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OPINION COMMITTEE

Mike Stafford  
Harris County Attorney

December 19, 2003

RQ-0152-GA

FILE # ML-43391-0

I.D. # 43391

The Honorable Greg Abbott  
Attorney General of Texas  
P. O. Box 12548  
Austin, Texas 78711-2548

VIA CERTIFIED MAIL, RETURN RECEIPT  
REQUESTED NO. 7002 2410 0000 6921 4992

Re: Whether the Juvenile Board may designate the Juvenile Probation Department as the office authorized to determine whether to defer prosecution of a child referred to Juvenile Court for minor, non-violent misdemeanor offenses instead of forwarding such referrals to the prosecuting attorney.

*C. A. File No. 03GEN1458*

Dear General Abbott:

Pursuant to TEX. GOV'T CODE ANN. §402.043, we respectfully request your opinion on whether the Harris County Juvenile Board may designate the Harris County Juvenile Probation Department as the office with the authority to determine whether deferred prosecution would be in the best interests of a child referred to the Juvenile Court for minor, non-violent misdemeanor offenses without forwarding such referrals to the prosecuting attorney for review.

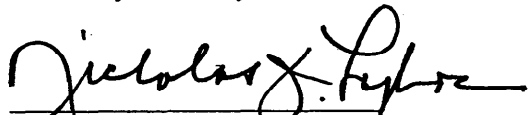
The Harris County Juvenile Board has designated the Harris County Juvenile Probation Department as the office authorized by the Board to conduct the preliminary investigation and other statutory duties, pursuant to a referral of a child to the Harris County Juvenile Courts. TEX. FAM. CODE ANN. §53.01. The Harris County Juvenile Probation Department in appropriate cases defers prosecution of the child as authorized by TEX. FAM. CODE §53.03. However, the Harris County District Attorney is taking the position that the Texas Constitution requires the District Attorney to review all referrals for legal sufficiency and the desirability of prosecution.

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The Honorable Greg Abbott  
December 19, 2003

Our Memorandum Brief is enclosed. Thank you for your consideration of this matter.

Sincerely,

MIKE STAFFORD  
Harris County Attorney

By:   
NICHOLAS J. LYKOS  
Assistant County Attorney  
Division Chief

MS:NJL:gf

Enclosure

Approved:

  
JOHN R. BARNHILL  
First Assistant County Attorney

cc: Members of the Juvenile Board  
Honorable Charles Rosenthal

**BY INTER-OFFICE MAIL**  
**BY INTER-OFFICE MAIL**

## MEMORANDUM

### Question Presented

Whether the Juvenile Board of Harris County may designate the Juvenile Probation Department as the office authorized to determine whether to defer prosecution of a child referred to the department for minor, non-violent misdemeanor offenses instead of forwarding such referrals to the prosecuting attorney.

Title 3 of the Texas Family Code, the Juvenile Justice Code, is the successor to the Juvenile Court Act and was added by Acts 1973, 63<sup>rd</sup> Legislature and prescribes the procedural framework for responding to juvenile misconduct. Juvenile proceedings involving delinquent conduct, although quasi-criminal in nature, are civil proceedings that are governed by the Family Code and not the Code of Criminal Procedure. However, despite the civil law designation, a juvenile is entitled, by virtue of the right to due process, to the right to adequate notice of charges, the right to counsel, the right to confrontation and cross examination of witnesses, and the right to the privilege against self-incrimination. *See In re Gault*, 387 U.S. 1 (1967). Additionally, the Texas legislature has determined that juvenile cases are to be handled differently from adult criminal cases because of the State's *parens patriae* interest in preserving and promoting the welfare of the child.

Section 51.01 of the Family Code identifies the purposes of the Juvenile Justice Code and states as follows:

This title shall be construed to effectuate the following public purposes:

- (1) to provide for the protection of the public and public policy;
- (2) consistent with the protection of the public and public policy:
  - (A) to promote the concept of punishment for criminal acts;
  - (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and**
  - (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
- (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
- (4) to protect the welfare of the community and to control the commission of unlawful acts by children;
- (5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
- (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the**

**parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.**

TEX. FAM. CODE ANN. § 51.01 (Vernon 2002). [emphasis added].

The Juvenile Board of Harris County has designated the Juvenile Probation Department as the office authorized to conduct the preliminary investigation, as well as perform other statutory duties, including supervising a program of deferred adjudication, on the referral of a child to juvenile court. "Referral to juvenile court" is defined in section 51.02(12) of the Texas Family Code.

Referral to juvenile court means the referral of a child or a child's case to the office or official, including an intake officer or probation officer, designated by the juvenile board to process children within the juvenile justice system.

TEX. FAM. CODE ANN. § 51.02(12) (Vernon Supp. 2004). Once "a child" or "a child's case" is referred to the juvenile probation department, the department is statutorily mandated to conduct a preliminary investigation of the case to determine exclusive original jurisdiction and probable cause for the allegations.

(a) On referral of a person believed to be a child or on referral of the person's case to the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the board shall conduct a preliminary investigation to determine whether:

(1) the person referred to juvenile court is a child within the meaning of this title; and

(2) there is probable cause to believe the person:

(A) engaged in delinquent conduct or conduct indicating a need for supervision; or

(B) is a nonoffender who has been taken into custody and is being held solely for deportation out of the United States.

(b) If it is determined that the person is not a child or there is no probable cause, the person shall immediately be released.

(c) When custody of a child is given to the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the board shall promptly give notice of the whereabouts of the child and a statement of the reason the child was taken into custody to the child's parent, guardian, or custodian unless the notice given under Section 52.02(b) provided fair notice of the child's present whereabouts.

(d) Unless the juvenile board approves a written procedure proposed by the office of prosecuting attorney and chief juvenile probation officer which provides otherwise, **if it is determined that the person is a child and, regardless of a finding of probable cause, or a lack thereof, there is an allegation that the child engaged in delinquent conduct of the grade of felony, or conduct constituting a misdemeanor offense**

**involving violence to a person or the use or possession of a firearm, illegal knife, or club, as those terms are defined by Section 46.01, Penal Code, or prohibited weapon, as described by Section 46.05, Penal Code, the case shall be promptly forwarded to the office of the prosecuting attorney, accompanied by:**

- (1) all documents that accompanied the current referral; and
  - (2) a summary of all prior referrals of the child to the juvenile court, juvenile probation department, or a detention facility.
- (e) If a juvenile board adopts an alternative referral plan under Subsection d, the board shall register the plan with the Texas Juvenile Probation Commission.
- (f) A juvenile board may not adopt an alternative referral plan that does not require the forwarding of a child's case to the prosecuting attorney as provided by Subsection (d) if probable cause exists to believe that the child engaged in delinquent conduct that violates Section 19.03, Penal Code (capital murder), or Section 19.02, Penal Code (murder).

TEX. FAM. CODE ANN. § 53.01 (Vernon Supp. 2004). [emphasis added].

The prosecuting attorney is required to review referrals made under section 53.01, which states as follows:

- (a) The prosecuting attorney shall promptly review the circumstances and allegations of a referral made under Section 53.01 for legal sufficiency and the desirability of prosecution and may file a petition without regard to whether probable cause was found under Section 53.01.
- (b) If the prosecuting attorney does not file a petition requesting the adjudication of the child referred to the prosecuting attorney, the prosecuting attorney shall:
  - (1) terminate all proceedings, if the reason is for lack of probable cause; or
  - (2) return the referral to the juvenile probation department for further proceedings.
- (c) The juvenile probation department shall promptly refer a child who has been returned to the department under Subsection (b)(2) and who fails or refuses to participate in a program of the department to the prosecuting attorney for review of the child's case and determination of whether to file a petition.

TEX. FAM. CODE ANN. § 53.012 (Vernon 2002).

After completion of the preliminary investigation, the juvenile probation department, in the appropriate case and subject to the direction of the juvenile court, may defer prosecution of a child pursuant to Section 53.03, which states in part as follows:

(a) Subject to Subsections (e) and (g), if the preliminary investigation required by Section 53.01 of this code results in a determination that further proceedings in the case are authorized, the probation officer or other designated officer of the court, subject to the direction of the juvenile court, may advise the parties for a reasonable period of time not to exceed six months concerning deferred prosecution and rehabilitation of a child if:

(1) deferred prosecution would be in the interest of the public and the child;

(2) the child and his parent, guardian, or custodian consent with knowledge that consent is not obligatory; and

(3) the child and his parent, guardian, or custodian are informed that they may terminate the deferred prosecution at any point and petition the court for a court hearing in the case.

(b) Except as otherwise permitted by this title, the child may not be detained during or as a result of the deferred prosecution process.

(c) An incriminating statement made by a participant to the person giving advice and in the discussions or conferences incident thereto may not be used against the declarant in any court hearing.

(d) The juvenile board may adopt a fee schedule for deferred prosecution services and rules for the waiver of a fee for financial hardship in accordance with guidelines that the Texas Juvenile Probation Commission shall provide. . . .

(e) A prosecuting attorney may defer prosecution for any child. A **probation officer or other designated officer of the court:**

(1) **may not defer prosecution for a child for a case that is required to be forwarded to the prosecuting attorney under Section 53.01(d); and**

(2) **may defer prosecution for a child who has previously been adjudicated for conduct that constitutes a felony only if the prosecuting attorney consents in writing.**

(f) The probation officer or other officer designated by the court supervising a program of deferred prosecution for a child under this section shall report to the juvenile court any violation by the child of the program.

(g) Prosecution may not be deferred for a child alleged to have engaged in conduct that:

(1) is an offense under Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or

(2) is a third or subsequent offense under Section 106.04 or 106.041, Alcoholic Beverage Code.

(h) If the child is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision that violates Section 28.08, Penal Code, deferred prosecution under this section may include:

(1) voluntary attendance in a class with instruction in self-responsibility and empathy for a victim of an offense conducted by a local juvenile probation department, if the class is available; and

(2) voluntary restoration of the property damaged by the child by removing or painting over any markings made by the child, if the owner of the property consents to the restoration.

(i) The court may defer prosecution for a child at any time;

(1) for an adjudication that is to be decided by a jury trial, before the jury is sworn;

(2) for an adjudication before the court, before the first witness is sworn; or

(3) for an uncontested adjudication, before the child pleads to the petition or agrees to a stipulation of evidence.

(j) The court may add the period of deferred prosecution under Subsection (i) to a previous order of deferred prosecution, except that the court may not place the child on deferred prosecution for a combined period longer than one year.

TEX. FAM. CODE ANN. § 53.03 (Vernon Supp. 2004). [emphasis added].

The Harris County District Attorney is taking the position that the decision to defer prosecution made by the juvenile probation department under Section 53.03 deprives the District Attorney of the ability to file a delinquency petition in all cases.

As previously indicated, the Family Code outlines the procedures that must be meticulously followed when dealing with juveniles alleged to have engaged in delinquent conduct. The effect of the Legislature's enactment of Title 3 of the Family Code has been explained as follows:

[The] Legislature set out a statutory procedure covering the arrest, trial, and disposition of juveniles accused of delinquency. Police officers, courts, and others involved with these juveniles are bound to comply with the detailed and explicit procedures enacted by the Legislature in this code.

*In re D.M.G.H.*, 553 S.W.2d 827, 828 (Tex. App.—El Paso 1977, no writ). Courts have strictly required that the juvenile procedures mandated by the Family Code be followed. *See Ex Parte D.W.C.* 1 S.W.3<sup>rd</sup> 896 (Tex. App.—Beaumont 1999, pet. denied) (juveniles do not have absolute constitutional right to bail); *In the Matter of S.L.L.*, 906 S.W.2d 190 (Tex. App.—Austin 1995, no writ) (legislature has not given juvenile same right as adult to withdraw a guilty plea); *In the Interest of D.Z.*, 869 S.W.2d 561 (Tex. App.—Corpus Christi 1993, writ denied) (confession was illegally obtained because juvenile not taken to designated juvenile processing office and never saw designated juvenile officer); *In the Matter of D.S.*, 833 S.W.2d 250 (Tex. App.—Corpus Christi 1992, writ denied) (determinate sentencing statute does not violate federal or state constitution).

*In the Matter of S.B.C.*, appellant contended that the State's determinate sentencing statutes under which he was adjudicated violated his federal constitutional rights to equal protection and due process. The court held:

When the constitutionality of a statute has been challenged, alleging that a fundamental right is violated, the courts must review that statute under a standard of strict scrutiny. *R.L.H.*, 771 S.W.2d at 701. Such a statute shall be upheld if it furthers a compelling state interest. *Id.* In enacting the determinate sentencing statutes, the legislature has furthered a compelling state interest by striking a balance between the state's interest in providing for the care, protection and development of its children, TEX. FAM. CODE ANN. § 51.01 (Vernon 1986), and its interest in providing protection and security for its general citizenry. Since both of these goals are vital, and the determinate sentencing statutes strike a balance between them, the statutes further a compelling state interest.

*In re S.B.C.* 805 S.W.2d 1 (Tex. App.—Tyler 1991, writ denied). [emphasis added].

Although we found no Texas cases construing whether the juvenile probation department's decision to defer prosecution of a minor, non-violent misdemeanor offense under section 53.03 of the Family Code deprives a district attorney's ability to file a delinquency petition in all cases, the rationale in the following California case is persuasive.

The resolution of this issue turns on whether the prosecuting attorney has the same discretion to file a petition to declare a minor a ward as he exercises in the filing of criminal complaints. Put another way, respondent contends that the prosecuting attorney has the sole and exclusive discretion to file a petition in any case, even if it were not forwarded by the probation officer or appealed by the applicant. If he has such discretion, the statute is merely to organize the intake process for the prosecuting attorney, in which event the deviation from that procedure in the instant case loses its significance. We conclude that he does not have such discretion. Juvenile matters are only properly before the prosecuting attorney for the exercise of his discretion of whether to file a wardship petition if the probation officer causes an affidavit requesting the commencement of such proceedings to be taken to the prosecuting attorney, or an applicant for the commencement of such proceedings presents a timely request to the prosecuting attorney for review of a probation officer's decision not to take such affidavit to the prosecuting attorney.

*Marvin F. v. Superior Court* (1977), 75 Cal.App.3<sup>rd</sup> 281.

Although two recent Texas cases have held that the State does not have the right to appeal in a juvenile case, see *In the Matter of S.N.*, 95 S.W.3d 535 (Tex. App.—Houston



[1<sup>st</sup> Dist.] 2002, pet. filed); *In the Matter of F.C.*, 108 S.W.3d 384 (Tex. App.—Tyler, 2003, no writ), the legislature recently amended the Family Code and added section 56.03 by Acts 2003, 78<sup>th</sup> Leg., ch. 283, § 25. Effective September 1, 2003, the state is entitled to appeal certain orders in cases that involve violent offenses or habitual felony conduct where a grand jury has approved the petition under section 53.045.

(b) The state is entitled to appeal an order of a court in a juvenile case in which the grand jury has approved of the petition under Section 53.045 if the order:

- (1) dismisses a petition or any portion of a petition;
- (2) arrests or modifies a judgment;
- (3) grants a new trial;
- (4) sustains a claim of former jeopardy; or
- (5) grants a motion to suppress evidence, a confession, or an admission and if:
  - (A) jeopardy has not attached in the case;
  - (B) the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay; and
  - (C) the evidence, confession, or admission is of substantial importance in the case.

TEX. FAM. CODE ANN. § 56.03(b) (Vernon Supp. 2004). [emphasis added]. However, before the legislature amended the Family Code, in a case of first impression, the First Court of Appeals explained:

The State has presented us with no authority supporting its standing to appeal in juvenile-delinquency cases. The State has the right to appeal certain orders in criminal cases, including the granting of motions to suppress evidence. *See* Tex. Const. Art. V, § 26; *see* Tex. Code Crim. Proc. Ann. art 44.01(a)(5) (Vernon Supp. 2002). However, the Legislature has mandated certain statutory protections for juveniles. **The right to appeal in juvenile proceedings is specifically controlled by the Family Code**, which only allows for appeals by or on behalf of a child.

*In the Matter of S.N.*, 95 S.W.3d 535, 536 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2002, pet. filed). [emphasis added].

The significance of both cases is that the holdings were based on the absence of express statutory authority in the Family Code for the state to appeal in juvenile proceedings. While the legislature has given the state the limited right to appeal orders in certain juvenile cases, the holding in *In the Matter of F.C.* would not have changed since the allegation did not involve a violent offense or habitual felony conduct. However, these cases demonstrate rather firmly that the state has the right to prosecute juvenile cases only in the manner expressly provided in the Texas Family Code.