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**JERI YENNE**

**CRIMINAL DISTRICT ATTORNEY  
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NOV 03 2011

October 31, 2011

**OPINION COMMITTEE**

The Honorable Greg Abbott  
Office of the Texas Attorney General  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-46860-11  
I.D. # 46860

**RQ-1012-GA**

Dear General Abbott:

We request your opinion as to whether the newly created Code of Criminal Procedure article 4.19 which allows the judge of a criminal court to "order the child" (who has been certified as an adult) to be "treated as an adult as provided by this Code," overrides the requirements of the newly amended section 51.12 (f) & (h) of the Family Code which requires the separation of facilities for certified juveniles under the age of 17 years from that of adult offenders.

Attached are our memorandum brief and a copy of Senate Bill 1209. Because we have a juvenile who will soon be transferred to criminal court, we would ask you for an expedited review and response.

Sincerely,

Jeri Yenne  
Brazoria County Criminal District Attorney

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## **BRIEF IN SUPPORT OF ATTORNEY GENERAL OPINION**

The Brazoria County District Attorney files the following brief in support of its request for an attorney general opinion under section 402.043 of the Texas Government Code.

### **I. Question**

Does the newly created Code of Criminal Procedure article 4.19 which allows the judge of a criminal court to “order the child” (who has been certified as an adult) to be “treated as an adult as provided by this Code,” override the requirements of the newly amended section 51.12 (f) & (h) of the Family Code which requires the separation of facilities for certified juveniles under the age of 17 years from that of adult offenders?

### **II. Background and Facts**

On September 17, 2011, the Brazoria County District Attorney’s Office filed a Petition for Discretionary Transfer to Criminal Court in cause no. JV-17891W, styled “In the Matter of E.O.G.” E.O.G. is 16 years of age and committed the offense in question on September 24, 2011. He is currently housed in a juvenile facility. But because of new legislation there is an issue as to whether the Criminal District Judge can order he be housed in an adult detention facility after he is certified. Brazoria County has no separate quarters in its adult detention facilities for juveniles and to create this type of facility would be financially prohibitive. The issue is: if the Judge orders that he be housed in an adult facility, must the certified juvenile be kept separate from the adult population

as set out in section 51.12 of the Family Code. The continued housing of E.O.G. in the juvenile facility after certification would represent a danger to other juveniles housed in that facility.

### **III. Discussion**

The newly created Code of Criminal Procedure article 4.19 appears to give the criminal court, in a certification case, discretion to order a juvenile be transferred to an adult facility without the separation required between inmates and juveniles as set out in section 51.12 of the Code of Criminal Procedure. Senate Bill 1209, effective September 5, 2011, made a number of changes to juvenile procedures (See attached Senate Bill 1209). Because this bill is newly enacted, there is no case law interpreting it.

#### ***Statutory Authority***

The newly created section 152.0015 of the Human Resources Code provides:

A juvenile board shall establish a policy that specifies whether a person who has been transferred for criminal prosecution under Section 54.02, Family Code, and is younger than 17 years of age may be detained in a juvenile facility pending trial as provided by Section 51.12, Family Code.

#### **Human Resources Code § 152.0015 (Vernon).**

Sections 51.12(f), (g), & (h) of the Family Code, as amended, provides:

(f) A child detained in a building that contains a jail, lockup, or other place of secure confinement, including an alcohol or other drug treatment facility, shall be separated by sight and sound from adults detained in the same building. Children and adults are separated by sight and sound only if they are unable to see each other and conversation between them is not possible. The separation must

extend to all areas of the facility, including sally ports and passageways, and those areas used for admission, counseling, sleeping, toileting, showering, dining, recreational, educational, or vocational activities, and health care. The separation may be accomplished through architectural design. *A person who has been transferred for prosecution in criminal court under Section 54.02 and is under 17 years of age is considered a child for the purposes of this subsection.*

(g) Except for a child detained in a juvenile processing office, a place of nonsecure custody, a secure detention facility as provided by Subsection (j), or a facility as provided by Subsection (l), a child detained in a building that contains a jail or lockup may not have any contact with:

(1) part-time or full-time security staff, including management, who have contact with adults detained in the same building; or

(2) direct-care staff who have contact with adults detained in the same building.

(h) *This section does not apply to a person:*

(1) *who has been transferred to criminal court for prosecution under Section 54.02 and is at least 17 years of age; or*

....

**Tex. Family Code Ann. § 51.12 (Vernon).**

Section 54.02(h) of the Family Code, as amended, provides:

(h) If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure, *except that if detention in a certified juvenile detention facility is authorized under Section 152.0015, Human Resources Code, the juvenile court may order the person to be detained in the facility pending trial or until the criminal court enters an order under Article 4.19, Code of Criminal Procedure.* A transfer of custody made under this subsection is an arrest.

**Tex. Family Code Ann. § 54.02 (Vernon).**

But, newly created article 4.19 of the Code of Criminal Procedure provides:

Notwithstanding the order of a juvenile court to detain a child in a certified juvenile detention facility under Section 54.02(h), Family Code, *the judge of the criminal court having jurisdiction over the child may order the child to be transferred to another facility and treated as an adult as provided by this code.*

**Tex. Code Crim. Proc. art. 4.19 (Vernon).**

### ***Analysis***

Section 152.0015 of the Human Resource Code provides that a juvenile board may allow a juvenile who has been certified as an adult, and is younger than 17 years, be held in a juvenile facility.

Sections 51.12(f), (g), & (h) of the Family Code requires that under normal circumstances, a juvenile who has been certified and is younger than 17 years of age, must be housed in facilities separate from the adult population.

Section 54.02(h) of the Family Code allows a juvenile court to transfer a juvenile, who has been certified, to a juvenile facility, if allowed by the juvenile board under section 152.0015 of the Human Resource Code.

Article 4.19 of the Code of Criminal Procedure gives discretion to the judge of criminal court receiving a certified juvenile to either permit him to stay in the juvenile facility under section 152.0015 of the Human Resource Code or to treat him as an adult and transfer him to an adult facility. Nothing in this article requires that in treating the certified juvenile as an adult that the Judge require him to be separated from the adult population as set out in 51.12 of the Family Code. Article 4.19 appears to be a general grant of authority to the District Court to order, within

his discretion, that the certified juvenile, “be treated as an adult as provided by this code (Code of Criminal Procedure).”

In interpreting a statute, a court must attempt to discern the collective intent or purpose of the legislators who enacted the legislation. *State v. Mason*, 980 S.W.2d 635, 638 (Tex. Crim. App. 1998). The focus is on the literal text of the statute in question and discerning the fair, objective meaning of that text at the time of its enactment. *Id.* When reviewing the literal text of the statute, the words and phrases of the statute are read within context and are construed “according to the rules of grammar and common usage.” *Id.*; **Tex. Gov’t Code Ann. § 311.011(a) (Vernon 2005)**. But if the plain language of a statute would lead to absurd results, or if the language is ambiguous, then a Court may review extra textual factors in interpreting a statute. *Mason*, 980 S.W.2d at 638

The wording of Senate Bill 1209 is ambiguous. Therefore the consequences and objective of the bill should be used to aid in its interpretation. Section 311.023 of the Government Code provides:

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) *object sought to be attained*;
  - (2) circumstances under which the statute was enacted;
  - (3) legislative history;
  - (4) common law or former statutory provisions, including laws on the same or similar subjects;
  - (5) *consequences of a particular construction*;
  - (6) administrative construction of the statute; and
  - (7) title (caption), preamble, and emergency provision.
- Tex. Gov’t Code Ann. § 311.023 (Vernon 2005).**

In construing a statute, a court may consider among other matters the consequences of a particular construction. See *Griego v. State*, 853 S.W.2d 664, 666 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1993, *no pet.*).

There is a sound public policy basis to interpret Senate Bill 1209 as set out above. Smaller counties are not able to afford separate facilities for the most dangerous of certified juveniles. It is unusual in this county to have more than one certified juvenile at a time. This means the creation of not only separate physical facilities for a small number of inmates, but also the hiring of separate staff. Section 51.12(g) of the Family Code requires that a juvenile may not come in contact with staff who have contact with adults detained in the same building. **Tex. Family Code Ann. § 51.12 (Vernon).**

It should be noted that the Legislative Budget Boards Fiscal Notes for this bill states under “Local Government Impact” that the cost required by this bill, “would vary by county, but is not anticipated to be significant statewide” (See attached copy of Legislative Budget Board Fiscal Notes). Given the number of small counties in the State, the cost statewide would definitely be significant if article 4.19 does not authorize the trial judge discretion to house certified juveniles with adults. It could not have been the intent of the legislature to require this type of grossly unfunded mandate on already cash strapped counties.

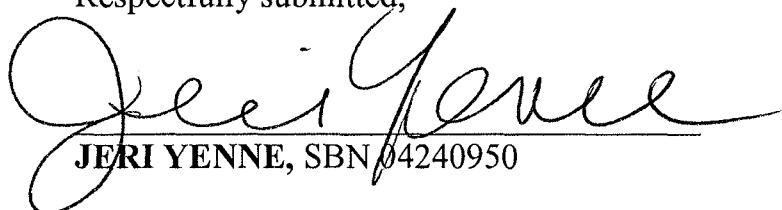
While not many juveniles are certified, those that are certified are among the most dangerous. It is unfair to endanger other juvenile offenders, many of whom committed minor offenses, by housing them with juveniles who have been

certified as an adult. For example, it is difficult to believe the legislature intended a 16 year old child certified for murder be housed with another child charged only with misdemeanor theft. If a certified juvenile were housed in a juvenile facility under section 152.0015 of the Human Resource Code, he would, of necessity, be kept in isolation for the safety of the other juveniles. This creates the same conditions of isolation which this bill was designed to avoid, as noted in the Sponsor's Statement of Intent in the Legislative Bill Analysis (See attached copy of the Bill Analysis).

#### **IV. Conclusion**

The wording and public policy behind Senate Bill 1209 would suggest that article 4.19 gives the criminal trial court discretion whether to treat a certified juvenile as an adult (and be housed with adults), send him to a juvenile facility under § 152.0015 of the Human Resources Code, or send him to an adult facility and keep him separate from adult offenders under section 51.12 of the Family Code. But the ambiguity of the wording of this senate bill, together with the absence of interpretive case law, obliges this office to seek a legal opinion before acting. Based on the foregoing, the Brazoria County District Attorney's Office requests that the Texas Attorney General issue a legal opinion on the above question presented.

Respectfully submitted,



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