Juvenile Law, 5th Edition, Dr. Robert O. Dawson (Published by Texas Juvenile Probation Commission, September 2000) pg. 282*

77. *Miller v. Fenton, 474 U.S. 104, 109, 88 L. Ed. 2d 405, 410, 106 S. Ct. 445, 449 (1985).*

78. *People v. Scott, 148 Ill. 2d 479, 509, 594 N.E.2d 217, 171 Ill. Dec. 365 (1992).*

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

81. *In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).*

82. *Texas Family Code '51.095 (a)(1)(D).*

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

84. *Marine v. State, 607 A.2d 1185, 1195 (Del. 1992).*

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

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

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

88. *In the Interest of J.M.J., 2007 SD 1, 726 N.W.2d 621, 2007 S.D. Lexis 1, Tex.Juv.Rep. Vol. 21 No. 2 & 07-2-6. (Sup.Ct. SD, 1/3/07).*

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

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

92. *Texas Family Code '51.095(b)(1).*

93. *In the Matter of F.C.W., MEMORANDUM, No. 14-05-00556-CV, 2006 Tex.App.Lexis 8364 (Tex.App.C Houston, 9/26/06).*

94. *In the Matter of F.C.W., MEMORANDUM, No. 14-05-00556-CV, 2006*

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*Tex.App.Lexis 8364 (Tex.App.C Houston, 9/26/06).*

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

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

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

98. *In the Matter of M.A.O., MEMORANDUM, No. 04-07-00658-CV, 2008 WL 5170297, Tex.Juv.Rep. Vol. 23, No.1, ¶ 09-1-4A (Tex.App.-San Antonio, 12/10/08).*

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

100. *In the Matter of J.W., MEMORANDUM, No. 05-05-00675-CV, 2006 Tex.App.Lexis 5005 (Tex.App.C Dallas, 6/12/06).*

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

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

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

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

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

106. *Cortez v. State, \_\_\_S.W.3d \_\_\_, No. 03-06-00359-CR, 2007 Tex.App.Lexis 6800 (Tex.App.C Austin, 8/21/07).*

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

108. *Estelle v. Smith, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).*

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

110. *In the Matter of C.E., No. 03-05-00495-CV, 2007 Tex.App.Lexis 6367 (Tex.App.C Austin, 8/9/07).*

111. *Wilkerson v. State, 173 S.W.3d 521, 523 (Tex. Crim. App. 2005).*

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112. *Wilkerson, Id. at 530-31.*
113. *Vega v. State, UNPUBLISHED, No. 13-99-435-CR, 2001 Tex. App. Lexis 7364 (Tex. App. B Corpus Christi) November, 2001.*
114. *In the Matter of H.V., \_\_S.W.3d\_\_, No. 06-0005, 2008 WL 1147567, Tex.Juv.Rep. Vol. 22, No. 2 & 08-2-11 (Tex.Sup.Ct., 4/11/08).*
115. *Texas Family Code '51.095(e).*
116. *Diaz v. State, Tex.App. LEXIS 5319, No. 04-00-00025-CR, (Tex.App.-San Antonio 2001).*
117. *In the Matter of J.A.B., No. 08-06-00097-CV, \_\_S.W.3d \_\_\_\_, 2008 WL 1757880, Tex.Juv.Rep. Vol. 22, No. 2 & 08-2-13 (Tex.App.-El Paso, 4/17/08).*
118. *In the Matter of J.M.S., UNPUBLISHED, No. 06-04-00008-CV, 2004 Tex. App. Lexis 8139 (Tex.App.- Texarkana), September, 2004.*
119. *Texas Family Code '51.095(a)(5)*
120. *Texas Family Code '51.095(a)(1)(D).*
121. *Texas Juvenile Law, 5th Edition, Dr. Robert O. Dawson (Published by Texas Juvenile Probation Commission, September 2000) pg. 288*
122. *Reta v. State, MEMORANDUM, No. 04-07-00564-CR, 2008 WL 2260726, Tex.Juv.Rep. Vol. 22, No. 3 & 08-3-7 (Tex.App.- San Antonio, 6/4/08).*
123. *In the Matter of H.V., \_\_S.W.3d\_\_, No. 06-0005, 2008 WL 1147567, Tex.Juv.Rep. Vol. 22, No. 2 & 08-2-11 (Tex.Sup.Ct., 4/11/08).*
124. *Glover v. State, UNPUBLISHED, No. 14-95-00021-CR, 1996 WL 384932, 1996 Tex.App.Lexis 2935 (Tex.App. B Houston [14th Dist.] 1996)*
125. *Romero v. State, 800 S.W.2d 539, 544-45 (Tex. Crim. App. 1990).*
126. *Baldree v. State, 784 S.W.2d 676, 684 (Tex. Crim. App. 1989); see also Marini v. State, 593 S.W.2d 709, 713 (Tex. Crim. App. 1980).*
127. *Dixon v. State, 639 S.W.2d 9 (Tex.App. -Dallas [5th Dist.] 1982).*
128. *Meza v. State, 577 S.W.2d 705 (Tex.Crim.App. 1979).*
129. *Meza v. State, 577 S.W.2d 705 at 708 (Tex.Crim.App. 1979).*
130. *Roquemore v. State, 60 S.W.3d 862, No. 722-00, 2001 Tex.Crim.App. LEXIS*

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*106 (Tex.Crim.App. 9/14/01).*

*131. Texas Family Code '54.01(g).*

*132 Chaves v. State, No. 01-07-00563-CR, MEMORANDUM, 2008 WL 5263404, Tex.Juv.Rep. Vol. 23, No. 1, ¶ 09-1-5B (Tex.App.-Hous. (1 Dist.) 12/18/08).*

*133. Texas Family Code '51.095(b)(2).*

*134 Texas Family Code ' 51.095(a)(5).*

*135. Texas Family Code '51.095 (a)(5).*

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

*137. Texas Family Code '51.095 (f).*

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