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## Criminal Procedure: Confessions, Searches, and Seizures

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*Texas Court of Criminal Appeals*

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# CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*Crystal N. Abbey\**  
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## I. INTRODUCTION

Over the last two years, the U.S. Supreme Court and the Texas Court of Criminal Appeals decided a number of cases regarding confessions, and searches and seizures. The Supreme Court established several new nuances in these areas while the court of criminal appeals clarified the existing law's applicability under unique facts. This article covers the most significant confession, and search and seizure cases decided during this two-year period. Each section identifies recent decisions in the subcategories of both confession, and search and seizure, and analyzes the jurisprudential significance of these decisions.

There has been no new development from the Supreme Court interpreting confession law in the past two years. The court of criminal appeals, however, handed down two cases during this time addressing questions regarding custodial interrogations and confessions elicited by government agents. The most dramatic changes for both the Supreme Court and the court of criminal appeals involve search and seizure law. The Supreme Court provided new interpretations for reasonable suspicion and expanded who may challenge a search or seizure. On the other hand, the court of criminal appeals provided guidance and clarification on how this new precedent applies in unique factual circumstances.

## II. CONFESSIONS

The Fifth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment,<sup>1</sup> provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>2</sup> In *Miranda v. Arizona*, the U.S. Supreme Court explained that the Fifth Amendment serves as a clear and unwavering commitment to protect individuals from government overreach.<sup>3</sup> *Miranda* specifically requires police to inform suspects of their right to remain silent and right to counsel during a custodial interrogation.<sup>4</sup>

### A. CUSTODIAL INTERROGATION

A custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”<sup>5</sup> A court determines whether an individual was in custody based on objective circumstances by considering (1) the circumstances surrounding the interrogation; and (2) whether a reasonable person in those circumstances would have felt free to leave.<sup>6</sup> Questioning constitutes interrogation when an officer’s ques-

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1. U.S. CONST. amend. XIV, § 1; *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (incorporating the privilege against self-incrimination).

2. U.S. CONST. amend. V.

3. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

4. *Id.* at 467–70.

5. *Id.* at 444.

6. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

tions are “reasonably likely to elicit an incriminating response.”<sup>7</sup> This questioning, combined with custody, triggers the *Miranda* warning requirement.<sup>8</sup> A suspect’s self-incriminating statement made during custodial interrogation, absent *Miranda* warnings, will be held unconstitutional.<sup>9</sup> In Texas, the right is codified in Code of Criminal Procedure Article 38.22,<sup>10</sup> which requires police to admonish suspects of their rights and mandates that any confession obtained during an interrogation, absent such admonishments, is inadmissible at trial.<sup>11</sup>

### I. *State v. Cruz*

Routine booking questions are an exception to the *Miranda* rule.<sup>12</sup> Such questions typically arise after arrest and “serve a legitimate administrative need.”<sup>13</sup> Examples include name, address, physical description, birth date, and age.<sup>14</sup> A court does not consider a request for this biographical information as interrogation because the information does not tend to result in producing an incriminating response.<sup>15</sup> Moreover, the information may be part of a routine, administrative inquiry that serves legitimate purposes beyond criminal investigations.<sup>16</sup>

Despite this widely accepted exception, a question arose in *State v. Cruz* concerning whether routine booking questions create a per se rule that makes statements made in response to routine questions always admissible. The Texas Court of Criminal Appeals held that, while questions commonly part of routine booking procedures are admissible, there are circumstances in which a court must suppress statements in response to questions asked outside of the booking procedure or absent an administrative purpose.<sup>17</sup>

In *Cruz*, officers investigated a murder and discovered a fingerprint matching Cruz, who had several aliases and an outstanding Illinois warrant.<sup>18</sup> Texas officers contacted U.S. Marshals in Illinois who then arrested Cruz on the outstanding warrant and booked Cruz into jail in Illinois. The Texas officers travelled to Illinois and interviewed Cruz without *Miranda* warnings. Nor did they reveal the agency for which they worked.<sup>19</sup> The Texas officers asked Cruz several biographical questions including his name, birth date, address, phone number, whether he owned a cell phone, who he lived with, and how long he had been in the

7. *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980).

8. *Miranda*, 384 U.S. at 444–45.

9. *Id.* at 444.

10. TEX. CODE OF CRIM. PROC. ANN. art. 38.22, § 2(a) (West 2013).

11. *Id.* §§ 2–3.

12. *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990).

13. *Alford v. State*, 358 S.W.3d 647, 654 (Tex. Crim. App. 2012).

14. *Muniz*, 496 U.S. at 601; *Alford*, 358 S.W.3d at 654.

15. *State v. Cruz*, 461 S.W.3d 531, 538 (Tex. Crim. App. 2015).

16. *Id.*

17. *Id.* at 540.

18. *Id.* at 533–34.

19. *Id.* at 534.

United States. After Cruz provided all the requested information, the officers read him the *Miranda* warnings and Cruz immediately requested an attorney.<sup>20</sup> Based on the information Cruz provided, the Texas officers searched his house and discovered his birth certificate with his actual name and birth date.<sup>21</sup> And using the cell phone number he provided, officers also seized cell phone records that showed the phone was near the crime scene on the date of the murder.<sup>22</sup>

The trial judge granted Cruz's pretrial motion to suppress with respect to the interview but denied the motion with respect to the booking questions Illinois officers asked, fingerprints obtained upon arrest, cell phone records, and evidence discovered at Cruz's residence.<sup>23</sup> The court of appeals held that the interview statements were admissible under the routine booking exception because officers would not have known that the answers would elicit an incriminating response.<sup>24</sup>

The court of criminal appeals, however, disagreed and held that while the questions were biographical in nature, that fact alone does not preclude such questions from constituting an interrogation.<sup>25</sup> Biographical questions can transform into an interrogation when, a reasonable person in a similar position would have understood that answering such a question would be evidence of consciousness of guilt for a criminal offense.<sup>26</sup> Examining the question's content and the totality of circumstances surrounding the question, the court of criminal appeals held that the officers knew or should have known that their question about Cruz's cell phone number would lead to an incriminating response.<sup>27</sup> Because the Texas officers did not book Cruz and thus, could not exercise any formal authority over him, the officers' questions did not relate to any administrative needs or routine booking procedures.<sup>28</sup>

## B. PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment protects individuals from being compelled in a criminal case to act as witnesses against themselves.<sup>29</sup> Similarly, the Sixth Amendment provides the right to counsel that requires an attorney's presence during police questioning when an individual invokes the right.<sup>30</sup> Statements are inadmissible at any trial against the individual for

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20. *Id.*

21. *Id.* at 535.

22. *Id.*

23. *Id.*

24. *Id.* at 535–36.

25. *Id.* at 538–39 (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990)).

26. *Id.* at 539–40 (citing *Felder v. State*, 848 S.W.2d 85, 98 (Tex. Crim. App. 1992)).

27. *Id.* at 540.

28. *Id.* at 542.

29. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).

30. *See Massiah v. United States*, 377 U.S. 201, 206–07 (1964) (holding that a defendant's self-incriminating statements that law enforcement deliberately elicited after indictment and absent counsel cannot be used against him at trial).

any offense if the statements are obtained illegally.<sup>31</sup> The privilege also prohibits the State from commenting on a defendant's refusal to testify at trial<sup>32</sup> and prohibits the court from revoking probation when a defendant legitimately exercises the right.<sup>33</sup> A violation occurs only when the government or a government agent acts. A person will be considered an agent, or at least an informant, if the person "[has] at least . . . some sort of agreement with, or act[s] under instructions from, a government official."<sup>34</sup>

### I. *Rubalcado v. State*

The Texas Court of Criminal Appeals determined whether a victim who called the defendant to elicit incriminating responses acted as a government agent.<sup>35</sup> In this case, the victim called Rubalcado on three occasions. On each occasion, the victim was supervised by the officer and used law enforcement recording equipment.<sup>36</sup> In doing so, the officer intended the victim to elicit a confession from Rubalcado. On all three occasions, however, Rubalcado referenced his attorney.<sup>37</sup>

In *Rubalcado*, the court of criminal appeals did not establish a bright-line rule determining when a person becomes a government agent, but instead provided a rough guideline for future litigants.<sup>38</sup> The court of criminal appeals looked to how other jurisdictions determine when an informant becomes a government agent.<sup>39</sup> The other jurisdictions essentially evaluate a government agency relationship on whether a person acts under an arrangement with the government with the expectation of some benefit or advantage.<sup>40</sup> In other words, the question is whether a quid pro quo relationship between the individual and the government exists.<sup>41</sup> Here, the court of criminal appeals concluded that the victim in this case was a government agent because the officer (1) encouraged the victim to call and elicit a confession; (2) supplied the victim with the recording equipment; and (3) was present during each call.<sup>42</sup> Thus, through its analysis of other jurisdictions, the *Rubalcado* court provided a rough guideline from which litigants may structure their arguments.<sup>43</sup>

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31. *Rubalcado v. State*, 424 S.W.3d 560, 572–73 (Tex. Crim. App. 2014) (citing *Thompson v. State*, 108 S.W.3d 269, 270 (Tex. Crim. App. 2003) (per curiam) (Keasler, J., dissenting against the court's refusal to grant rehearing on its own motion)).

32. *Griffin v. California*, 380 U.S. 609, 614 (1965).

33. *Murphy*, 465 U.S. at 438.

34. *Manns v. State*, 122 S.W.3d 171, 184 (Tex. Crim. App. 2003).

35. *Rubalcado*, 424 S.W.3d at 576.

36. *Id.* at 564.

37. *Id.* at 565–66.

38. *See id.* at 576.

39. *Id.*

40. *See, e.g., People v. Dement*, 264 P.3d 292, 318 (Cal. 2011).

41. *Creel v. Johnson*, 162 F.3d 385, 394 (5th Cir. 1998).

42. *Rubalcado*, 424 S.W.3d at 576.

43. *See id.*

### III. SEARCHES AND SEIZURES

The Fourth Amendment to the U.S. Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”<sup>44</sup> An individual must satisfy several threshold issues to successfully raise a Fourth Amendment challenge. First, an individual must have “a legitimate expectation of privacy in the invaded space” and establish the government’s intrusion.<sup>45</sup> A legitimate expectation of privacy is measured by (1) the individual’s subjective expectation of privacy in the person, place, or thing searched; and (2) an objective inquiry about whether society is prepared to accept such an expectation as reasonable.<sup>46</sup> Second, the intrusion must constitute a search.<sup>47</sup> This element, however, is judged according to a relatively low standard.<sup>48</sup> Even a minor trespass into a protected area for the purposes of gathering information for prosecution constitutes a search.<sup>49</sup>

#### A. PROPERTY-BASED FOURTH AMENDMENT JURISPRUDENCE

Recently, with regards to the first threshold issue, both the U.S. Supreme Court and the Texas Court of Criminal Appeals addressed who can assert a Fourth Amendment challenge and how those challenges will be reviewed. The Supreme Court found that a group of similarly situated individuals or persons may raise a facial challenge under the Fourth Amendment.<sup>50</sup> The court of criminal appeals held that a reasonable expectation of privacy gives an individual standing to raise a Fourth Amendment challenge.<sup>51</sup> Additionally, the Supreme Court clarified its position on co-tenant consent for warrantless searches.<sup>52</sup>

##### 1. City of Los Angeles v. Patel

Los Angeles had a municipal code that required hotels to record guest information and provide it to any Los Angeles police officer to inspect.<sup>53</sup> The code classified a failure to provide the information to the police as a misdemeanor.<sup>54</sup> A group of hotel operators raised a facial challenge to the code under the Fourth Amendment.

The district court held for the city and found that the hotel operators

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44. U.S. CONST. amend. IV.

45. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

46. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

47. *See United States v. Jones*, 132 S. Ct. 945, 949 (2012).

48. *See id.*

49. *See id.*

50. *City of L.A. v. Patel*, 135 S. Ct. 2443, 2448 (2015).

51. *See Matthews v. State*, 431 S.W.3d 596, 607 (Tex. Crim. App. 2014).

52. *See Fernandez v. California*, 134 S. Ct. 1126, 1129–30 (2014).

53. *Patel*, 135 S. Ct. at 2447–48.

54. *Id.* at 2448.

“lacked a reasonable expectation of privacy in the records.”<sup>55</sup> A divided panel of the Ninth Circuit affirmed, but sitting en banc, reversed. The Ninth Circuit held that the code violated the Fourth Amendment because it allowed records inspection without providing for a neutral and detached magistrate to assess reasonableness against the threat of criminal prosecution for failing to comply.<sup>56</sup>

The U.S. Supreme Court first examined whether facial challenges could be brought on Fourth Amendment claims and held such claims are permissible because facial challenges can be brought under the First and Second Amendments, the Fourteenth Amendment’s Due Process Clause, and the Foreign Commerce Clause.<sup>57</sup> The Supreme Court then held that the code was facially unconstitutional because it “fail[ed] to provide hotel operators with an opportunity for precompliance review.”<sup>58</sup>

In the Supreme Court’s eyes, the code had to provide an opportunity for precompliance review.<sup>59</sup> Specifically, the Supreme Court warned, “Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests.”<sup>60</sup> A search authorized by the code is per se unreasonable if not approved by a judge or magistrate before the search, unless the search also falls within a prescribed exception.<sup>61</sup> “This rule ‘applies to commercial premises as well as to homes.’”<sup>62</sup> Warrantless searches, however, may be reasonable in special needs circumstances and where the primary purpose is not criminal prosecution.<sup>63</sup> But the Supreme Court explained that, even if the search was for administrative purposes—one that ensures compliance and deters criminals from operating criminal enterprises—“the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decision maker.”<sup>64</sup> The Supreme Court emphasized that the hotel operator need only have the opportunity for a neutral decision maker to review the officer’s demand for a search.<sup>65</sup>

## 2. *Matthews v. State*

In *Matthews v. State*, the Texas Court of Criminal Appeals held that a person who legitimately borrowed a vehicle has standing to challenge the

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55. *Id.*

56. *Id.*

57. *Id.* at 2449–50 (discussing *Sibron*’s application that essentially held that Fourth Amendment facial attacks are unlikely to succeed when “there is substantial ambiguity as to what conduct a statute authorizes”).

58. *Id.* at 2451.

59. *Id.*

60. *Id.* at 2452–53.

61. *Id.* at 2452.

62. *Id.* (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978)).

63. *Id.*

64. *Id.* (citing *Camara v. Mun. Court of City & Cty. of S.F.*, 387 U.S. 523, 545 (1967); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984)).

65. *Id.*



vehicle's search.<sup>66</sup> In *Matthews*, officers received an anonymous tip about a black man named Neil Matthews, who wore a white muscle tee and dark pants, and sold crack out of a white van in front of a food store.<sup>67</sup> The officers knew it was a high-crime area. When officers arrived on the scene they found Matthews inside a van and dressed according to the tipster's description. The officers approached Matthews, but because it was dark and a high-crime area, they asked him to step out of the van so they could see his hands.<sup>68</sup> When Matthews did not respond, the officers ordered him to exit the van. The officers frisked Matthews but found nothing. The officers then asked his name, and he said, "Cornelius Matthews."<sup>69</sup> The officers asked to search the van, but he refused, stating the van was not his.<sup>70</sup> Based on Matthews's refusal, the officers called for a drug sniff dog, and Matthews became nervous.<sup>71</sup> As the officers escorted him to the squad car for further questioning, Matthews fled. After a pursuit, the officers caught Matthews. The drug dog arrived and alerted officers to marijuana and crack cocaine in the van.<sup>72</sup>

Matthews moved to suppress the evidence, but both the trial judge and the appellate court concluded that he lacked standing to challenge the officers' search because he lacked a "possessory interest in the van."<sup>73</sup> Both courts also determined that reasonable suspicion supported the initial detention, based on the officers' corroboration and the tip's credibility.<sup>74</sup>

On the issue of standing, the court of criminal appeals explained that a person who borrows a car has an expectation of privacy in that car because the borrower has a possessory interest in the car, albeit less than the owner's.<sup>75</sup> But a person who voluntarily abandons a borrowed car loses his or her expectation of privacy in the car.<sup>76</sup> Here, the officers corroborated the tip and established the tip's reliability by confirming the vehicle's description, its location, Matthews's clothing, and his name.<sup>77</sup> In other words, the officer had more than the tip to support reasonable suspicion to order Matthews out of the van.<sup>78</sup> And while Matthews did have an expectation of privacy in the borrowed van, he lost that expectation of privacy once he abandoned the van by fleeing.<sup>79</sup>

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66. *Matthews v. State*, 431 S.W.3d 596, 599 (Tex. Crim. App. 2014).

67. *Id.* at 600.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 601.

73. *Id.*

74. *Id.*

75. *Id.* at 607 (explaining that by virtue of being in the place legitimately, having complete dominion and control and the right to exclude others, taking normal precautions to seek privacy before the intrusion, using the car for private use, and the accused's claim of privacy, are all consistent with historical notions of privacy).

76. *Id.* at 608–09.

77. *Id.* at 605.

78. *Id.*

79. *Id.* at 610.

On the issue of reasonable suspicion, the court of criminal appeals held that based on the totality of the circumstances, the officers had sufficient facts to support reasonable suspicion to detain Matthews.<sup>80</sup> In reaching this conclusion, the court of criminal appeals explained, “detention must be ‘reasonably related in scope to the circumstances which justified the interference in the first place.’”<sup>81</sup> While an officer must confirm or dispel suspicions quickly, the detention “may continue for a reasonable period of time until the officers have confirmed or dispelled their original suspicion of criminal activity.”<sup>82</sup>

### 3. *Fernandez v. California*

The *Fernandez* Court decided whether one resident can consent to a police home search after another resident refuses and is arrested.<sup>83</sup> Here, an officer received a report of a gang related robbery. When officers arrived at the scene, a man directed them to a nearby building the suspect occupied. The officers went into the building and heard what sounded like a domestic dispute.<sup>84</sup> The officers knocked on the door and a crying woman with marks and blood answered the door. The officers asked if they could enter the apartment, but Fernandez appeared and refused the officers’ entry.<sup>85</sup> Believing Fernandez caused the woman’s injuries, the officers arrested him and took him to the station. The officers returned and asked the woman if they could search the home and she consented.<sup>86</sup> The search produced evidence of Fernandez’s gang membership, weapons, and the clothes the robber reportedly wore. Fernandez moved to suppress the evidence, but the trial judge denied the motion.<sup>87</sup> The court of appeals affirmed and the California Supreme Court denied review.<sup>88</sup>

Adding to the contours of warrantless searches and seizures precedents, the U.S. Supreme Court held that “[a]n occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.”<sup>89</sup> In *United States v. Matlock*, the Supreme Court explained that a warrantless search was permissible because, “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”<sup>90</sup> In *Illinois v. Rodriguez*, the Supreme Court held that a woman who falsely claimed to be a resident of

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80. *Id.* at 605.

81. *Id.* at 603 (quoting *Davis v. State*, 947 S.W.2d 240, 242 (Tex. Crim. App. 1997)).

82. *Id.* (citing *Davis*, 947 S.W.2d at 245).

83. *Fernandez v. California*, 134 S. Ct. 1126, 1129–30 (2014).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1131.

88. *Id.*

89. *Id.* at 1134.

90. *United States v. Matlock*, 415 U.S. 164, 170 (1974) (finding the woman’s consent was sufficient for the warrantless search when the defendant and the woman lived together).

an apartment lacked common authority.<sup>91</sup> But under the apparent authority doctrine, the Supreme Court concluded the entry lawful because the police reasonably believed that the woman was a resident after she referred to the residence as “our apartment.”<sup>92</sup> In *Georgia v. Randolph*, however, the Court held that when the objecting resident is present and expressly refuses the search, a warrantless search is unlawful.<sup>93</sup> Unlike in *Randolph*, the *Fernandez* Court explained that a continuing refusal to consent to a search (1) is impractical; (2) is inconsistent with *Randolph*’s logic; and (3) would deny the other occupants’ rights over the home.<sup>94</sup> Therefore, a co-tenant’s consent to a police search, in the absence of the refusing co-tenant, may suffice for a warrantless search.<sup>95</sup>

The decisions in *Patel* and *Matthews* clarify who can raise Fourth Amendment challenges and how courts review those challenges.<sup>96</sup> Even though Fourth Amendment facial challenges are difficult to raise successfully, *Patel* demonstrates it can be done.<sup>97</sup> Moreover, *Matthews* clarifies that ownership is not the end of the inquiry when determining whether an individual has a reasonable expectation of privacy.<sup>98</sup> Finally, *Fernandez* further elaborates how a co-tenant’s consent or refusal to a search applies in Fourth Amendment jurisprudence.<sup>99</sup>

#### B. GENERAL SCOPE OF FOURTH AMENDMENT PROTECTION

As demonstrated above, the Fourth Amendment applies when the government or its agent seizes either property or a person, not when a private actor does so independent of the government.<sup>100</sup> Seizure includes any meaningful interference with an individual’s possessory interest.<sup>101</sup> A person is considered seized when a reasonable person would believe that the individual was not free to leave based on the totality of the circumstances.<sup>102</sup> The government is required to obtain a warrant supported by

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91. *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990).

92. *Id.* at 179, 188–89.

93. *Georgia v. Randolph*, 547 U.S. 103, 122–23 (2006) (finding that a wife’s consent to a search was insufficient for a warrantless search of drug evidence in the house).

94. *Fernandez*, 134 S. Ct. at 1135–36. *But cf. id.* at 1139 (Ginsburg, J., dissenting) (applying *Randolph* with the opposite effect and finding the Court dispensed with the warrant requirement).

95. *See id.* at 1137 (majority opinion).

96. *See City of L.A. v. Patel*, 135 S. Ct. 2443, 2447 (2015); *Matthews v. State*, 431 S.W.3d 596, 599 (Tex. Crim. App. 2014).

97. *See Patel*, 135 S. Ct. at 2447.

98. *See Matthews*, 431 S.W.3d at 599.

99. *See Patel*, 134 S. Ct. at 1137.

100. *See U.S. CONST.* amend. IV.

101. *See, e.g., Fernandez v. California*, 134 S. Ct. 1126, 1139 (2014) (Ginsburg, J., dissenting) (finding the government’s warrantless intrusion violated the Fourth Amendment).

102. *See, e.g., Johnson v. State*, 414 S.W.3d 184, 193–94 (Tex. Crim. App. 2013) (determining a police encounter was non-consensual because “a reasonable person would not have felt free to leave” and thus constituted a detention when an officer shined a bright spotlight on the Johnson who was in a parked car; partially blocked Johnson, in a way that would have forced Johnson to maneuver around the officer’s car; used a loud authoritative voice; and demanded Johnson’s identification).

probable cause before searching or seizing either property or person.<sup>103</sup> Warrants are required to search homes;<sup>104</sup> closed containers not in vehicles;<sup>105</sup> vehicles via GPS tracking;<sup>106</sup> digital cell phone data;<sup>107</sup> and possibly an arrestee's blood in driving under the influence cases.<sup>108</sup> Search and arrest warrants require: (1) a neutral and detached magistrate; (2) sworn police affidavits; (3) probable cause to believe that evidence of a specific crime will be found in the place searched; and (4) a description of the place to be searched and the things to be seized with particularity.<sup>109</sup> If the information comes from an informant, an officer must be able to show the informant's basis of knowledge and the informant's veracity based on the totality of the circumstances.<sup>110</sup>

### C. REASONABLE SUSPICION AND PROBABLE CAUSE

The Fourth Amendment provides the parameters for police interactions with citizens. Consensual encounters do not raise any constitutional issues;<sup>111</sup> nonconsensual encounters do. Temporary investigative detentions, or Terry stops, are permissible only when the officer has reasonable suspicion that the detainee is engaged, has been engaged, or is about to engage in criminal activity.<sup>112</sup> Probable cause is required for an officer to (1) arrest an individual without a warrant;<sup>113</sup> (2) conduct a warrantless vehicle search;<sup>114</sup> or (3) obtain a search or arrest warrant.<sup>115</sup> The cases below detail how both the U.S. Supreme Court and the Texas Court of Criminal Appeals reviewed different facts to find whether reasonable suspicion or probable cause existed.

#### I. *Navarette v. California*

Investigative traffic stops are permissible when the officer has reasonable suspicion.<sup>116</sup> Reasonable suspicion justifying a stop depends on the officer's information and the information's credibility.<sup>117</sup> The test requires examining the totality of the circumstances and finding more than a hunch but less than a probable cause.<sup>118</sup> And while a stop need not be based on an officer's observation alone, "an anonymous tip alone seldom

103. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

104. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

105. *See United States v. Ross*, 456 U.S. 798, 824 (1982).

106. *United States v. Jones*, 132 S. Ct. 945, 946–47 (2012).

107. *Riley v. California*, 134 S. Ct. 2473, 2492–93 (2014).

108. *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013).

109. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

110. *Id.* at 21.

111. *Florida v. Royer*, 460 U.S. 491, 497–98 (1983).

112. *Terry*, 392 U.S. at 21–22.

113. *Henry v. United States*, 361 U.S. 98, 102 (1959).

114. *California v. Acevedo*, 500 U.S. 565, 569 (1991).

115. *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983).

116. *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (citing *United States v. Cortez*, 449 U.S. 411, 417–18 (1981); *Terry*, 392 U.S. at 21–22).

117. *Id.* (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)).

118. *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

demonstrates the informant's basis of knowledge or veracity."<sup>119</sup> By its very nature, an anonymous tipper's credibility is unknown but "can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'"<sup>120</sup>

In *Navarette*, the U.S. Supreme Court determined that an anonymous tip had the requisite indicia of reliability to support reasonable suspicion and that the tip, being reliable, would provide a reasonable officer with reasonable suspicion of drunk driving.<sup>121</sup> There, police dispatch received an anonymous tip that reported a vehicle's make and model, license plate number, and location.<sup>122</sup> The tipster also complained that the driver ran the tipster off the road. Dispatch then relayed that information to nearby patrolling officers.<sup>123</sup> After the police stopped the vehicle occupied by the driver and Navarette, the officers smelled marijuana. The officers arrested both the driver and Navarette after the officers searched the car and found thirty pounds of marijuana. Navarette moved to suppress the evidence, arguing the officer lacked reasonable suspicion for the traffic stop.<sup>124</sup> On appeal, the court affirmed and found that the anonymous tip, coupled with the officer's corroboration, was sufficiently reliable to justify the stop, and that the tip provided sufficiently dangerous facts that warranted an investigative stop without any further officer investigation.<sup>125</sup>

The Supreme Court emphasized that the caller had eyewitness knowledge with the ability to identify the car's make, model, and license plate number, which the officers corroborated, and the ability to provide a detailed account of the criminal activity.<sup>126</sup> The information was especially credible because, as in evidentiary law, "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."<sup>127</sup> The same reasoning justifies admitting excited utterances or "'statement[s] relating to a startling event' . . . 'made while the declarant was under the stress of excitement that it caused.'"<sup>128</sup> The Supreme Court also cited "the caller's use of the 911 system," which has caller ID safeguards against false reports, but it was careful to note that

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119. *White*, 496 U.S. at 329.

120. *Navarette*, 134 S. Ct. at 1688 (quoting *White*, 496 U.S. at 327). Compare *White*, 496 U.S. at 330–31 (finding an anonymous tipper's information providing predictable information corroborated by police made the tip credible, supporting reasonable suspicion), with *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (determining no reasonable suspicion existed where there was no basis making the tip credible because the tip lacked familiarity with the suspect, the suspect's affairs, or predictions about future conduct).

121. *Navarette*, 134 S. Ct. at 1690 (citing *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

122. *Id.* at 1686.

123. *Id.* at 1687.

124. *Id.*

125. *Id.*

126. *Id.* at 1689.

127. *Id.* (quoting Advisory Committee's Note to Rule 803(1) of the Federal Rules of Evidence, which explains the basis for the present sense impression hearsay exception).

128. *Id.* (quoting FED. R. EVID. 803(2)).

911 tips are not per se reliable.<sup>129</sup> In concluding that the officer acted reasonably based on the totality of the circumstances, the Supreme Court observed that the tipster alleged reckless or drunk driving—more than a minor traffic offense—and that many of the officers had experience in DWI detection.<sup>130</sup>

Justice Scalia’s dissent criticized the majority opinion for departing from Fourth Amendment jurisprudence by allowing an anonymous and uncorroborated tip to support reasonable suspicion.<sup>131</sup> He took issue with how the majority characterized the tip as reliable simply because it provided intimate and unobservable knowledge.<sup>132</sup> In his view, the tip provided only general knowledge that “everyone in the world who saw the car would have . . . and anyone who wanted the car stopped would have to provide that information.”<sup>133</sup>

Scalia also criticized the majority’s reliance on the present sense impression and excited utterance exceptions to the hearsay rule.<sup>134</sup> These types of statements are deemed credible because their immediacy prevents the declarant from adding or detracting from their statement.<sup>135</sup> Here, the tip lacked immediacy.<sup>136</sup> Enough time passed to allow the tipster to see the license plate, stop, write down the information, and dial the police—all of which negate immediacy.<sup>137</sup> Moreover, the same hearsay exceptions have not yet been interpreted to determine that an unknown declarant’s statements would be admissible, and it would be unlikely that the law would find such a statement trustworthy.<sup>138</sup> Finally, 911 calling systems do not establish trustworthiness because what matters is whether callers are aware that the 911 system is capable of identifying them, not that the system is doing so.<sup>139</sup>

## 2. *Heien v. North Carolina*

In *Heien*, the U.S. Supreme Court held that reasonable suspicion can arise from a mistake of law when it is based on a reasonable misunderstanding of the scope of a law’s prohibition.<sup>140</sup> In *Heien*, an officer observed a driver who looked stiff and nervous.<sup>141</sup> The officer followed the driver and when he slowed down, the officer only saw one brake light illuminate. The officer stopped the driver, believing that having only a

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129. *Id.* at 1690.

130. *Id.* at 1691.

131. *Id.* at 1692 (Scalia, J., dissenting).

132. *Id.* at 1693.

133. *Id.*

134. *Id.*

135. *Id.* at 1694.

136. *Id.*

137. *Id.* (noting that seeing and remembering the license number would be a difficult task after being run off the road while the car sped away, assuming that the tipster wrote the information down and used her own cell phone).

138. *Id.*

139. *Id.*

140. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

141. *Id.*

single working brake light violated North Carolina law. While questioning the driver and Heien, the passenger, the officer discovered cocaine in the car.<sup>142</sup> The officer then arrested Heien and the driver for trafficking cocaine. Heien filed a motion to suppress the evidence, but the North Carolina Supreme Court held that an officer's reasonable mistake of law provides a valid basis for reasonable suspicion.<sup>143</sup>

The Supreme Court explained that reasonable suspicion is based on facts the officer observes, the officer's understanding of the relevant laws, and the application of those facts to the law.<sup>144</sup> An officer can be mistaken on either the law or facts and in either circumstance, "the result is the same: the facts are outside the scope of the law."<sup>145</sup> Accordingly, the result from a mistake of fact should not differ from a mistake of law.<sup>146</sup> The mistake, however, must be reasonable:<sup>147</sup> "the Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable."<sup>148</sup> Indeed, another officer in the same position might also think that Heien's faulty brake light violated North Carolina law.<sup>149</sup> Officers who fail to diligently study the law will therefore not be excused under the doctrine.<sup>150</sup> Therefore, applying its new gloss on reasonableness, the Supreme Court held that the officer's mistake of law was reasonable and did not violate Heien's Fourth Amendment rights.<sup>151</sup>

### 3. *Rodriguez v. United States*

The U.S. Supreme Court also addressed whether police may conduct a drug dog sniff on a completed traffic stop without establishing reasonable suspicion. The Supreme Court held that an officer may not prolong a stop beyond its initial purpose to investigate absent additional reasonable suspicion of another offense discovered during the course of investigating the traffic offense.<sup>152</sup>

Around midnight, a Nebraska officer saw a car drive onto the shoulder of the highway.<sup>153</sup> Because this action violated Nebraska's traffic code, the officer stopped the car, asked the driver for his license and registration, and asked him to step out of the car.<sup>154</sup> The driver provided his

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142. *Id.*

143. *Id.* at 535.

144. *Id.* at 536 (relying on *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

145. *Id.*

146. *Id.*

147. *Id.* at 536–38 (discussing probable cause-like cases dating back to Chief Justice Marshall taking into account reasonable mistakes of law as a justifiable basis if the mistake is reasonable. *See Stacey v. Emery*, 97 U.S. 642 (1878); *United States v. Riddle*, 3 L. Ed. 110 (1809); *Michigan v. DeFillippo*, 443 U.S. 31 (1979)).

148. *Id.* at 539 (emphasis in original).

149. *Id.* at 540.

150. *Id.* at 539–40.

151. *Id.* at 540.

152. *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015).

153. *Id.*

154. *Id.* at 1613.

identification, but declined to step out of the car. The officer checked the driver's information and returned to his patrol car to check the passenger's information. Discovering nothing, the officer returned to the car to issue a written warning.<sup>155</sup> After issuing the warning, the officer asked the driver if he could walk a drug-sniff dog around the car but the driver refused. The officer then instructed the driver to turn off the engine, get out, stand in front of the patrol car, and wait for another officer to arrive.<sup>156</sup> Once the second officer arrived, the officers walked a drug-sniff dog around the car. The drug dog alerted the officers to a large hidden bag of methamphetamine.<sup>157</sup> Rodriguez, the driver, moved to suppress the evidence, arguing that the search and seizure resulted from an unlawfully prolonged traffic stop to conduct a dog sniff in the absence of reasonable suspicion.<sup>158</sup>

The Supreme Court explained that a proper *Terry* stop duration “is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop, and attend to related safety concerns.”<sup>159</sup> The stop should not last any longer than is necessary to address the infraction—the purpose of the stop.<sup>160</sup> Thus, “[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.”<sup>161</sup> Granted, an officer “may conduct certain unrelated checks during an otherwise lawful traffic stop,” but the officer may not conduct the checks “in a way that prolongs the stop, absent reasonable suspicion ordinarily demanded to justify detaining an individual.”<sup>162</sup> In cases concerning officer safety, Supreme Court precedent justifies a brief or *de minimis* intrusion extending traffic stops.<sup>163</sup> Citing *Arizona v. Johnson*, which upheld an unrelated investigation lengthening a roadside detention,<sup>164</sup> the Supreme Court explained that the dangers to officers accompanying traffic stops justify precautions that extend the traffic stop’s duration for the officer “to complete his mission safely.”<sup>165</sup>

According to the Supreme Court, an officer deviates from his or her mission when the officer conducts or attempts to conduct on-scene investigations into other crimes.<sup>166</sup> These investigations do not involve a general interest to stem crime or drug interdiction on the highways.<sup>167</sup> Notably, the Supreme Court addressed only whether the officer could

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1614 (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *United States v. Sharpe*, 470 U.S. 675, 685 (1985); *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

160. *Id.*

161. *Id.* (citing *Sharpe*, 470 U.S. at 686).

162. *Id.* at 1615.

163. *Id.*

164. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009).

165. *Rodriguez*, 135 S. Ct. at 1616.

166. *Id.*

167. *Id.*



prolong the stop.<sup>168</sup> The Supreme Court remanded the case to determine whether the officer had reasonable suspicion to justify the prolonged detention.<sup>169</sup>

In the dissent, Justice Thomas opined that the officer executed the stop in a reasonable manner.<sup>170</sup> He noted that the stop lasted only twenty-nine minutes and that the officer conducted ordinary traffic stop activities.<sup>171</sup> He also pointed out that the officer called a backup for safety reasons.<sup>172</sup> Under this reasoning, Justice Thomas believed the officer conducted a reasonable and lawful stop.<sup>173</sup> Therefore, the dog sniff did not transform the stop into an otherwise illegal stop.<sup>174</sup> Justice Thomas cautioned that the outcome would lead to “haphazard results” because reasonableness will be wholly dependent on how fast an officer can process a traffic stop, either based on experience, access to technology, or efficiency.<sup>175</sup>

And focusing on the stop’s reasonableness as the central issue, Justice Thomas drew a distinction between what is reasonable during a *Terry* stop based on reasonable suspicion versus a stop based on probable cause.<sup>176</sup> An officer cannot prolong a stop based on reasonable suspicion.<sup>177</sup> But, a stop based on probable cause, as was the case here, is typically afforded “more leeway.”<sup>178</sup>

Thus, the take-away principle from this case is that officers cannot prolong a traffic stop beyond its scope to investigate other crimes absent additional reasonable suspicion or probable cause, even for routine dog sniffs.

#### 4. McClintock v. State

Interpreting *Florida v. Jardines*, the Texas Court of Criminal Appeals decided two cases addressing dog sniffs and probable cause affidavits: *McClintock v. State* and *State v. Cuong Phu Le*.

First, in *McClintock*, the Texas Court of Criminal Appeals decided whether a search warrant affidavit, removed of illegally obtained information, sufficiently established probable cause for a search.<sup>179</sup> The affidavit alleged that the officer received a tip of a possible indoor marijuana growing operation on the second floor of a building.<sup>180</sup> The officer located the building and surveilled the first floor, a business with a public access stairwell in the rear leading from a parking lot to the second floor.

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168. *Id.*

169. *Id.* at 1616–17.

170. *Id.* at 1618 (Thomas, J., dissenting).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1618–19.

176. *Id.* at 1620–21.

177. *Id.* at 1621.

178. *Id.*

179. *McClintock v. State*, 444 S.W.3d 15, 16 (Tex. Crim. App. 2014).

180. *Id.* at 16.

The officer later observed a male come and go before and after business hours. Based on his experience, the officer believed this was consistent with drug activity.<sup>181</sup> When the officer approached the second floor's exterior, he smelled what he believed was marijuana, so he requested a drug-dog. The dog alerted the officer of the drugs. McClintock moved to suppress the seized drugs, challenging the search warrant's validity for lack of probable cause.<sup>182</sup>

The court of criminal appeals held that *Florida v. Jardines* required the dog sniff to be excluded.<sup>183</sup> It explained that when some of the information in the affidavit must be excluded, a reviewing court must determine whether there is sufficient information left to support probable cause.<sup>184</sup> Based on the remaining information, the officer's reference to "the location" was ambiguous, even taking into account the other legally obtained information, and did not clearly establish probable cause.<sup>185</sup> The court of criminal appeals remanded the case for a determination on whether the affidavit was supported by probable cause absent the dog sniff.<sup>186</sup> On remand, the First Houston Court of Appeals held that the affidavit was not supported by probable cause determining that the officer's good faith reliance was not an exception to Texas's exclusionary rule.<sup>187</sup>

##### 5. *State v. Cuong Phu Le*

Unlike *McClintock*, in *Cuong Phu Le*, the Texas Court of Criminal Appeals held that the search warrant affidavit's information supplied sufficient probable cause.<sup>188</sup> Here, a neighbor reported suspicious activity in a vacant house. The officer had extensive investigatory experience concerning indoor marijuana cultivation.<sup>189</sup> The affidavit did not identify the neighbor, but the officer knew the informant's identity and that the informant had a clean criminal background. Based on the tip, the officer drove by the house and observed the tightly shut blinds.<sup>190</sup> Investigating further, he subpoenaed the house's electrical utilities records, which listed Cuong Phu Le as the owner. But, according to DPS records, Cuong Phu Le's address on his license did not match the utilities record.<sup>191</sup> On a separate occasion, the officer visited the house and heard the air conditioner running even though it was cool outside. The officer concluded that this was consistent with a hydroponic grow operation because the

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181. *Id.* at 17.

182. *Id.*

183. *Id.* at 19–20.

184. *Id.* at 19 (citing *Castillo v. State*, 818 S.W.2d 803, 805 (Tex. Crim. App. 1991)).

185. *Id.*

186. *Id.* at 20–21.

187. *McClintock v. State*, 480 S.W.3d 734, 736 (Tex. App.—Houston [1st Dist.] 2015, pet. granted).

188. *State v. Cuong Phu Le*, 463 S.W.3d 872, 874 (Tex. Crim. App. 2015), *cert. denied*, *Texas v. Cuong Phu Le*, 136 S. Ct. 819 (2016).

189. *Id.*

190. *Id.* at 875.

191. *Id.*

lights used to grow the plants generate a lot of heat. He then walked up to the front door and smelled marijuana.<sup>192</sup> Afterwards, the officer conducted multiple night surveillances and saw no lights on other than those on the front and back doors. He contacted another narcotics officer who observed a car at the residence. When the car left, the officer conducted a traffic stop. He noticed a strong smell of raw marijuana coming from both the car and the driver, Cuong Phu Le.<sup>193</sup> The officers then used a drug dog to smell the car and the house's front door. The dog alerted the officers to the front door of Cuong Phu Le's house. Afterwards, a magistrate issued a search warrant and the officers found 358 marijuana plants in the house.<sup>194</sup>

The court of criminal appeals held that, even without the dog sniff evidence, there was enough information in the search warrant affidavit to support probable cause.<sup>195</sup> A "search warrant based in part on tainted information is nonetheless valid if it clearly could have been issued on the basis of the untainted information in the affidavit."<sup>196</sup> Here, the court of criminal appeals reasoned that the tipster was reliable because the tipster had no criminal history, had a clean driving record, and was an established homeowner in the community for many years.<sup>197</sup> The tipster also remained accountable to the officer<sup>198</sup> and provided enough information for the officer to evaluate the tipster's trustworthiness.<sup>199</sup> Even more, the officer corroborated the tipster's information by observing the house and Cuong Phu Le for several weeks.<sup>200</sup> In fact, the officers smelled the marijuana odor themselves.<sup>201</sup>

#### D. EXCEPTIONS TO THE WARRANT REQUIREMENT

The Fourth Amendment requires officers to obtain an arrest or search warrant from a detached, neutral magistrate.<sup>202</sup> Generally speaking, fruits of warrantless searches and seizures must be suppressed.<sup>203</sup> However, there are many exceptions to the warrant requirement that render evidence admissible.<sup>204</sup> Some exceptions discussed here include searches incident to arrest, exigent circumstances, and consent.

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192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 881.

196. *Id.* (citing *Brown v. State*, 605 S.W.2d 572, 577 (Tex. Crim. App. 1980), *abrogated* by *Hedicke v. State*, 779 S.W.2d 837 (Tex. Crim. App. 1989)).

197. *Id.* at 878.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 879.

202. *Katz v. United States*, 389 U.S. 347, 356–57 (1967).

203. *See, e.g., id.* at 357 (holding warrantless searches are per se unreasonable under the Fourth Amendment); *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (same).

204. *See Katz*, 389 U.S. at 357 n.19 (citing cases that chart other recognized warrant requirement exceptions).

### 1. *Search-Incident-to-Arrest: Riley v. California*

The U.S. Supreme Court recently confronted whether police can conduct a warrantless search of digital information on an arrestee's cell phone based on that person's arrest. In *Riley v. California*, the Supreme Court decided two cases concluding that police need a warrant for such searches.<sup>205</sup> In *Riley*, an officer stopped Riley because he drove a car with expired registration.<sup>206</sup> During the stop, the officer learned that Riley's license was suspended, and the officer arrested Riley and impounded his car. The officer conducted a vehicle inventory search that revealed several firearms. Another officer also conducted a search-incident-to-arrest and found a cell phone and items on Riley's person that associated him with the Bloods street gang. At the station, an officer went through the phone and found further evidence of Riley's possible Bloods membership.<sup>207</sup> Later, the officer searched the phone again and found pictures of Riley standing before a car that was suspected in another earlier crime. Riley moved to suppress all evidence from the cell phone, but the trial judge denied the motion.<sup>208</sup> On appeal, the California Court of Appeals affirmed because the cell phone search was incident to a lawful arrest.<sup>209</sup>

In *Wurie*, the second case addressed by the Supreme Court in its *Riley* opinion, officers observed Wurie selling drugs and arrested him.<sup>210</sup> At the police station, the officers conducted a search-incident-to-arrest and found a flip cell phone. Officers seized the phone and searched the phone's contents, particularly the call log and found Wurie's home number. The officers also observed the background picture showing a woman and baby.<sup>211</sup> The officers used a phone directory to trace the home number to a physical address and went to the apartment.<sup>212</sup> Once there, officers saw Wurie's last name on the mailbox and a woman in the window who looked like the one in the background picture.<sup>213</sup> The officers obtained a search warrant and discovered drugs, drug paraphernalia, firearms and ammunition, and cash.<sup>214</sup> Wurie moved to suppress the evidence because officers obtained it through an illegal search of his phone.<sup>215</sup> The district court denied the motion.<sup>216</sup> The First Circuit, however, reversed and held that cell phones are distinct under the Fourth Amendment because of the amount of personal and private information stored on them.<sup>217</sup>

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205. *Riley v. California*, 134 S. Ct. 2473, 2480–82 (2014).

206. *Id.* at 2480.

207. *Id.*

208. *Id.* at 2481.

209. *People v. Riley*, No. D059840, 2013 WL 475242, at \*6 (Cal. App. Feb. 8, 2013).

210. *Riley*, 134 S. Ct. at 2480–81.

211. *Id.* at 2481.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 2842.

216. *Id.*

217. *United States v. Wurie*, 728 F.3d 1, 13 (1st Cir. 2013).

The Supreme Court explained that the search-incident-to-arrest exception applies to achieve two primary goals: to promote and ensure officer safety and to prevent evidence destruction.<sup>218</sup> As a general rule, a search-incident-to-arrest “requires no additional justification” if the suspect’s custodial arrest is supported by probable cause and is reasonable and lawful.<sup>219</sup> The search is limited to only the arrestee’s personal property within his or her immediate control.<sup>220</sup> But in the case of cell phones, reasonableness needs to be determined by balancing the degree of intrusion on the individual’s privacy and the need for promoting legitimate governmental interests.<sup>221</sup>

Thus, the Supreme Court concluded that a digital data search of cell phones incident to arrest violates the Fourth Amendment.<sup>222</sup> The Supreme Court explained that protecting officer safety and preventing evidence destruction are not concerns that exist when searching cell phone digital data.<sup>223</sup> While the Supreme Court has said that arrestees have a diminished expectation of privacy,<sup>224</sup> cell phones have large amounts of personal data stored on them and thus, “bears little resemblance to the type of brief physical search considered” in the past.<sup>225</sup> The Supreme Court distinguished cell phones from the usual items recovered in a search-incident-to-arrest<sup>226</sup> and explained that digital data cannot be used as a weapon or to help the arrestee escape.<sup>227</sup>

Indeed, once officers secure a cell phone, there is no longer a danger that an arrestee will destroy evidence.<sup>228</sup> While there are ways to prevent or restrict police access to cell phone data, either by remote wiping or encryption, the arrestee cannot actively destroy evidence once under arrest.<sup>229</sup> If officers need to access digital information on an arrestee’s cell phone without a warrant, officers may be able to rely on exigent circum-

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218. *Riley*, 134 S. Ct. at 2483 (citing *Chimel v. California*, 395 U.S. 752, 762–63 (1969)).

219. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

220. *Id.* at 2484 (citing *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991)) (finding a search of a 200-pound footlocker violated the exception when compared to the search in *Robinson* where the officer discovered a crumpled cigarette package in the arrestee’s pocket); *see also Arizona v. Gant*, 556 U.S. 332, 343, 350 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)) (A search incident to arrest can include a vehicle search “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search,” and “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”).

221. *Riley*, 134 S. Ct. at 2484 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

222. *Id.* at 2485; *see also State v. Granville*, 423 S.W.3d 399, 417 (Tex. Crim. App. 2014) (finding a cell phone search incident to arrest violated Granville’s Fourth Amendment rights).

223. *Riley*, 134 S. Ct. at 2485–86.

224. *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013).

225. *Riley*, 134 S. Ct. at 2485.

226. *Id.* (quoting *Gant*, 556 U.S. at 343) (asking “whether application of the search incident to arrest doctrine to this particular category of effects would ‘untether the rule from the justification underlying the *Chimel* exception’”).

227. *Id.* at 2485–86.

228. *Id.* at 2486.

229. *Id.*

stances but not a search-incident-to-arrest.<sup>230</sup> Although arrestees have a diminished privacy interest, a substantial invasion into their privacy may still violate the Fourth Amendment and require a warrant.<sup>231</sup> Cell phone storage capacity and capability may reveal all sorts of private information, making it unique under the Fourth Amendment.<sup>232</sup> Moreover, cell phones are ubiquitous.<sup>233</sup>

## 2. *Exigent Circumstances: State v. Villarreal*

There are some exigent circumstances that may justify a warrantless search and seizure when supported by probable cause. The inquiry is decided on a case-by-case basis, but the general principle behind the exigent circumstances exception is to prevent evidence destruction or a suspect's escape.<sup>234</sup> For instance, exigent circumstances will support a warrantless search and seizure if the police are in hot pursuit of a fleeing felon.<sup>235</sup>

Until the U.S. Supreme Court decided *Missouri v. McNeely*, it was unclear whether dissipation of alcohol from blood constituted a per se exigent circumstance, that justified a warrantless blood draw in DWI cases.<sup>236</sup> The Supreme Court declined to hold that mere dissipation of alcohol from blood is a per se exigent circumstance, and instead held that exigency must be determined on a case-by-case basis.<sup>237</sup>

In the wake of *McNeely*, the Texas Court of Criminal Appeals in *State v. Villarreal*, addressed whether a warrantless, nonconsensual blood draw when investigating a repeat DWI offender, pursuant to Texas's mandatory blood draw provisions<sup>238</sup> violated the Fourth Amendment.<sup>239</sup> The court of criminal appeals held that such blood draws violate the Fourth Amendment because the blood draws neither fall within the established Fourth Amendment exceptions nor satisfy reasonableness.<sup>240</sup>

In *Villarreal*, the officer pulled Villarreal over and observed apparent signs of intoxication.<sup>241</sup> Villarreal refused to take any field sobriety tests and the officer arrested him for DWI. After Villarreal refused the officer's request for a blood sample, the officer from ran a criminal history check on Villarreal's name and discovered several prior DWI convictions.<sup>242</sup> The officer transferred Villarreal to a hospital and ordered medical staff to take a blood sample, despite Villarreal's objections. In his

230. *Id.* at 2487 (citing *Missouri v. McNeely*, 1334 S. Ct. 1552, 1561–62 (2013)).

231. *Id.* at 2488 (citing *Chimel v. California*, 395 U.S. 752, 766–67, n.12 (1969)).

232. *Id.* at 2488–89.

233. *Id.* at 2490 (explaining that about ninety percent of Americans carry a cell phone daily).

234. *See Kentucky v. King*, 563 U.S. 452, 460–61 (2011).

235. *See id.* at 460 (citing *United States v. Santana*, 427 U.S. 38, 42–43 (1976)).

236. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013).

237. *Id.* at 1563.

238. TEX. TRANSP. CODE ANN. §§ 724.011(a), 724.012(b), 724.013 (West 2011).

239. *State v. Villarreal*, 475 S.W.3d 784, 787 (Tex. Crim. App. 2014), *cert. denied*, Texas v. Villarreal, 136 S. Ct. 2544 (2016).

240. *Id.*

241. *Id.* at 788.

242. *Id.*

report, the officer stated that he had probable cause that Villarreal committed DWI.<sup>243</sup> The tests showed a blood-alcohol concentration level well above the legal limit.<sup>244</sup> Villarreal moved to suppress the evidence from the blood tests. At the suppression hearing, the officer testified that he could have gotten a warrant for the blood draw but did not because the statute did not require it. Villarreal, however, cited *McNeely* and the trial judge granted his motion.<sup>245</sup> The court of appeals affirmed.<sup>246</sup>

The court of criminal appeals charted every potentially applicable warrant requirement exception and found that none of the exceptions justified the warrantless search.<sup>247</sup> First, looking at the relevant statutes, the court of criminal appeals explained that the “statutory scheme appears to ‘extinguish’ a suspect’s right to refuse to submit a specimen” if certain aggravating factors are present.<sup>248</sup> The court of criminal appeals rejected the State’s arguments concerning consent because, in order for consent to be valid, an individual must have the ability to freely give, limit or revoke that consent.<sup>249</sup> And a valid Fourth Amendment waiver requires that a suspect’s consent be voluntarily and freely given.<sup>250</sup> Therefore, the statutory provision providing for implied consent is invalid, particularly when a suspect explicitly refuses to submit to such blood testing.<sup>251</sup>

Second, the court of criminal appeals applied the totality of the circumstances test and found a search must be reasonable.<sup>252</sup> Over the dissenters’ arguments that a general reasonableness theory applied, the majority held that a search must fit into a recognized warrant requirement exception.<sup>253</sup> The court of criminal appeals explained that exceptions applicable to parolees and probationers were dissimilar.<sup>254</sup> Neither *United States v. Knights*<sup>255</sup> nor *Samson v. California*<sup>256</sup> stood for the proposition that “the government may condition the granting of a privilege upon the waiver of a constitutional right.”<sup>257</sup> Instead, the two cases relied on a general Fourth Amendment balancing test.<sup>258</sup> In that same vein, the court of criminal appeals also distinguished *Maryland v. King*<sup>259</sup> because a veni-

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243. *Id.*

244. *Id.*

245. *Id.* at 789.

246. *Id.* at 793.

247. *Id.* at 798.

248. *Id.* at 795.

249. *Id.* at 799.

250. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

251. *Id.* at 799–800.

252. *Id.* at 808–09.

253. *Id.* at 808–09, 811.

254. *Id.* at 812.

255. 534 U.S. 112, 118 (2001) (holding that a warrantless search of a probationer’s apartment was reasonable under the Fourth Amendment).

256. 547 U.S. 843, 848 (2006) (holding that a warrantless search of parolee was reasonable under the Fourth Amendment).

257. *Villarreal*, 475 S.W.3d at 802.

258. *Id.*; see *Knights*, 534 U.S. at 118; *Samson*, 547 U.S. at 848.

259. 133 S. Ct. 1958, 1977–80 (2013) (holding that the DNA information collected in a reasonable manner, via buccal swab, not for the purposes of gathering evidence against the suspect, and without officer discretion as to when the information is collected did not vio-

puncture blood draw is a greater bodily intrusion than a buccal swab.<sup>260</sup> Therefore, the intrusion in *Villarreal* outweighed the government's interest in curbing drunk driving.<sup>261</sup>

The court of criminal appeals further explained that the automobile exception was inapplicable because the exception is "limited to the vehicular-search context," and does not apply to a search of the individual's body.<sup>262</sup> Moreover, the court of criminal appeals declined to find that a blood draw search falls within the special needs exception because the exception applies "only in situations in which the existence of special needs makes obtaining a warrant impracticable."<sup>263</sup> In the DWI context, the blood draw's primary purpose is to collect evidence against the suspect for criminal prosecution, an impermissible basis for such an unreasonable warrantless intrusion.<sup>264</sup> The search-incident-to-arrest exception was likewise inapplicable because such a search requires some sort of exigency, such as preventing the escape of a suspect, assault of an officer, or the destruction of evidence—none of which is a concern when trying to collect information from a blood draw.<sup>265</sup> Therefore, considering the search's reasonableness under the totality of the circumstances, the court of criminal appeals explained that generally, "per se rules are inappropriate in the Fourth Amendment context."<sup>266</sup>

Third, the court of criminal appeals analyzed the U.S. Supreme Court's *Schmerber v. California*<sup>267</sup> opinion, which permitted a warrantless search and seizure based on exigent circumstances.<sup>268</sup> Applying *McNeely*, the court of criminal appeals explained that it determines exigency on a case-by-case basis, considering the totality of the circumstances.<sup>269</sup> Here, however, the court of criminal appeals did not find an exigent circumstance that permitted a warrantless search.<sup>270</sup> Thus, the court of criminal appeals held that the search violated Villarreal's Fourth Amendment rights.<sup>271</sup>

Despite the *Villarreal* decision, the question of exigency is still pending at the court of criminal appeals. Before it decided *Villarreal*, the court of criminal appeals granted petitions for discretionary review raising a simi-

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late the Fourth Amendment); *but cf. Villarreal*, 475 S.W.3d at 813 (distinguishing parolees and probationers that have diminished privacy interests than that of suspects who have "no ongoing supervisory relationship with any parole or probationer officer").

260. *Villarreal*, 475 S.W.3d at 810.

261. *Id.*

262. *Id.* at 805.

263. *Id.*

264. *Id.* at 807 (citing *Ferguson v. City of Charleston*, 535 U.S. 67, 84 (2001)).

265. *Id.*

266. *Id.* at 796 (quoting *United States v. Drayton*, 536 U.S. 194, 201 (2002)).

267. 384 U.S. 757 (1966).

268. *Villarreal*, 475 S.W.3d at 796–97 (quoting *Schmerber*, 384 U.S. at 770) (explaining that the Supreme Court upheld warrantless searches based on exigent circumstances in part because *Schmerber* was in an accident and "the officer 'might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence'").

269. *Id.* at 797.

270. *Id.* at 798.

271. *Id.* at 815.



lar exigent circumstances question.<sup>272</sup> As of this writing, the court of criminal appeals has not yet decided those cases and the state bar can expect continued litigation on this issue.<sup>273</sup>

#### E. FRUIT OF THE POISONOUS TREE

If the police exploit a constitutional illegality to obtain evidence, the original illegality taints that evidence.<sup>274</sup> And unless the connection between the illegality and the evidence is so attenuated, dissipating any taint from the original illegality, that evidence will be suppressed.<sup>275</sup> Typically, courts will look to the following factors to determine attenuation: temporal proximity, intervening events, and intervening acts of the suspect's free will.<sup>276</sup> For example, under the independent source doctrine, evidence found in plain view during an initially unlawful entry but later genuinely obtained independent of the earlier unlawful entry is admissible.<sup>277</sup> Thus, if the police can show that they found the evidence from an independent source, it may be admissible<sup>278</sup> because it "breaks the causal chain between the constitutional violation alleged and the discovery of the evidence challenged."<sup>279</sup> Separately, under the inevitable discovery doctrine, if the government can show that the police would have inevitably discovered the evidence legally, the evidence may also be admissible.<sup>280</sup>

#### I. Wehrenberg v. State

The Texas Court of Criminal Appeals recently decided whether the independent source doctrine applied in Texas, and considered Texas's exclusionary rule as codified in Texas Code of Criminal Procedure Article 38.23.<sup>281</sup> After officers received a confidential informant's call and observed house's occupants manufacture methamphetamine, the officers entered the house without either a search warrant or consent.<sup>282</sup> They arrested all of the occupants and did a protective sweep searching to find evidence that the occupants made methamphetamine, but found none.

272. See, e.g., *Weems v. State*, 434 S.W.3d 655, 657–58 (Tex. App.—San Antonio 2014), *aff'd*, No. PD-0635-14, 2016 WL 299733 (Tex. Crim. App. May 25, 2016) (raising the issue of exigency under a different provision of the same statute in *Villarreal* when an accident results from a DWI causing injuries and sending people to the hospital); *Cole v. State*, 454 S.W.3d 89 (Tex. App.—Texarkana 2014, pet. granted), *rev'd*, 490 S.W.3d 918 (Tex. Crim. App. 2016) (finding the facts insufficient to support exigency justifying a warrantless blood draw).

273. Subsequently, the court of criminal appeals has decided both cases. See generally *Weems v. State*, No. PD-0635-14, 2016 WL 299733 (Tex. Crim. App. May 25, 2016); *Cole v. State*, 490 S.W.3d 918 (Tex. Crim. App. 2016).

274. See *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

275. *Id.* at 491.

276. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

277. *Murray v. United States*, 487 U.S. 533, 542 (1988).

278. *Segura v. United States*, 468 U.S. 796, 799 (1984).

279. *United States v. Scott*, 270 F.3d 30, 44 (1st Cir. 2001).

280. *Murray*, 487 U.S. at 539 (citing *Nix v. Williams*, 467 U.S. 431 (1984)).

281. *Wehrenberg v. State*, 416 S.W.3d 458, 461 (Tex. Crim. App. 2013).

282. *Id.*

Afterwards, the officers prepared a search warrant affidavit that included only the confidential informant's information and excluded the information from their warrantless entry. A magistrate issued the warrant and the officers found methamphetamine manufacturing implements.<sup>283</sup>

The court of criminal appeals held that the independent source doctrine applied in Texas and was consistent with Article 38.23.<sup>284</sup> In reaching its conclusion, the court of criminal appeals explained that while the independent source doctrine applies, the inevitable discovery doctrine does not.<sup>285</sup> The court of criminal appeals found the inevitable discovery doctrine inconsistent with Article 38.23's requirement because the doctrine necessitates officers finding evidence unlawfully.<sup>286</sup> This is because the doctrine applies only in situations where the police conduct an unlawful seizure.<sup>287</sup> Evidence found through an independent source means that the evidence was discovered through lawful independent means, and there is a "complete break in the causal chain between the illegality and the acquisition of evidence."<sup>288</sup> On remand, the trial court held that the evidence was admissible based on the informant's tip.<sup>289</sup>

## 2. *State v. Jackson*

Examining what constitutes an intervening circumstance, the Texas Court of Criminal Appeals in *Jackson* held that police verifying a fact, independently, constitutes an intervening circumstance.<sup>290</sup> And with the unlawful search attenuated from the verification, there is no purposeful and flagrant official misconduct.<sup>291</sup> In *Jackson*, an officer observed a criminal informant and Jackson delivered drugs in a Dodge Charger.<sup>292</sup> The officer used that information to get a court order that authorized him to install and monitor the Charger with a GPS tracking device. Using the GPS device, the officer tracked the Charger from Colorado City to the Dallas-Fort Worth metro area.<sup>293</sup> When Jackson returned to Colorado City, the GPS device alerted the officer that the Charger was speeding. At the monitoring officer's request, another officer independently verified that Jackson was speeding and stopped Jackson.<sup>294</sup> Jackson consented to the officers' request to search his car, which revealed two ounces of methamphetamine in the trunk.<sup>295</sup>

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283. *Id.* at 462.

284. *Id.* at 468–69 (determining that the doctrine applies only where there is no causal link between the illegal conduct and the evidence's search and seizure).

285. *Id.* at 471.

286. *Id.* (citing *State v. Daugherty*, 931 S.W.2d 268, 269–71 (Tex. Crim. App. 1996)).

287. *Id.* (citing *Garcia v. State*, 829 S.W.2d 796, 799–800 (Tex. Crim. App. 1992)).

288. *Id.* at 472.

289. *See Wehrenberg v. State*, No. 02-11-00560-CR, 2014 WL 890320, at \*1–2 (Tex. App.—Fort Worth Mar. 6, 2014, pet. ref'd).

290. *State v. Jackson*, 464 S.W.3d 724, 732–33 (Tex. Crim. App. 2015).

291. *Id.*

292. *Id.* at 727.

293. *Id.*

294. *Id.*

295. *Id.* at 728.

At trial, Jackson moved to suppress the methamphetamine evidence. The trial judge granted Jackson's motion and relied on *United States v. Jones*,<sup>296</sup> which held that installing and monitoring a GPS device on a vehicle constituted a search.<sup>297</sup> The trial judge found that the officers' verification of Jackson's speed was linked to the illegal GPS monitoring.<sup>298</sup> The court of appeals affirmed because the officers conducted a warrantless search and only had reasonable suspicion, not probable cause.<sup>299</sup>

The court of criminal appeals, however, reversed.<sup>300</sup> The court of criminal appeals explained that evidence would not be suppressed "simply because it would not have come to light but for the illegal actions of the police."<sup>301</sup> The court of criminal appeals reasoned that, as long as the intervening circumstance comes between the "primary illegality and the later discovery of evidence that is alleged to be 'fruit of the poisonous tree,'" the intervening circumstance is a factor a reviewing court should consider.<sup>302</sup> Here, the illegal search was not a product of flagrant official misconduct because there was no evidence of the officer's intent to disregard Jackson's constitutional rights.<sup>303</sup> Rather, the officer had no knowledge of the *Jones* precedent at the time of the arrest and had no reason to believe that installing a GPS device on Jackson's car was a search that violated the Fourth Amendment.<sup>304</sup> Moreover, a second officer verified Jackson's speed.<sup>305</sup> This circumstance sufficiently constituted an intervening circumstance that dissipated any taint resulting from the illegal GPS monitoring.<sup>306</sup> In short, the officer's independent verification of Jackson's speed sufficiently broke the connection between the illegal search via the GPS device and the methamphetamine evidence.<sup>307</sup> Therefore, while evidence found in violation of an individual's rights tainted by an illegal search is inadmissible, an intervening circumstance can lead to a different outcome if the taint is dissipated.

#### IV. CONCLUSION

The biggest changes presented here were decided by the U.S. Supreme Court and will significantly impact Texas's jurisprudence. The most significant change in the last two years came in Fourth Amendment search and

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296. 132 S. Ct. 945 (2012).

297. *Jackson*, 464 S.W.3d at 728.

298. *Id.* at 729.

299. *Id.*

300. *Id.* at 734.

301. *Id.* at 731 (quoting *State v. Mazuca*, 375 S.W.3d 294, 300 (Tex. Crim. App. 2012) (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963))); *see also* *Johnson v. State*, 871 S.W.2d 744, 750-51 (Tex. Crim. App. 1994) (providing that suppression is not required if the evidence was not obtained unlawfully).

302. *Jackson*, 464 S.W.3d at 733.

303. *Id.* at 733-34.

304. *Id.* at 734.

305. *Id.*

306. *Id.*

307. *See id.*

seizure law. Furthermore, the Texas Court of Criminal Appeals continues to grapple with the questions *McNeely* and *Villarreal* did not address, expressly. Other Texas Court of Criminal Appeals cases, while not always establishing new law, distinguished and analogized unique facts in confessions, searches, and seizures provided further clarity for the state bar.

