



Mike Stafford  
Harris County Attorney

March 27, 2007

RQ-0579-GA

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

**RECEIVED**

MAR 30 2007

**OPINION COMMITTEE**

FILE # ML-45188-07  
I.D. # 45188

Attention: Opinion Committee

Re: Constitutionality of the \$5 Court Costs Fee to Pay for Juvenile Case Managers in Harris County

Dear General Abbott:

On behalf of Harris County, we submit our legal analysis concerning the constitutionality of a \$5 court cost fee authorized by House Bill 1575 of the Regular Session of the 79<sup>th</sup> Texas Legislature. A memorandum brief is enclosed.

Thank you for your consideration.

Yours very truly,

MIKE STAFFORD  
County Attorney

By Rachel Boates  
RACHEL BOATES  
Assistant County Attorney

## MEMORANDUM BRIEF

At issue is whether the juvenile case manager fee, authorized by article 102.0174 of the Code of Criminal Procedure, is constitutional. After review of the pertinent case law and Attorney General opinions, it appears a juvenile case manager fee is unconstitutional as a violation of the right to due process and equal protection guaranteed by the United States and Texas constitutions. The statute at issue reads as follows:

Art. 102.0174. Court Costs; Juvenile Case Manager Fund.

- (a) In this article, "fund" means a juvenile case manager fund.
- (b) The governing body of a municipality by ordinance may create a juvenile case manager fund and may require a defendant convicted of a fine-only misdemeanor offense in a municipal court to pay a juvenile case manager fee not to exceed \$5 as a cost of court.
- (c) The commissioners court of a county by order may create a juvenile case manager fund and may require a defendant convicted of a fine-only misdemeanor offense in a justice court, county court, or county court at law to pay a juvenile case manager fee not to exceed \$5 as a cost of court.
- (d) The ordinance or order must authorize the judge or justice to waive the fee required by Subsection (b) or (c) in a case of financial hardship.
- (e) In this article, a defendant is considered convicted if:
  - (1) a sentence is imposed on the defendant;
  - (2) the defendant receives deferred disposition, including deferred proceedings under Article 45.052 or 45.053; or
  - (3) the defendant receives deferred adjudication in county court.
- (f) The clerks of the respective courts shall collect the costs and pay them to the county or municipal treasurer, as applicable, or to any other official who discharges the duties commonly delegated to the county or municipal treasurer for deposit in the fund.
- (g) A fund created under this section may be used only to finance the salary and benefits of a juvenile case manager employed under Article 45.056.

(h) A fund must be administered by or under the direction of the commissioners court or under the direction of the governing body of the municipality.

TEX. CODE CRIM. PROC. ANN. art. 102.0174 (Vernon 2006)

The statute in question purportedly authorizes a county commissioners court to create a juvenile case manager fund that is financed by defendants convicted of fine-only misdemeanor offenses in a juvenile court, county court, or county court at law, and assess a juvenile case manager fee as a court cost to be assessed at a sum "not to exceed \$5 as a cost of the court," to be used to finance the salary and benefits of a juvenile case manager employed under Article 45.056. *See* TEX. CODE CRIM. PROC. ANN. art. 102.0174 (Vernon 2006). Article 45.056 provides for authorization of a county or justice court to "employ one or more full-time juvenile case managers to assist the court in administering the court's juvenile docket and in supervising its court orders in juvenile cases" and specifies that the juvenile case managers shall work primarily on cases that involve Class C misdemeanor offenses for "Parent Contributing to Non-Attendance" and "Failure to Attend School." TEX. CODE CRIM. PROC. ANN. art. 45.056 (Vernon 2006), *see also* TEX. EDUC. CODE §§ 25.093, 25.094 (Vernon 2006).

The Harris County Commissioners Court has authorized the fee and the hiring of juvenile case managers and the payment of their salaries and benefits via this fund, as authorized by article 102.0174 of the Code of Criminal Procedure. Order of Harris County Commissioners Court dated December 19, 2006 (attached). Our concern is based upon case law and prior opinions of the Attorney General that suggest such action is unconstitutional as a violation of equal protection rights because there is considerable possibility that different costs will be imposed in different counties for the same offense at the discretion of the commissioners courts throughout the state of Texas and the fee's purpose of truancy prevention is not related in any way to the vast majority of the fine-only misdemeanors of which the fee will be assessed.

#### Analysis

Section 19 of the Bill of Rights to our state Constitution provides: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. 1, § 19. Additionally, the Federal Constitution provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of laws.

U.S. CONST. art. 14, § 1. Because of these guarantees, state and federal courts have consistently held statutes to be unconstitutional when they fail to accord equal rights and equal protection of the law to all citizens.

In *Memet v. State*, the Fourteenth Court of Appeals held that a statute violates an individual's equal protection rights and is thus unconstitutional if such statute prescribes different penalties for the same conduct in different counties of the state. *Memet v. State*, 642 S.W.2d 518, 525-26 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1982, no writ). In this case, the defendant was convicted of a violation of a City of Houston ordinance which required a permit to be issued to operate a sexually oriented commercial enterprise. *Id.* at 520. The statute in question states that an offense by such an enterprise in a county or city that does not have a comprehensive zoning ordinance is a Class B misdemeanor (which was a fine up to \$1000 and/or confinement up to 180 days); however, such a violation in a city with a comprehensive zoning ordinance is a Class C misdemeanor (which was a fine up to \$200). *Id.* at 525 [emphasis added]. The court ultimately held that the statute was “unconstitutional as a denial of due process and equal protection” since there was no rational basis for “prescribing different penalties for the same conduct in different cities of the state.” *Id.* at 525-26 (the court reasoned that since the defendant was convicted and sentenced to a fine of \$500, a Class B misdemeanor, his rights were not equally protected because, if charged in the City of Dallas, he would have been charged with a Class C misdemeanor and his punishment would have been limited to \$200).

The basis for the holding in *Memet* that statutes that prescribe different punishments for the same conduct in different political subdivisions to be unconstitutional is long standing. See *Ex Parte Sizemore*, 8 S.W.2d 134 (Tex. Crim. App. 1928), *Ex Parte Ferguson*, 132 S.W.2d 408 (Tex. Crim. App. 1939), and *Ex Parte Carson*, 159 S.W.2d 126 (Tex. Crim. App. 1942). The *Carson* court applied the rationale to a non-uniform cost of court, holding:

any law which makes the punishment for an offense in one or more counties greater than the punishment of other counties for the same offense is void as in contravention of the provisions of the Constitution.

159 S.W.2d at 130 (here, a defendant was convicted and, because he resided in a county having eight or more district courts and three or more county courts, was assessed a one dollar fee for the establishment of a county library). Likewise, the *Sizemore* court, when reviewing the constitutionality of a local county road law which did not relate to roads but to fines that were applicable to residents of a particular county, found that the “terms of the law itself do not prescribe different penalties for the same offense, but in its practical operation the... road law has this effect,” and thus held that this law and any law, in making “different punishments follow the same identical criminal acts in the different political subdivisions of Texas violates both our state and Federal Constitutions. 8 S.W.2d 134 at 135 (Tex. Crim. App. 1928).

Additionally, the *Ferguson* court was faced with the challenge of judging the constitutionality of a state statute which allowed defendants convicted of misdemeanors to work for the county, at a rate of \$1-\$3 per day, depending on the size of the county, in order to pay off the fines owed for punishment. *Ex Parte Ferguson*, 132 S.W.2d 408, 407-09 (1939). The court ultimately found that defendants in one county may serve a much more severe punishment (up to three times as much as defendants in other counties) when awarded an identical punishment for the same offense. *Id.* at 410. Like the *Carson* and *Sizemore* courts, this court ruled

[w]hen two or more courts of coordinate jurisdiction in different counties each pronounce judgment upon an accused, which judgments are made of identical severity, but the law permits one of these tribunals to prescribe, in the enforcement of the judgment, a more severe punishment than the other is allowed, then equal protection of all of its citizens, guaranteed by the Constitution, both State and Federal, is not accorded.

*Ex Parte Ferguson*, 132 S.W.2d at 410 (further stating that to allow the “commissioners court authority to change or alter the quantum of punishment which has been assessed against the convict” would be “to allow one county to assess a much greater and more severe penalty than another county in an identical case and be a delegation of Legislative power”).

Furthermore, the Texas Attorney General has long relied upon the case law precedent discussed above. In June of 1992, Attorney General Dan Morales assessed the constitutionality of a statute that allowed court fees to be assessed in criminal cases in those counties in which the commissioners court adopted a resolution authorizing them. Op. Tex. Att’y Gen. No. DM-123 (1992); *see also* TEX. GOV’T CODE § 51.702(f). Attorney General Morales opined that under the test announced in *Carson* and *Memet*, this statute is unconstitutional because “it automatically imposes, in those counties that have adopted the statutory scheme of section 51.702, a punishment, for conviction of the same offense, which is greater than that imposed in those counties which have not adopted the statutory scheme.” *Id.* at 4; *see also* Op. Tex. Att’y Gen. No. JM-880 (1988) (holding that costs imposed upon defendants in misdemeanor cases involving state criminal statutes must be uniform and “a law allowing different costs to be assessed in different counties for the same penal offense would have the effect of allowing the penalty for state-defined crimes to vary from county to county and would violate both ‘due process’ and ‘equal protection’ constitutional rights”). It must be noted that a lone trial court in Wichita Falls reviewed this same statute, in conjunction with Morales’ opinion, and entered a declaratory judgment finding section 51.702 of the Texas Government Code was constitutional; however, that judgment has never been appealed to a higher court. *In re Dorsey Trapp*, No. 139568-B (78<sup>th</sup> Dist. Ct., Wichita County, Tex. Aug. 24, 1992).

In 1999, Attorney General John Cornyn was asked to issue an opinion regarding the same statute, section 51.702 of the Texas Government Code. *See* Op. Tex. Att’y Gen. No. JC-0098 (1999). In his analysis, Attorney General Cornyn reviewed all pertinent case law, including the *Carson*, *Ferguson*, *Sizemore*, and *Memet* cases, as well as the 1999 Morales opinion discussed above and the Wichita trial court opinion. When reviewing such case law in light of the statute, Attorney General Cornyn stated that “although a trial court has authorized the collection of fees and costs under section 51.702, a county opting to collect such fees and costs runs a substantial risk that such practice will be declared unconstitutional by a different district court or by an appellate court.” *Id.* at page 4. Additionally, Attorney General Cornyn reiterated the fact that under “*Carson*, *Memet* and other cited cases, [the statute at issue] is clearly invalid.” *Id.*; *citing* Op. Tex. Att’y Gen. No. DM-123 (1992).

It should also be noted that the Act does not require a uniform fee among the counties that opt to adopt it. Commissioners courts are authorized to require a fee “not to exceed \$5.”

TEX. CODE CRIM. PROC. ANN.art. 102.0174 (c) (Vernon 2006). Thus, it appears that as presently written, some counties may require fees of less than \$5.00, thus creating unequal penalties even should all counties in Texas require a fee but in different amounts.

Aside from the equal protection issues discussed herein, it is imperative to review the relationship between the fee to be charged and the purpose of the statute itself – to aid in combating juvenile truancy. In *Ex Parte Carson*, as discussed above, a court fee was levied against defendants in counties with eight or more district courts and three or more county courts for the establishment and maintenance of the county law library. 159 S.W.2d 126 (Tex. Crim. App. 1942). The court, in its discussion of the question of remoteness of legitimate court costs to litigants, reasoned that

if something as remote as a law library may be properly charged to the litigant on the theory that it better prepares the courts and the attorneys for the performance of their duties... we might logically tax an item of cost for the education of such attorneys and judges and even the endowments of the schools which they attend.

*Id.* at 127. The *Carson* court ultimately concluded, as other states have, that the “number of district and county courts in a county bears no reasonable and logical relationship whatsoever to the question of a need for a library” and thus the court fee imposed under the statute is “not and cannot be logically considered a proper item of cost in litigation.” *Id.* at 127-128.

If a county law library was too remote of a reason to allow for such a court fee in *Carson*, then fees to provide for a juvenile case manager fund to combat truancy appears be too far removed, and thus, improper. Even if there might be a rational relationship between the prevention of truancy and truancy related fine-only misdemeanors, the work of a juvenile case manager would not appear to be related to all or even most of the fine-only misdemeanor offenses to which it would be applied;

### Summary

In light of the case law and Attorney General opinions, it appears that the \$5 court fee accesses different punishments to criminal defendants based on their county of conviction within the state of Texas. The court fee can only be regarded as constitutional if all two hundred and fifty-four (254) counties across the state adopt and implement a juvenile court manager fund and begin accessing and collecting identical court fees. Even then, the commissioners court of each county could decide to discontinue the juvenile court manager fund and thus the court fee would be deemed unconstitutional as to all other counties in Texas that continue to collect the fee. A better practice may be to persuade the legislature to mandate a set fee that must be assessed and collected by all county commissioner courts in the funding of the juvenile case manager fund.

**Order of Harris County Commissioners Court**



Sylvia R. Garcia  
Commissioner

Downtown Office  
1001 Preston, Suite 950  
Houston, TX 77002  
Tel: 713.755.6220  
Fax: 713.755.8810

December 11, 2006

Baytown Annex  
701 W. Baker Road,  
Suite 104  
Baytown, TX 77621  
Tel: 281.427.7311  
Fax: 281.837.1290

**AGENDA ITEM**

Commissioners Court  
Harris County Administrative Building  
1001 Preston, 9<sup>th</sup> floor  
Houston, Texas 77002

05 DEC 13 AM 8:51  
HARRIS COUNTY  
MANAGEMENT SERVICES

Clear Lake Annex  
16608 Buccaneer Lane  
Suite 100,  
Houston, TX 77062  
Tel: 281.488.4678  
Fax: 281.286.7450

Dear Court Members:

Please consider the following item for the December 19, 2006 Commissioners Court Agenda.

**Request the implementation of the Juvenile Case Manager Fund authorized in the 79<sup>th</sup> Regular Legislative session to begin March 1, 2007. This fund would require each defendant convicted of a fine-only misdemeanor offense in a justice court, county court or county court at law to pay a juvenile case manger fee not to exceed \$5.00 as a court cost. The fund created may be used only to finance the salary and benefits of juvenile case managers.**

Raul C. Martinez Annex  
1001 S. Sgt. Macario  
Garcia Dr., Suite 102  
Houston, TX 77011  
Tel: 713.924.3975  
Fax: 713.924.3971

Vote of the Court:	Yes	No	Abstain
Judge Eckels	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comm. Lee	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Comm. Garcia	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comm. Radaack	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Comm. Eversole	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Sincerely,

*Sylvia R. Garcia*  
Sylvia R. Garcia  
Commissioner  
Harris County Precinct Two

Jim Fonteno Annex  
14350 Wallisville Road  
Houston, TX 77049  
Tel: 713.455.8104  
Fax: 713.451.6714

SRG/gem

Presented to Commissioner's Court

DEC 19 2006

APPROVE R/G  
Recorded Vol 242 Page 1115

Kyle Chapman  
Pasadena Annex  
7330 Spencer Hwy  
Pasadena, TX 77505  
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Comm. P. 2 ✓  
Co. Atty ✓  
Co. Attorney Janet Martin ✓  
Fund (Hendler) ✓

On this the 19<sup>th</sup> day of December, 2006, the Commissioners Court of Harris County, Texas, sitting as the governing body of Harris County, at a regular meeting of the Court, upon motion of Commissioner Radack, seconded by Commissioner Garcia, duly put and carried,

IT IS ORDERED that the request of Commissioner, Precinct 2 to implement the Juvenile Case Manager Fund, which requires each defendant convicted of a fine-only misdemeanor offense in a justice court, county court, or county court at law to pay a juvenile case manager fee not to exceed \$5.00 as a court cost, and may be used only to finance the salary and benefits of juvenile case managers, authorized in the 79<sup>th</sup> regular legislative session be authorized with a beginning date of March 1, 2007 be approved.

IT IS FURTHER ORDERED that the County Attorney be authorized to obtain an Attorney General opinion regarding the collection of this fee, if he so desires.

The vote of the Court on the above Motion was as follows:

AYES:	Four (Judge Eckels, Commissioners Garcia, Radack, and Eversole)
NOES:	One (Commissioner Lee)
ABSTENTIONS:	None

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Presented to Commissioner's Court

DEC 19 2006

APPROVE \_\_\_\_\_

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