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## Criminal Procedure: Confessions, Searches, and Seizures

Honorable Michael E. Keasler

Ben Gillis

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# CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*Honorable Michael E. Keasler\**

*Ben Gillis\*\**

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\* Judge Michael E. Keasler earned his B.A. and L.L.B. degrees from The University of Texas at Austin. In 1969, he was appointed assistant district attorney for Dallas County. He was a senior felony chief prosecutor in the Career Criminal Division and a veteran of over four hundred jury trials when in 1981 he was appointed judge of the 292nd District Court in Dallas. While in that role, Judge Keasler served as chair of the State Bar Judicial Section, Chair of the Dallas County Criminal District Judges, and Chair of the ABA State Trial Judges' Ethics Committee. From 1990 to 1997, Judge Keasler served as dean of continuing judicial education in Texas and instituted the Texas College of Advanced Judicial Studies in 1993. He has been a faculty member at the National Judicial College since 1992. In 1998, he was elected to serve on the Court of Criminal Appeals and holds that position to date. Judge Keasler teaches judicial ethics, constitutional criminal law, statutory construction, and appellate standards of review nationally.

\*\* Ben Gillis earned his B.A. at Brigham Young University and his J.D. at The University of Texas School of Law. From 2013 to 2014, he worked as a briefing attorney for Judge Michael Keasler of the Texas Court of Criminal Appeals. He is currently an Assistant Criminal District Attorney in Caldwell County, Texas.

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## I. INTRODUCTION

A review of the past two years' cases involving confessions, searches, and seizures reveals important developments made by the United States Supreme Court. The Texas Court of Criminal Appeals also decided a number of cases in these areas, which largely served to clarify existing law. This article reviews the most significant cases decided during the two-year survey period regarding (1) confessions and (2) searches and seizures. Each part identifies the areas of confession and search-and-seizure law that the recently decided cases implicate, discusses the courts' opinions in those cases, and analyzes the cases' significance to the law of Texas and the United States.

## II. CONFESSIONS

The Fifth Amendment of the U.S. Constitution, made 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> Procedural safeguards under both the federal and the Texas Constitution protect this right. Perhaps chief among them, originating in *Miranda v. Arizona*,<sup>3</sup> is the requirement that authorities inform suspects of their right to remain silent and their right to counsel prior to custodial interrogation.<sup>4</sup> Other facets of the Fifth Amendment's protection against self-incrimination prohibit the State from commenting on a defendant's refusal to testify at trial,<sup>5</sup> insulate probationers from compelled self-incrimination,<sup>6</sup> and govern the circumstances under which a suspect may claim Fifth Amendment protections prior to trial.<sup>7</sup>

### A. CUSTODIAL INTERROGATION

As noted above, the Constitution forbids compelling a suspect to incriminate himself.<sup>8</sup> To safeguard this right, the Supreme Court has articulated that before a suspect is subjected to custodial interrogation, the suspect must be informed of

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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 (1966).

4. *Id.* at 467-70.

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

6. See *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984); *Chapman v. State*, 115 S.W.3d 1, 5-6 (Tex. Crim. App. 2003).

7. *Murphy*, 465 U.S. at 427; see also *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 113 (1927).

8. See *supra* notes 1-2.

his right to remain silent, that anything he says can and will be used against him in a court of law, of the right to an attorney and to have an attorney present during interrogation, and of the right to have an attorney appointed if he is unable to personally afford one.<sup>9</sup> Texas has codified these warnings as Texas Code of Criminal Procedure article 38.22.<sup>10</sup> If law enforcement fails to properly admonish a suspect regarding these rights, any confession obtained in a contemporaneous interrogation is inadmissible in court.<sup>11</sup>

1. *Bobby v. Dixon*

In *Bobby v. Dixon*,<sup>12</sup> the U.S. Supreme Court held that the Sixth Circuit Court of Appeals erred in granting Dixon habeas corpus relief under the Antiterrorism and Effective Death Penalty Act (AEDPA) because the Ohio Supreme Court's decision to allow the admission of Dixon's confession was not clear error as required for relief under the Act.<sup>13</sup>

Archie Dixon and Tim Hoffner murdered Chris Hammer and stole his car.<sup>14</sup> Dixon then used Hammer's identification to sell the car and forged Hammer's name on the check he received in payment.<sup>15</sup> Investigating officers suspected Dixon's involvement and questioned him in a non-custodial setting about the murder, but Dixon refused to answer any questions without the presence of his lawyer.<sup>16</sup> Next, police were able to determine that Dixon had sold Hammer's car and arrested him for forgery.<sup>17</sup> Officers chose not to provide Dixon with *Miranda* warnings at that time, fearing that he would refuse to speak to them about Hammer's murder.<sup>18</sup> During this unwarned interrogation, Dixon confessed to forgery.<sup>19</sup> Police also attempted to elicit a murder confession by telling Dixon that his accomplice, Tim Hoffner, was about to reveal the involvement of both men in the killing, but Dixon avowed that he had "[n]othing whatsoever" to do with Hammer's death.<sup>20</sup>

After this interview concluded, Hoffner led police to where Hammer's body was buried.<sup>21</sup> Later that day, the police initiated a second interview with Dixon.<sup>22</sup> Before any questioning began, Dixon told officers that he had spoken to his lawyer and now wished to confess to murdering Hammer.<sup>23</sup> Dixon was read his *Miranda* rights, and he signed a waiver of those rights before providing police with a detailed confession.<sup>24</sup>

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9. *Miranda*, 384 U.S. at 467-73.

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

11. *Id.* §§ 2-3.

12. *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam).

13. *Id.* at 27; see also 28 U.S.C. § 2254(d)(1) (2006).

14. *Dixon*, 132 S. Ct. at 27.

15. *Id.* at 28.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

At trial, Dixon argued that his murder confession should be suppressed.<sup>25</sup> Ultimately, the Ohio Supreme Court found that Dixon's confession was admissible because, under *Oregon v. Elstad*,<sup>26</sup> a suspect who initially responded to unwarned but uncoercive questioning can waive his rights and confess at a subsequent interrogation after he has been given the proper *Miranda* warnings.<sup>27</sup> Dixon then filed a petition for a writ of habeas corpus, claiming that the Ohio Supreme Court's decision "contravened clearly established federal law."<sup>28</sup> A divided panel of the Sixth Circuit agreed with Dixon and granted him the requested relief.<sup>29</sup>

The Supreme Court, in reviewing the Sixth Circuit's decision, stated that a federal court only has authority to issue a writ of habeas corpus under AEDPA when a state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law."<sup>30</sup> The Court addressed each of the "errors" in the Ohio Supreme Court's decision that the Sixth Circuit identified as egregious and concluded that none of them rose to that exacting standard.<sup>31</sup> First, the Sixth Circuit had indicated that admitting Dixon's murder confession was egregious error because Dixon had previously refused to answer the police's questions before he had been arrested on the forgery charge.<sup>32</sup> The Supreme Court indicated that this could not possibly be error because an individual cannot invoke his *Miranda* rights anticipatorily in a context other than custodial interrogation.<sup>33</sup> Second, the Sixth Circuit held that police violated Dixon's rights by urging him to "cut a deal" before his accomplice Tim Hoffner revealed their involvement in Hammer's murder.<sup>34</sup> The Supreme Court held that this could not be error, either, because "the Court [had previously] refused to find that a defendant who confesses, after being falsely told that his codefendant" had provided the State with evidence, had made an involuntary confession."<sup>35</sup>

Third, the Sixth Circuit held that the Ohio Supreme Court had unreasonably applied *Oregon v. Elstad* to this case.<sup>36</sup> In *Elstad*, a suspect who had not received *Miranda* warnings confessed to a burglary.<sup>37</sup> About an hour later, the suspect received his *Miranda* warnings and made a second confession regarding the same offense.<sup>38</sup> The Supreme Court held that the later, warned confession was admissible because it had been voluntarily made.<sup>39</sup> In this case, however, the

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25. *Id.* at 28–29.

26. *Oregon v. Elstad*, 470 U.S. 298 (1985).

27. *Dixon*, 132 S. Ct. at 29.

28. *Id.*

29. *Id.*

30. *Id.* (quoting *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011)).

31. *Id.* at 29–32.

32. *Id.* at 29.

33. *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991); *Montejo v. Louisiana*, 556 U.S. 778, 795 (2009)).

34. *Id.* at 29–30.

35. *Id.* (quoting *Oregon v. Elstad*, 470 U.S. 298, 317 (1985)).

36. *Id.* at 30.

37. *Elstad*, 470 U.S. at 301.

38. *Id.* at 301–02.

39. *Id.* at 318.

Sixth Circuit held that Dixon's confession was not voluntary because it was the product of a "question-first, warn-later strategy" like that addressed by the Supreme Court in *Missouri v. Seibert*.<sup>40</sup> In *Seibert*, police used a two-step strategy to reduce the effect of *Miranda* warnings: a suspect was questioned until she confessed, and then, after a short break, *Miranda* warnings were provided and the suspect was asked to repeat the prior confession.<sup>41</sup> The Court held that this tactic could not produce an admissible confession because a suspect could not think he had a genuine right to remain silent based on the answers he had already given to the prior questioning.<sup>42</sup>

The Sixth Circuit believed that the voluntariness of Dixon's confession in this case was obliterated by his prior, unwarned confession to the forgery offense.<sup>43</sup> The Supreme Court, however, disagreed.<sup>44</sup> First, it reasoned, there was no indication that either of Dixon's confessions were given involuntarily.<sup>45</sup> And second, Dixon's confession to murder was not at all like the involuntary confession in *Seibert* where police asked the suspect to repeat her prior confession after providing *Miranda* warnings.<sup>46</sup> In this case, Dixon denied involvement in Hammer's murder in his first confession.<sup>47</sup> As a result, police could neither have had Dixon repeat an earlier murder confession, nor could they have used the first confession to coerce the later one.<sup>48</sup>

*Dixon* serves to reaffirm the Supreme Court's commitment to the principles of *Miranda* and *Elstad*.<sup>49</sup> Police must notify suspects of their Fifth Amendment rights before commencing a custodial interrogation.<sup>50</sup> However, an unwarned confession does not automatically destroy the possibility that a subsequent, properly-warned confession will be admissible in court.<sup>51</sup> So long as the subsequent confession is voluntary and not the product of a coercive "question-first, warn-later" strategy, it will satisfy the safeguards of the Fifth Amendment.<sup>52</sup>

## 2. *Howes v. Fields*

*Miranda v. Arizona* was designed to protect suspects from the "inherently compelling pressures of custodial interrogation."<sup>53</sup> This underlying purpose of the *Miranda* safeguards has frequently led the Supreme Court to address the circumstances in which a suspect is considered to be in "custody" and therefore deserving of a recitation of his rights.<sup>54</sup> In *Howes v. Fields*, the Court examined

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40. *Dixon*, 132 S. Ct. at 30–31; *Missouri v. Seibert*, 542 U.S. 600 (2004).

41. *Seibert*, 542 U.S. at 604–06.

42. *Id.* at 613.

43. *Dixon*, 132 S. Ct. at 30–31.

44. *Id.* at 32.

45. *Id.* at 30.

46. *Id.* at 31.

47. *Id.*

48. *Id.* at 30–31.

49. *See id.* at 30–32.

50. *See Miranda v. Arizona*, 384 U.S. 436, 467–70 (1966).

51. *See Oregon v. Elstad*, 470 U.S. 298, 317 (1985).

52. *See id.*; *Missouri v. Seibert*, 542 U.S. 600, 613 (2004).

53. *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010) (internal quotation marks omitted) (quoting *Miranda*, 384 U.S. at 467).

54. *Howes v. Fields*, 132 S. Ct. 1181, 1189 (2012).

whether an inmate, incarcerated for a separate offense, is considered in “custody” when he is questioned by law enforcement about his involvement in another criminal transaction.<sup>55</sup>

Randall Fields was serving a sentence in a Michigan jail when law enforcement officers removed him from the general prison population and brought him to a conference room where officers questioned him about sexual involvement with a minor he was alleged to have committed prior to his incarceration.<sup>56</sup> Fields was never given *Miranda* warnings, but he was not handcuffed during the interview, and he was told several times that he was free to leave at any point.<sup>57</sup> Fields later testified that he informed the officers several times during the interview that he no longer wished to speak with them, but he at no point specifically asked to be returned to his cell.<sup>58</sup> He eventually confessed to the officers that he did have sexual relations with the minor.<sup>59</sup>

At trial, Fields argued that his confession should be suppressed.<sup>60</sup> The trial judge ruled that he had not been in custody for purposes of *Miranda* during the interview, and thus no *Miranda* warnings were required.<sup>61</sup> On appeal, the Michigan Supreme Court denied discretionary review.<sup>62</sup> Fields next filed a petition for a writ of habeas corpus in federal district court, which granted relief.<sup>63</sup> The Sixth Circuit Court of Appeals affirmed, holding that clearly established federal law required *Miranda* warnings to be given when an inmate is removed from the general prison population and questioned about conduct occurring outside the prison environment.<sup>64</sup>

The Supreme Court disagreed. First, the Court explained that under the AEDPA, no “clearly established federal law” required *Miranda* warnings in a prison setting; indeed, the Court had recently declined to adopt such a bright-line rule.<sup>65</sup> As a result, habeas relief was not warranted.<sup>66</sup> Second, the Court indicated that Fields’s interrogation was not custodial.<sup>67</sup> Simply because a suspect’s freedom of movement is restricted does not automatically mean that the suspect is in custody for *Miranda* purposes.<sup>68</sup> The real inquiry is “whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.”<sup>69</sup> The Court outlined

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55. *Id.* at 1186–87.

56. *Id.* at 1185.

57. *Id.* at 1186.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1186–87; *see also* 28 U.S.C. § 2254(d)(1) (2006) (stating that habeas relief may be granted if a state-court adjudication is the result of a “decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”).

65. *Howes*, 132 S. Ct. at 1187–88 (citing *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)).

66. *Id.* at 1187–89.

67. *Id.* at 1194.

68. *Id.* at 1189.

69. *Id.* at 1190 (citing *Shatzer*, 559 U.S. at 112).

three reasons why imprisonment alone is not considered “custody” for *Miranda* purposes:

- (1) questioning a person who is already in prison does not involve the shock that accompanies arrest;
- (2) an inmate is unlikely to be lured into a confession because of his desire for a prompt release; and
- (3) an inmate knows that law enforcement officers “lack the authority to affect the duration of his sentence.”<sup>70</sup>

Based on these factors and the undisputed fact that Fields was told that he was free to end the questioning and return to his cell at any time, the Court concluded that Fields was not in custody within the meaning of *Miranda*.<sup>71</sup>

The Court’s holding in *Howes* lessens the responsibility of officers to provide already-incarcerated suspects a recitation of their Fifth Amendment rights.<sup>72</sup> So long as an inmate is assured that he is free to end the interview and return to his cell at any time, it seems that officers need not provide *Miranda* warnings.<sup>73</sup> The Court’s decision, however, leaves ambiguous the question of when exactly *Miranda* warnings would be required within a prison setting.<sup>74</sup> Justice Ginsberg, in a dissenting opinion, pointed out that Fields told officers more than once that he did not want to speak with them anymore, yet officers never terminated the interview or returned Fields to his cell.<sup>75</sup> The majority in *Howes* never addressed how Fields’s statements affected their conclusion that the interrogation was non-custodial, and thus it is possible that such an interview would only be deemed “custodial” if the inmate specifically requested to be returned to his cell and officers instead refused and continued interrogating him.<sup>76</sup>

### 3. *Elizondo v. State*

The Texas Court of Criminal Appeals addressed under what circumstances non-law enforcement officers are required to give *Miranda* warnings in *Elizondo v. State*.<sup>77</sup> In this case, Becky Elizondo was caught shoplifting clothing from an Old Navy store and was asked to read and sign a “civil demand notice” by the store’s loss-prevention officer.<sup>78</sup> Elizondo signed the notice which was an admission that she had stolen merchandise.<sup>79</sup> She later argued that the notice should be suppressed based on the theory that the officer should have given her *Miranda* warnings because he was engaged in an agency relationship with law enforcement.<sup>80</sup>

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70. *Id.* at 1190–91.

71. *Id.* at 1194.

72. *See id.*

73. *See id.* at 1193.

74. *See id.* at 1193–94.

75. *Id.* at 1195 (Ginsberg, J., dissenting).

76. *See id.*

77. *Elizondo v. State*, 382 S.W.3d 389, 391 (Tex. Crim. App. 2012).

78. *Id.*

79. *Id.*

80. *Id.*



Previously, the Court had determined that *Miranda* warnings were required when the interviewer was acting as an instrumentality of the State and fashioned three factors that courts should consider in making that determination.<sup>81</sup> In this case, the Court acknowledged that “private citizens, even security guards, are not ordinarily considered ‘law enforcement officers,’” and stated that Elizondo had the burden to prove that the loss-prevention officer was acting as an agent of law enforcement when he interviewed her.<sup>82</sup> Ultimately, the Court concluded that the loss-prevention officer was not an agent of law enforcement.<sup>83</sup> There was no indication that police relied upon the officer’s notice as evidence or even asked to use it as such.<sup>84</sup> The officer’s reason for obtaining the notice was to adhere to the policies of his employer, rather than for purposes of prosecution.<sup>85</sup> And nothing in the record indicated that Elizondo believed that the officer was acting as an agent of law enforcement at the time of the interview.<sup>86</sup> Because no factor indicated an agency relationship, the loss-prevention officer was not deemed to be an agent of law-enforcement officials.<sup>87</sup>

*Elizondo* served to reinforce the principles the Court had already set forth in determining whether a private citizen acts as an agent of law enforcement for *Miranda*-warning purposes.<sup>88</sup> Defendants will have to be careful to establish some link between the private party and police or prosecution if they wish to establish such a relationship.<sup>89</sup> When the State does not use the confession obtained by the private party as evidence, it will be difficult for a defendant to prove that the agency relationship existed at the time of the interview.<sup>90</sup>

#### 4. *Alford v. State*

The Court of Criminal Appeals considered an exception to *Miranda* in *Alford v. State*.<sup>91</sup> In *Pennsylvania v. Muniz*, a four-justice plurality of the United States Supreme Court recognized that *Miranda* warnings need not be given prior to custodial interrogation when police were merely asking questions necessary to secure biographical data used to complete booking or pretrial services.<sup>92</sup> The Supreme Court reasoned that such questions are asked for “record-keeping purposes only” and do not implicate the Fifth Amendment concerns at issue in *Miranda*.<sup>93</sup> The Court of Criminal Appeals subsequently adopted this exception,<sup>94</sup> and the details of its application were brought before the Court in

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81. *Wilkerson v. State*, 173 S.W.3d 521, 530–31 (Tex. Crim. App. 2005) (stating that the factors are (1) “the relationship between the police and the potential police agent;” (2) “the interviewer’s actions and perceptions;” and (3) “the defendant’s perceptions of the encounter”).

82. *Elizondo*, 382 S.W.3d at 394–95.

83. *Id.* at 396.

84. *Id.* at 395.

85. *Id.*

86. *Id.* at 396.

87. *Id.*

88. *See id.* at 390–91.

89. *See id.* at 395.

90. *See id.* at 396.

91. *Alford v. State*, 358 S.W.3d 647, 649–50 (Tex. Crim. App. 2012).

92. *Pennsylvania v. Muniz*, 496 U.S. 582, 600–02 (1990) (plurality opinion).

93. *Id.* at 601–02.

94. *See Cross v. State*, 144 S.W.3d 521, 524 n.5 (Tex. Crim. App. 2004).

*Alford*.<sup>95</sup>

Alford was arrested for resisting arrest and was taken to jail.<sup>96</sup> After transport, police searched the back seat of the patrol car pursuant to department procedure and discovered a computer flash drive hidden under the seat.<sup>97</sup> While Alford was being booked by jail facility personnel, he was asked what the flash drive was and whether it belonged to him.<sup>98</sup> Alford responded that the item was a “memory drive” and that it did belong to him.<sup>99</sup> At this point, Alford had not been provided with *Miranda* warnings.<sup>100</sup> The flash drive was placed with Alford’s personal property for safekeeping.<sup>101</sup> Alford later filed a pretrial motion to suppress the statements he made to the booking officer.<sup>102</sup>

The Court of Criminal Appeals recognized that Alford was in custody when he answered these questions, but concluded that his statements were admissible because they fell under the *Muniz* “booking-question exception” to *Miranda*.<sup>103</sup> Because courts across the nation hold divergent views as to the scope of this exception, the Court elaborated that, “in deciding the admissibility of a statement under th[is] exception, a trial court must determine whether the question reasonably relates to a legitimate administrative concern, applying an objective standard.”<sup>104</sup> This analysis is not affected by whether the questioning officer knows or should know that the answers provided will be incriminating.<sup>105</sup> In this case, because the flash drive was immediately placed with Alford’s personal property for safekeeping, the totality of the circumstances objectively showed that the officer’s questions were reasonably related to a legitimate administrative concern and thus fell within the exception.<sup>106</sup> The holding in *Alford* gives officers significant leeway in asking unwarned questions pursuant to administrative procedures such as booking.<sup>107</sup> However, the Court has yet to address other significant issues relating to the “booking-question exception,” such as whether safety concerns in a jail setting allow officers to question new inmates about gang affiliation.<sup>108</sup>

#### B. PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment’s general protection against being compelled in any

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95. *Alford*, 358 S.W.3d at 647.

96. *Id.* at 650.

97. *Id.*

98. *Id.* at 650–51.

99. *Id.*

100. *Id.* at 651.

101. *Id.*

102. *Id.*

103. *Id.* at 662.

104. *Id.* at 659–60.

105. *Id.* (reasoning that to hold otherwise would render the exception a nullity, as any kind of police questioning would be subject to a “should-have-known” test).

106. *Id.* at 662.

107. *See id.*

108. *See, e.g., Ramirez v. State*, No. AP-75167, 2007 WL 4375936, at \*15 (Tex. Crim. App. Dec. 12, 2007) (not designated for publication) (holding that questions regarding gang affiliation during the booking process were admissible under the booking-question exception); *Pierce v. State*, 234 S.W.3d 265, 272 (Tex. App.—Waco 2007, pet. ref’d) (reaching the same holding as *Ramirez*).

criminal case to be a witness against oneself—termed the privilege against self-incrimination—prohibits forced testimony that falls properly within its scope.<sup>109</sup> For example, the State may not comment on a defendant's refusal to testify at trial,<sup>110</sup> or revoke probation solely because of the legitimate exercise of a Fifth Amendment privilege.<sup>111</sup> However, a defendant's silence prior to custodial arrest does not receive such stringent protections.<sup>112</sup> Specifically, the Supreme Court has held that a suspect who wishes to enjoy Fifth Amendment protection of his refusal to respond to police questioning before he has received his *Miranda* warnings must affirmatively claim that protection.<sup>113</sup>

### 1. *Salinas v. Texas*

In *Salinas v. Texas*, the Court of Criminal Appeals and the United States Supreme Court addressed the requirement that a suspect must affirmatively assert his rights prior to receiving his *Miranda* warnings in order to enjoy Fifth Amendment protections.<sup>114</sup> In *Salinas*, two brothers were shot and killed in their home and police found six shotgun shell casings at the scene.<sup>115</sup> The investigation led officers to Genovevo Salinas, who agreed to hand over his shotgun for ballistics testing and voluntarily accompanied officers to the police station for questioning.<sup>116</sup> At the station, Salinas answered questions freely until he was asked whether his shotgun would match the shells recovered at the scene.<sup>117</sup> At that point, Salinas said nothing but exhibited distinct signs of nervousness.<sup>118</sup> After a few moments of silence, police began asking different questions, which Salinas answered.<sup>119</sup>

At trial, prosecutors used Salinas's reaction to the officers' question as evidence of his guilt.<sup>120</sup> He was found guilty, and on appeal, argued that this use of his silence violated the Fifth Amendment.<sup>121</sup> The Court of Criminal Appeals rejected Salinas's claim.<sup>122</sup> The court held that while the Fifth Amendment protected defendants against compelled self-incrimination, Salinas's pre-arrest, pre-*Miranda* interactions with police were not compelled.<sup>123</sup> Thus, the Fifth Amendment's safeguards could not apply to a suspect's decision to remain silent

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

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

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

112. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (finding no Fifth Amendment violation when defendant who choose to testify was cross-examined regarding his post-arrest, pre-*Miranda* silence); *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980) (no violation for cross-examination regarding pre-arrest, pre-*Miranda* silence).

113. *Murphy*, 465 U.S. at 425 (citing *United States v. Monia*, 317 U.S. 424, 427 (1943)).

114. *Salinas v. State*, 369 S.W.3d 176, 178 (Tex. Crim. App. 2012); *Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (plurality opinion).

115. *Salinas*, 133 S. Ct. at 2178.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 2177-78.

121. *Id.* at 2178.

122. *Salinas v. State*, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012).

123. *Id.*

when he is under no official compulsion to speak.<sup>124</sup>

The Supreme Court granted Salinas's petition for certiorari.<sup>125</sup> Ultimately, the Court agreed with the Court of Criminal Appeals that a suspect must assert his privilege against self-incrimination in order to benefit from it in the context of a pre-arrest, pre-Miranda questioning.<sup>126</sup> The Court stated that the requirement that a suspect affirmatively assert the privilege has two exceptions:

- (1) that a criminal defendant need not take the stand to assert the privilege at trial; and
- (2) that a witness's failure to invoke the privilege is excused where governmental coercion rendered that failure involuntary.<sup>127</sup>

In this case, it could not be said that Salinas's failure to invoke his privilege was due to governmental coercion because it was undisputed that his interview with police was voluntary.<sup>128</sup>

The Court also declined to create a new exception for cases in which a suspect stands mute and thereby declines to give an answer police suspect would be incriminating.<sup>129</sup> It indicated that such a rule would go against its precedent, which indicated that a defendant normally cannot invoke the privilege by remaining silent and would also unduly burden the government's ability to prosecute criminal activity.<sup>130</sup> The Court reinforced the fact that the requirement to affirmatively assert the privilege is not difficult to apply and avoids needless inquiries into what kind of conduct constitutes "silence" for Fifth Amendment purposes.<sup>131</sup>

The *Salinas* case provides prosecutors with a powerful tool: they may freely comment on a defendant's pre-arrest, pre-Miranda silence if such a refusal to answer a question was in the context of a voluntary, non-coercive interview with police.<sup>132</sup> But as the dissent notes, this decision does not specifically state what is required of a suspect in order for him to assert his right against self-incrimination.<sup>133</sup> Must he mention the Fifth Amendment or his right to silence by name, or would simply asking to change the subject or end the interview suffice?<sup>134</sup> This question is likely one that will come before courts in the near future.

## 2. *Dansby v. State*

In *Dansby v. State*, the Texas Court of Criminal Appeals considered the

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124. *Id.* (citing *Jenkins v. Anderson*, 447 U.S. 231, 241 (Stevens, J., concurring)).

125. *Salinas*, 133 S. Ct. at 2179.

126. *Id.*

127. *Id.* at 2179-80.

128. *Id.* at 2180.

129. *Id.* at 2180-81.

130. *Id.* at 2181 (citing *Roberts v. United States*, 445 U.S. 552, 560 (1980); *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 113 (1927)).

131. *Id.* at 2183-84.

132. *See id.* at 2179-80.

133. *Id.* at 2190 (Breyer, J., dissenting).

134. *Id.*

privilege against self-incrimination in the context of conditions of probation.<sup>135</sup> Michael Dansby was placed on deferred adjudication community supervision for the offense of indecency with a child.<sup>136</sup> As part of his conditions of probation, he was ordered to attend a sex offender treatment program and submit to polygraph examinations.<sup>137</sup> Eventually, he was required to submit to a sexual history polygraph, and when he refused to answer questions about extraneous prior sexual offenses, Dansby was discharged from the program.<sup>138</sup> The State filed a motion to adjudicate alleging that Dansby had failed to obtain the sexual history polygraph and failed to attend and successfully complete the treatment program.<sup>139</sup> The trial judge granted the State's motion over Dansby's objection that the motion to adjudicate amounted to an unconstitutional penalty on his invocation of his Fifth Amendment rights.<sup>140</sup>

The Court of Criminal Appeals agreed that Dansby's probation had been revoked on the basis of his refusal to answer incriminating questions during the polygraph test and during sex offender group therapy sessions.<sup>141</sup> The court of appeals had attempted to avoid the constitutional issue by holding that Dansby's revocation could have been based solely on his failure to successfully complete the treatment program.<sup>142</sup> The Court of Criminal Appeals, however, indicated that such an issue may be avoided only "if the violation upon which the reviewing court relies to uphold the trial court's ruling is itself unquestionably free of constitutional taint"—and in this case, there was a very strong inference that Dansby's unwillingness to incriminate himself was the deciding factor that led to his discharge.<sup>143</sup> The Court stated that the record "strongly suggest[ed]" that if Dansby had agreed to return to treatment and take the sexual history polygraph, the motion to revoke would have been dismissed, and Dansby's supervisors had certainly never testified that Dansby would have been discharged regardless of whether or not he had invoked his Fifth Amendment rights.<sup>144</sup>

The new "constitutional infection theory" that the Court fashioned in *Dansby* serves as an exception to the rule that an appellate court is entitled to rely on a single violation in affirming a revocation of community supervision.<sup>145</sup> However, as the dissent points out, the Court's inquiry into the reasons behind Dansby's discharge from the treatment program—essentially an analysis of the subjective intent of Dansby's supervisors—may ultimately dilute the abuse-of-discretion standard that has long been the standard of review for a trial judge's revocation

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135. *Dansby v. State*, 398 S.W.3d 233, 239–40 (Tex. Crim. App. 2013).

136. *Id.* at 234.

137. *Id.*

138. *Id.* at 234–35.

139. *Id.* at 235.

140. *Id.* at 239–40.

141. *Id.* at 240.

142. *Dansby v. State*, No. 05-10-00866-CR, 2012 WL 1150530, at \*5 (Tex. App.—Dallas Apr. 9, 2012, pet. granted) (mem. op., not designated for publication).

143. *Dansby*, 398 S.W.3d at 241.

144. *Id.* at 242.

145. *Id.* at 242–43; see also *Downey v. State*, No. 02-12-00511-CR, 2013 WL 5303634, at \*3 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.) (mem. op., not designated for publication) (illustrating how this "exception" has been utilized by at least one Texas court of appeals).

of probation.<sup>146</sup> It may be possible to reconcile *Dansby* with prior cases by reasoning that the Court essentially held that the trial judge abused his discretion when he revoked *Dansby's* probation when the evidence strongly suggested that the motion had been filed in response to *Dansby's* assertion of his Fifth Amendment rights.<sup>147</sup> But this is not clear from the Court's bottom line.<sup>148</sup> In any case, to successfully sidestep a probationer's constitutional claim of error, prosecutors will now have to be able to prove that at least one ground of a motion to revoke probation is wholly untainted by the constitutional issue.<sup>149</sup>

### 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>150</sup> At its most basic level, the Fourth Amendment protects individuals against unreasonable governmental intrusions.<sup>151</sup> To qualify for these constitutional protections, an individual must have standing to challenge an unreasonable search or seizure: first, they must prove that the actor conducting the intrusion was a governmental agent;<sup>152</sup> and second, they must prove that they had both “a subjective expectation of privacy” in the person, place, or thing being searched and that society would be prepared to accept that expectation as reasonable.<sup>153</sup>

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

Fourth Amendment jurisprudence has undergone something of a sea change in the last two years. Since 1967, when the United States Supreme Court decided *Katz v. United States*, a determination of whether a government search violated the Fourth Amendment revolved around whether an individual enjoyed

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146. *Dansby*, 398 S.W.3d at 244 (Keasler, J., dissenting); see also *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006) (holding that appellate review of an order revoking probation is limited to an abuse-of-discretion standard).

147. See *Dansby*, 398 S.W.3d at 242-43 (majority opinion) (“In the absence of testimony that [Dansby’s supervisors] would have discharged the appellant . . . quite apart from his failure to incriminate himself, the State has not established that his discharge presented a sufficient basis to proceed to adjudication that was wholly independent of his claim of Fifth Amendment privilege.”).

148. See *id.*

149. *Id.* at 241.

150. U.S. CONST. amend. IV.

151. *Katz v. United States*, 389 U.S. 347, 350 (1967) (“[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion.”); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (holding that the Fourth Amendment protects against “physical intrusion of a constitutionally protected area” (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983))).

152. *Bessey v. State*, 199 S.W.3d 546, 550 (Tex. App.—Texarkana 2006), *aff’d*, 239 S.W.3d 809 (Tex. Crim. App. 2007); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 487-88 (1971) (holding that the Fourth Amendment exclusionary rule is predicated upon unconstitutional police conduct, not the conduct of private citizens).

153. *United States v. Finley*, 477 F.3d 250, 258 (5th Cir. 2007); *Oles v. State*, 993 S.W.2d 103, 108 (Tex. Crim. App. 1999).

a “reasonable expectation of privacy” in the space searched.<sup>154</sup> This analysis was predicated upon the principle that “the Fourth Amendment protects people, not places.”<sup>155</sup> But before that decision, Fourth Amendment jurisprudence was tied to common-law trespass and was based on whether the space searched was constitutionally protected because of an individual’s property interest therein.<sup>156</sup> Recently, in *United States v. Jones* and *Florida v. Jardines*, the Supreme Court announced that the *Katz* privacy-based model had not supplanted the earlier property-based model, and that the two models coexist as alternate means of determining whether a Fourth Amendment violation has occurred.<sup>157</sup>

In *Jones*, the FBI began investigating Antoine Jones in order to determine whether he was trafficking in narcotics.<sup>158</sup> Agents obtained a warrant to apply an electronic tracking device to Jones’s vehicle within ten days and only in the District of Columbia.<sup>159</sup> On the eleventh day, and not in the District of Columbia but in Maryland, agents installed the device on Jones’s vehicle and began to track his movements.<sup>160</sup> In part because of the evidence obtained therefrom, Jones was indicted for multiple drug trafficking offenses.<sup>161</sup> Jones challenged the evidence gleaned from the tracking device, claiming it was obtained in violation of the Fourth Amendment.<sup>162</sup>

The Supreme Court held that, on a very basic level, the Fourth Amendment protected “persons, houses, papers, and effects” from unreasonable searches, and that a vehicle was unquestionably an “effect” as stated in the Amendment.<sup>163</sup> As such, the government’s installation of a tracking device on Jones’s vehicle and the subsequent use of that device to track the vehicle’s movements was a Fourth Amendment search.<sup>164</sup> The government, employing the *Katz* privacy-based model, argued that the search, although not executed pursuant to a valid warrant, was valid because Jones had no reasonable expectation of privacy in the exterior of his vehicle accessed by agents, as those parts were clearly visible to the public.<sup>165</sup> However, the Supreme Court indicated that simply because a search was reasonable under the privacy-based model did not mean that it was also reasonable under the property-based model: “[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection

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154. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); see also *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

155. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

156. See *United States v. Jones*, 132 S. Ct. 945, 949–50 (2012) (citing *Kyllo v. United States*, 533 U.S. 27, 31 (2001); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004)).

157. See *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (quoting *Jones*, 132 S. Ct. at 950) (“The *Katz* reasonable-expectations test ‘has been added to, not substituted for,’ the traditional property-based understanding of the Fourth Amendment.” (emphasis in original)).

158. *Jones*, 132 S. Ct. at 48.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 949 (quoting U.S. CONST. amend. V).

164. *Id.*

165. *Id.* at 950.

which the Amendment extends.”<sup>166</sup> As such, the government’s warrantless intrusion upon Jones’s constitutionally protected property violated the Fourth Amendment.<sup>167</sup>

*Florida v. Jardines* afforded the Court another opportunity to reinforce the mutual coexistence of the privacy-based and property-based models.<sup>168</sup> In *Jardines*, police received an unverified tip that Jardines was growing marijuana inside his home.<sup>169</sup> Officers brought a drug-sniffing dog to Jardines’s front porch, and the dog signaled to his handler that he detected the smell of drugs emanating from the house.<sup>170</sup> On the basis of the dog’s performance, officers obtained and executed a search warrant for the home.<sup>171</sup> Marijuana was found inside, and Jardines was charged with a drug trafficking offense.<sup>172</sup> At trial, Jardines moved to suppress the drug evidence on the basis that the canine investigation was an unreasonable search.<sup>173</sup>

In deciding the case, the Supreme Court reiterated the principles it laid out in *Jones*: that the Fourth Amendment protects against the government’s physical intrusion into constitutionally protected areas;<sup>174</sup> that the home is the area where an individual’s privacy expectations are the most heightened;<sup>175</sup> and that a decision in this case could be made on the basis of the property model alone, because that model coexists with the *Katz* privacy-based model.<sup>176</sup> The Court also reasoned that property-based protections would be of little value if government agents could intrude upon the areas in close proximity to the house with impunity, and therefore not only the house but its “curtilage” is constitutionally protected by the Fourth Amendment.<sup>177</sup> And because Jardines’s front porch was part of the “curtilage” associated with his home, the officers’ investigation took place in a constitutionally protected area.<sup>178</sup>

Despite that fact, however, the canine investigation would only violate the Fourth Amendment if it constituted an unlicensed physical intrusion into the curtilage.<sup>179</sup> After all, an officer “need not ‘shield [his] eyes’ when passing by the home ‘on public thoroughfares.’”<sup>180</sup> The facts of *Jardines* stand in stark contrast to an officer casually observing a home in passing, however—it cannot be said that it is customary for an officer to perform a canine sniff on an individual’s front porch.<sup>181</sup> As a result, the investigation was unlicensed and constituted an

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166. *Id.* at 950–51 (quoting *Alderman v. United States*, 394 U.S. 165, 176 (1969)).

167. *Id.* at 954.

168. *Florida v. Jardines*, 133 S. Ct. 1409, 1414–17 (2013).

169. *Id.* at 1413.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1414.

175. *Id.* at 1414–15 (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

176. *Id.* at 1417.

177. *Id.* at 1414 (citing *Oliver v. United States*, 466 U.S. 170, 180 (1984) (defining “curtilage” as “the land immediately surrounding and associated with the home”)).

178. *Id.* at 1415.

179. *Id.*

180. *Id.* (citing *Ciraolo*, 476 U.S. at 213).

181. *Id.* at 1416.



unreasonable search under the Fourth Amendment.<sup>182</sup>

The ramifications of the Supreme Court's decisions in *Jones* and *Jardines* are far-reaching. Now, when courts and litigants analyze Fourth Amendment claims, they must determine whether an unreasonable search has occurred under both the privacy- and property-based models.<sup>183</sup> An analysis under the property-based model is complicated by the fact that it is not always clear what property is protected by the Fourth Amendment. For example, lower courts—including Texas courts of appeals—have already begun to grapple with what exactly constitutes the “curtilage” of a home.<sup>184</sup> Likewise, the Texas Court of Criminal Appeals took these developments into account when it remanded *Rivas v. State*, a case factually similar to *Jardines*, to the court of appeals for that court to consider the effect that *Jardines* had upon its outcome.<sup>185</sup>

## B. GENERAL SCOPE OF FOURTH AMENDMENT PROTECTION

The general requirements of the Fourth Amendment, as indicated above, require that law enforcement officials obtain a warrant, predicated upon probable cause, before they are permitted to conduct a search or seize persons or property.<sup>186</sup> However, the Supreme Court's decisions indicate that applying this framework rigidly in every situation is unworkable.<sup>187</sup> For example, under the *Katz* privacy-based model, police may freely search spaces in which an individual does not have a reasonable expectation of privacy.<sup>188</sup> Additionally, officers have categorical authority to detain individuals incident to a lawful search, regardless of probable cause.<sup>189</sup> Recently, the Supreme Court has elaborated upon a number of situations that are expansions upon the traditional framework.

### 1. *Florence v. Board of Chosen Freeholders of Burlington*

The question of which constitutional rights are enjoyed by the inmates of jails and prisons is one that has been frequently tackled by the Supreme Court. For example, in *Bell v. Wolfish*, the Court held that the usual reasonable-expectation-of-privacy framework used to determine standing to challenge a search under the Fourth Amendment was impossible to apply in the prison context,<sup>190</sup> as “there is no mechanical way to determine whether intrusions on an inmate’s privacy are reasonable. . . . [Instead,] [t]he need for a particular search must be balanced against the resulting invasion of personal rights.”<sup>191</sup> In that case, the Court

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182. *Id.* at 1417–18.

183. *See id.* at 1417; *United States v. Jones*, 132 S. Ct. 945, 950 (2012).

184. *See, e.g., United States v. Bausby*, 720 F.3d 652, 656–57 (8th Cir. 2013) (holding that a motorcycle on display in an individual’s front yard is not within the “curtilage” of the house); *Sayers v. State*, No. 01-12-00712-CR, 2013 WL 6181852, at \*3 (Tex. App.—Houston [1st Dist.] Nov. 26, 2013, no pet. h.) (holding that a flowerbed adjacent to a house is within the house’s “curtilage”).

185. *Rivas v. State*, 411 S.W.3d 920, 921 (Tex. Crim. App. 2013).

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

187. *See id.*

188. *Id.*

189. *Michigan v. Summers*, 452 U.S. 692, 697–98 (1981).

190. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

191. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1516 (2012) (citing *Bell*, 441 U.S.

upheld a policy of requiring inmates to undergo a strip search after any contact visit with a person from outside the institution because the policy was based on considerations of prison safety and security.<sup>192</sup>

Recently, the Court extended these principles in *Florence v. Board of Chosen Freeholders of Burlington*.<sup>193</sup> In *Florence*, officers arrested Albert Florence after determining that he had an outstanding warrant in the police database and took him to the county jail.<sup>194</sup> Jail procedures required every arrestee to submit to a strip search as part of the initial booking process.<sup>195</sup> Florence was released the next day when it was determined that the warrant against him was not valid.<sup>196</sup> Outraged at the invasive search he had been forced to undergo, Florence sued the jail officials under 42 U.S.C. § 1983 for violations of his Fourth and Fourteenth Amendment rights.<sup>197</sup> He argued that persons arrested for a minor offense should not be required to submit to a strip search.<sup>198</sup> Such an invasive procedure should be reserved for inmates whom jail personnel suspected of concealing contraband.<sup>199</sup>

In deciding the issue, the Supreme Court reiterated the principles of *Bell*, indicating that legitimate safety concerns in prisons require deference to corrections officials in establishing “reasonable search policies to detect and deter the possession of contraband.”<sup>200</sup> The Court stated that the practice of strip searching in this case would be upheld unless there was “substantial evidence” indicating that prison officials’ preventative measures were “exaggerated.”<sup>201</sup> It further reasoned that the offense for which an inmate was arrested, and even the inmate’s criminal history, are poor indicators of whether the inmate is in possession of contraband.<sup>202</sup> Ultimately, the Court held that the strip search procedure acceptably balanced inmate privacy and the needs of the institution and that the search was not a violation of Florence’s constitutional rights.<sup>203</sup>

## 2. *Maryland v. King*

In *Maryland v. King*, the Supreme Court addressed whether a cheek or “buccal” swab of the interior of a recently booked inmate’s mouth for DNA testing is an unreasonable search of the person.<sup>204</sup> Alonzo King was arrested for

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at 558).

192. *Bell*, 441 U.S. at 560 (“[W]e deal here with the question whether visual body-cavity inspections . . . can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.”).

193. *Florence*, 132 S. Ct. 1517–23.

194. *Id.* at 1514.

195. *Id.*

196. *Id.*

197. *Id.* at 1514–15.

198. *Id.* at 1515.

199. *Id.* at 1515–16.

200. *Id.* at 1517.

201. *Id.* at 1518 (citing *Block v. Rutherford*, 468 U.S. 576, 584–85 (1984)).

202. *Id.* at 1520–22.

203. *Id.* at 1523.

204. *Maryland v. King*, 133 S. Ct. 1958, 1965–66 (2013).

first- and second-degree assault, and during booking, jail personnel used a cheek swab to take a DNA sample from him pursuant to Maryland law.<sup>205</sup> DNA testing revealed that King's DNA profile matched that of a sample collected in an unsolved 2003 rape case.<sup>206</sup> After being indicted for rape, King moved to suppress the cheek swab sample.<sup>207</sup>

The Supreme Court, in deciding the question, first recognized that virtually any intrusion into the human body constitutes an "invasion of cherished personal security" and is subject to constitutional scrutiny.<sup>208</sup> It stated, however, that in some circumstances, such as "special law enforcement needs," Fourth Amendment protections could be satisfied if the search is reasonable in scope and in manner of execution.<sup>209</sup> Identifying the cheek swab search as a situation where "reasonableness" should govern the issue, the Court indicated that strong governmental interests were served by such searches:

- (1) they provide police with a safe and accurate way to identify the persons they take into custody;<sup>210</sup>
- (2) they provide law enforcement with untainted information about inmates useful in maintaining the order and security of jails and prisons;<sup>211</sup> and
- (3) they provide information regarding an inmate's potential future dangerousness, which is helpful in determining whether an individual should be released on bail.<sup>212</sup>

These compelling interests, the Court concluded, more than make up for whatever minimal intrusion into an inmate's personal space a non-invasive cheek swab imposes.<sup>213</sup> As a result, the Court held that the cheek swab search was reasonable under the Fourth Amendment.<sup>214</sup>

### 3. *Bailey v. United States*

The Supreme Court has also held that an individual may be detained without probable cause while officers are executing a valid search warrant of the premises in which the individual is located.<sup>215</sup> In *Michigan v. Summers*, the Court indicated that such a detention is permissible because it constitutes only minimal intrusion on an individual's privacy and compelling governmental interests in play during the execution of a warrant render such a seizure reasonable.<sup>216</sup> Recently, in *Bailey v. United States*, the Supreme Court addressed whether police are also permitted to detain individuals some distance away from the premises

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205. *Id.* at 1966.

206. *Id.*

207. *Id.*

208. *Id.* at 1969 (internal quotation marks omitted) (citing *Schmerber v. California*, 384 U.S. 757, 770 (1966); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)).

209. *Id.* at 1969-70.

210. *Id.* at 1970-71.

211. *Id.* at 1972.

212. *Id.* at 1973.

213. *Id.* at 1977-78.

214. *Id.* at 1980.

215. See *Michigan v. Summers*, 452 U.S. 692, 697-98 (1981).

216. *Id.*

searched.<sup>217</sup>

Police had obtained a warrant to search a house for a handgun.<sup>218</sup> Before the warrant was executed, officers observed a man, who matched the physical description of an individual associated with the firearm, leave the house in a vehicle.<sup>219</sup> After the vehicle left the house, the warrant was executed, and the house was searched.<sup>220</sup> However, officers also followed the vehicle, eventually pulled it over, and detained Chunon Bailey “incident to the execution of a search warrant.”<sup>221</sup> Bailey was indicted for drug possession and possession of a firearm by a felon.<sup>222</sup> At trial, he moved to suppress evidence derived from what he claimed was an unreasonable seizure.<sup>223</sup>

The Supreme Court decided *Bailey* on the basis of whether the principles of *Summers* also justified detentions beyond the immediate vicinity of the premises being searched.<sup>224</sup> The Court had identified three principal law enforcement interests in *Summers* that justified the detention of occupants of premises during a search:

- (1) officer safety during the search;
- (2) freedom from interference from the premises’ occupants; and
- (3) the prevention of flight should incriminating evidence be found.<sup>225</sup>

The Court concluded that none of these interests are safeguarded when the individuals detained are physically remote from the premises being searched.<sup>226</sup> Because no “special law enforcement interests” were at stake in this case, Bailey’s seizure was unreasonable under the Fourth Amendment.<sup>227</sup> The Court’s decision ensures that police will not be able to justify an individual’s detention based solely on the execution of a search warrant occurring elsewhere.<sup>228</sup>

### C. REASONABLE SUSPICION AND PROBABLE CAUSE

The Supreme Court, guided by the requirements of the Fourth Amendment, has created standards that govern how and when police may interact with citizens. “Casual encounters” are consensual interactions between individuals and police and do not implicate constitutional rights.<sup>229</sup> A temporary, investigative detention—commonly called a “*Terry* stop”—is considered a seizure under the Fourth Amendment and is only justified if the officer has “reasonable suspicion” that the person detained is, has been, or soon will be engaged in

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217. *Bailey v. United States*, 133 S. Ct. 1031, 1035 (2013).

218. *Id.* at 1036.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1036–37.

224. *Id.* at 1038 (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion)) (“An exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale.”).

225. *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981).

226. *Bailey*, 133 S. Ct. at 1041.

227. *Id.* at 1042–43.

228. *See id.*

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

criminal activity.<sup>230</sup> Finally, “probable cause” is required in many instances—for example:

- (1) when an officer makes a warrantless arrest;<sup>231</sup>
- (2) when an officer conducts the warrantless search of an automobile;<sup>232</sup>
- or
- (3) when an officer wishes to obtain a search or arrest warrant.<sup>233</sup>

In the last two years, the Supreme Court and the Texas Court of Criminal Appeals have addressed under what circumstances probable cause and reasonable suspicion are found as well as how warrants should be properly issued.

### 1. *Florida v. Harris*

In *Florida v. Harris*, the U.S. Supreme Court tackled the question of how a court should determine whether a canine investigation of an automobile provides probable cause sufficient to perform a warrantless search.<sup>234</sup> In this case, an officer pulled over Clayton Harris’s automobile because it had an expired license plate.<sup>235</sup> Harris was “visibly nervous,” and the officer asked for consent to search his vehicle.<sup>236</sup> When Harris refused, the officer retrieved a dog trained to detect narcotics from his patrol car.<sup>237</sup> The dog signaled to the officer that he detected narcotics in the vehicle, and the officer concluded that he had probable cause to search the vehicle.<sup>238</sup> Harris was ultimately arrested when the officer discovered ingredients used to make methamphetamine in the vehicle.<sup>239</sup>

Harris moved to suppress the drug evidence, arguing that the dog’s signal had not given the officer probable cause for a search.<sup>240</sup> On appeal, the Florida Supreme Court agreed, holding that the mere fact that the dog had been trained and certified was insufficient to establish probable cause; instead, the State needed to present as evidence training and certification records, field performance records, the experience and training of the officer handling the dog, and any other objective evidence that bolstered the dog’s reliability.<sup>241</sup>

The U.S. Supreme Court granted certiorari, and ultimately reversed the Florida Supreme Court’s decision.<sup>242</sup> It reminded lower courts that the test for probable cause is merely whether the facts available to the investigating officer

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230. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

231. *Henry v. United States*, 361 U.S. 98, 102 (1959); *Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005).

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

233. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (holding that a magistrate is to determine whether probable cause exists to issue a search warrant by examining the “totality of the circumstances.”).

234. *Florida v. Harris*, 133 S. Ct. 1050, 1053 (2013).

235. *Id.* at 1053.

236. *Id.*

237. *Id.* at 1053–54.

238. *Id.* at 1054.

239. *Id.*

240. *Id.*

241. *Id.* at 1055.

242. *Id.*

would “warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present.”<sup>243</sup> Rigid rules, bright-line tests, and finely tuned standards of proof have no place in the probable-cause inquiry.<sup>244</sup> The Court stated that Florida’s test for a probable-cause determination in a canine-sniff case was overly formulaic, as it was “a strict evidentiary checklist, whose every item the State must tick off” to establish that an officer had probable cause to search.<sup>245</sup> Instead, evidence of a dog’s satisfactory performance in a training program would be enough for an officer to trust his alert so long as a defendant had the opportunity to challenge the dog’s reliability with his own evidence.<sup>246</sup> In this case, because the State had established the dog’s successful training and proficiency in finding drugs, and because Harris had not rebutted that evidence, the officer in fact did have probable cause to conduct the warrantless search of Harris’s automobile based on the dog’s signal that drugs were contained in the vehicle.<sup>247</sup>

### 2. *State v. Duarte*

In *State v. Duarte*, the Texas Court of Criminal Appeals addressed whether a magistrate could find probable cause sufficient to issue a search warrant for a residence, based solely on information provided by a first-time informant who did so based on the expectation of leniency on his pending criminal charges.<sup>248</sup> In deciding the question, the Court reiterated that while the standard for finding probable cause sufficient for a search warrant was “nondemanding,” courts should also ensure that warrants are not being issued based on “bare conclusions alone.”<sup>249</sup> A search warrant affidavit based largely on hearsay from a confidential informant should be corroborated by independent police work, because such informants, whose motives for cooperating with officers are often self-serving, cannot be presumed to be reliable.<sup>250</sup> In this case, the vague, uncorroborated information provided by the first-time informant did not add up to probable cause.<sup>251</sup> In the future, police will have to ensure that if a search warrant affidavit is largely based upon the statements of a first-time informant, the information relayed by the informant both specifically describes the criminal activity in question and is corroborated by independent police investigation.<sup>252</sup>

### 3. *Arguellez v. State*

In *Arguellez v. State*, the Court of Criminal Appeals qualified the ability of officers to conduct *Terry* stops based solely on an individual’s so-called

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243. *Id.* (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (internal quotation marks omitted)).

244. *Id.*

245. *Id.* at 1056.

246. *Id.* at 1057.

247. *Id.* at 1058–59.

248. *State v. Duarte*, 389 S.W.3d 349, 351 (Tex. Crim. App. 2012).

249. *Id.* at 354 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

250. *Id.* at 355–56 (citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3 at 98 (4th ed. 2004)).

251. *Id.* at 360.

252. *See id.*

“suspicious activity” in public.<sup>253</sup> Officers received a call indicating that a man was parked outside of a public pool, taking pictures of patrons wearing swimming attire.<sup>254</sup> Feliz Arguellez, the photographer, was detained, asked to make a statement regarding his activities, and was ultimately indicted for the offense of improper photography.<sup>255</sup> The Court of Criminal Appeals addressed the issue by analyzing whether officers had “specific, articulable facts that, when combined with rational inferences therefrom, le[[d [them] to reasonably conclude” that Arguellez had “engaged in criminal activity.”<sup>256</sup> The Court indicated that the totality of the circumstances known to officers “was that an unknown male in a described vehicle was taking photographs at a public pool,” and that this by itself was not unusual, suspicious, or criminal.<sup>257</sup> As a result, Arguellez’s detention was not based on reasonable suspicion and was invalid.<sup>258</sup>

The Court’s decision seems to indicate that an officer cannot conduct a *Terry* stop when an individual has engaged in activity that is not by itself unusual but that under some circumstances could be criminal.<sup>259</sup> To conduct the stop, he must instead have additional articulable facts that point firmly at the presence of criminal activity.<sup>260</sup> But as the dissent points out, a reasonable suspicion determination typically does not require that the articulable facts relied upon by police be criminal acts in and of themselves.<sup>261</sup> Thus, the *Arguellez* decision seems to have heightened the reasonable suspicion standard, although it is possible that the Court’s decision affects such a determination only in the context of facts similar to those in this case.<sup>262</sup>

#### D. EXCEPTIONS TO THE WARRANT REQUIREMENT

The Supreme Court has frequently reiterated the principle that “searches conducted outside the judicial process”—in other words, warrantless searches—“are *per se* unreasonable under the Fourth Amendment.”<sup>263</sup> However, the Court has also carved out situations where warrantless searches are deemed reasonable, but has always been careful to indicate that these exceptions are “specifically established and well-delineated” so as to provide proper guidance to law enforcement.<sup>264</sup> Exceptions to the general warrant requirement include the following:

- (1) searches incident to arrest;
- (2) consent;

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253. *Arguellez v. State*, 409 S.W.3d 657, 663–64 (Tex. Crim. App. 2013).

254. *Id.* at 659–60.

255. *Id.* at 660.

256. *Id.* at 663 (citing *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007)) (stating the “reasonable suspicion” framework necessary to justify an investigatory detention).

257. *Id.* at 664.

258. *Id.*

259. *See id.* at 663–664.

260. *See id.* at 663.

261. *Id.* at 665 (Keasler, J., dissenting).

262. *See id.* at 663–64 (majority opinion).

263. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

264. *Gant*, 556 U.S. at 338.

- (3) inventory searches; and
- (4) the existence of exigent circumstances.<sup>265</sup>

The Supreme Court and the Texas Court of Criminal Appeals have addressed at least two of these exceptions in recent years.

#### 1. Exigent Circumstances

“One well-recognized exception” to the warrant requirement “applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.”<sup>266</sup> A number of situations may present an exigency that justifies an officer’s warrantless search, including:

- (1) the need to provide emergency assistance to an individual;<sup>267</sup>
- (2) engage in pursuit of a suspect;<sup>268</sup> or
- (3) to prevent the imminent destruction of evidence.<sup>269</sup>

In deciding whether an exigency exists to justify a warrantless search, a reviewing court looks to the totality of the circumstances, instead of applying any bright-line rule.<sup>270</sup>

In *Missouri v. McNeely*, the Supreme Court addressed whether an officer can use the exigency exception to justify a nonconsensual blood test after a drunk-driving arrest, on the basis that if the blood test was not immediately performed, evidence would be “destroyed” through the natural metabolization of alcohol in the arrestee’s bloodstream.<sup>271</sup> The Court ultimately concluded that the exigent-circumstances exception could not justify such a significant intrusion into the arrestee’s body solely on the basis that natural bodily processes would in time dissipate potential evidence of the arrestee’s guilt.<sup>272</sup>

The Court identified *Schmerber v. California*<sup>273</sup> as the touchstone for deciding the issues in *McNeely*.<sup>274</sup> In that case, the Court had permitted the exigent-circumstances exception to justify a warrantless blood test because the arrestee had suffered injuries in an automobile accident and had to be taken to the hospital, which extended the delay necessary to appear before a magistrate to obtain a proper search warrant.<sup>275</sup> The decision in *Schmerber*, the Court explained, was based on an analysis of the totality of the circumstances, which pointed towards a real exigency justifying a warrantless search.<sup>276</sup> In this case, however, looking at the totality of the circumstances, there was no evidence that

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265. See *Katz*, 389 U.S. at 357 n.19 (citing Supreme Court cases in which the Court first recognized exceptions to the general warrant requirement).

266. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (internal quotation marks omitted).

267. See *Michigan v. Fisher*, 558 U.S. 45, 47–48 (2009).

268. *United States v. Santana*, 427 U.S. 38, 42–43 (1976).

269. E.g., *Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Ker v. California*, 374 U.S. 23, 40–41 (1963) (plurality opinion).

270. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006).

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

272. *Id.* at 1567–68.

273. *Schmerber v. California*, 384 U.S. 757 (1966).

274. *McNeely*, 133 S. Ct. at 1558–63.

275. *Schmerber*, 384 U.S. at 758, 770.

276. *McNeely*, 133 S. Ct. at 1560.



the arresting officer “faced an emergency or unusual delay in securing a warrant.”<sup>277</sup> Therefore, the warrantless search was not reasonable under the Fourth Amendment.<sup>278</sup>

The *McNeely* decision is significant because it categorically rejected the proposition that an officer is *per se* permitted to conduct a warrantless blood test on a drunk-driving arrestee based on exigent circumstances.<sup>279</sup> Instead, officers will have to be able to identify some other factor contributing to an exigency, such as the unavailability of a magistrate to issue a warrant, or an emergency situation such as the one in *Schmerber*.<sup>280</sup> Additionally, in Texas, the *McNeely* case has raised another issue—whether the Texas implied consent statute, which authorizes police to obtain a blood or breath sample from an individual without a warrant and regardless of consent under particular circumstances, has been rendered unconstitutional by the Court’s decision.<sup>281</sup> Defendants have argued that *McNeely* has rendered mandatory blood draws categorically unconstitutional.<sup>282</sup> Texas courts of appeals have not accepted this argument, reasoning instead that *McNeely* dealt only with situations where a warrantless blood or breath specimen was justified by resort to exigent circumstances alone.<sup>283</sup> It is likely that the Court of Criminal Appeals will deal with the question of the constitutionality of Texas’ implied consent statute in the near future.

In *Turrubiate v. State*, the Texas Court of Criminal Appeals again addressed whether a single factor can by itself justify a warrantless search based on exigent circumstances.<sup>284</sup> Here, when a policeman knocked on the door of a home, Marcos Turrubiate cracked the door open, and the officer noticed a strong odor of marijuana coming from inside.<sup>285</sup> Believing that the drugs would be destroyed if he left to obtain a warrant, the officer forcibly entered the home and ultimately arrested Turrubiate for drug possession.<sup>286</sup> On appeal, Turrubiate argued that the exigent-circumstances exception could not justify the officer’s entry into his home because the officer’s search had been based on only two factors: the officer’s belief that Turrubiate possessed marijuana, and Turrubiate’s awareness of the officer’s presence at his home.<sup>287</sup>

The Court of Criminal Appeals agreed.<sup>288</sup> First, the Court identified five factors that had traditionally been applied by officers in determining whether

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277. *Id.* at 1567–68.

278. *Id.* at 1568.

279. *See id.* at 1561–62.

280. *See id.*

281. *See* TEX. TRANSP. CODE ANN. § 724.012 (West 2012) (indicating that, for example, a warrantless blood or breath sample may be taken without consent when an officer has good reason to believe that an arrestee has two prior DWI convictions).

282. *See* *Douds v. State*, No. 14-12-00642-CR, 2013 WL 5629818, at \*4 (Tex. App.—Houston [14th Dist.] Oct. 15, 2013, no pet. h.).

283. *Id.* at \*5; *see also* *Smith v. State*, No. 13-11-00694-CR, 2013 WL 5970400, at \*3–4 (Tex. App.—Corpus Christi Oct. 31, 2013, no pet. h.).

284. *Turrubiate v. State*, 399 S.W.3d 147, 149 (Tex. Crim. App. 2013).

285. *Id.*

286. *Id.*

287. *Id.* at 150.

288. *Id.* at 156.

evidence might be destroyed or removed before they could obtain a search warrant.<sup>289</sup> However, the Court analyzed these factors in light of the U.S. Supreme Court's recent decision in *Kentucky v. King*,<sup>290</sup> and concluded that these factors "no longer adequately assist a court in determining whether the record shows an exigent circumstance."<sup>291</sup> The Supreme Court in *King* had directed courts to instead make an assessment of the record in determining whether the officer conducting the warrantless search "reasonably believed that the removal or destruction of evidence was imminent," and the factors in the older test had gone beyond that simple analysis.<sup>292</sup>

In this case, following the test from *King*, the circumstances did not indicate that destruction of evidence by Turrubiate was imminent.<sup>293</sup> Although the officer had smelled marijuana in Turrubiate's home, and Turrubiate had as a result known that the officer was "on his tail," there was no proof of attempted or actual destruction of evidence.<sup>294</sup> Lacking that evidence, an exigency based on the imminent destruction was invalid—the Court required proof "beyond mere knowledge of police presence and an odor of illegal narcotics."<sup>295</sup> This ruling is significant because the Court has precluded the possibility of a *per se* rule allowing warrantless searches of homes based solely on the odor of narcotics emanating therefrom.<sup>296</sup>

## 2. Consent to Search

Another exception to the general warrant requirement is consent. A warrantless search is considered reasonable if law enforcement obtains the voluntary consent of an individual possessing authority over the space that is searched.<sup>297</sup> Consent frequently arises in the context of searches of homes and automobiles. For homes, a person possessing authority might be the owner of the home, or an individual living in the home who shares common authority over property within.<sup>298</sup>

In *State v. Copeland*, the Texas Court of Criminal Appeals addressed consent to search in the context of automobiles.<sup>299</sup> The question before the court was whether a passenger may disallow police to search a vehicle in a situation where the driver has already provided that consent.<sup>300</sup> Police had pulled over a vehicle driven by Wayne Danish, who provided consent to search the car.<sup>301</sup> However,

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289. *Id.* at 151 (citing *McNairy v. State*, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991)).

290. *Kentucky v. King*, 131 S. Ct. 1849 (2011).

291. *Turrubiate*, 399 S.W.3d at 153.

292. *Id.* (citing *King*, 131 S. Ct. at 1862).

293. *Id.* at 153–54.

294. *Id.*

295. *Id.* at 154; *see also id.* at 154 n.5 (citing to several cases listing circumstances under which an exigency based on the imminent destruction of evidence had in fact been justified).

296. *See id.* at 151–54.

297. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)).

298. *Id.* (citing Supreme Court cases establishing rules regarding "authority" sufficient to uphold voluntary consent to search).

299. *State v. Copeland*, 399 S.W.3d 159, 159 (Tex. Crim. App. 2013).

300. *Id.*

301. *Id.* at 160.

Shirley Copeland, a passenger in the vehicle, told officers that she was the owner of the vehicle and that she refused to provide consent.<sup>302</sup> Officers then asked Danish for the second time if he consented to the search, and he affirmed.<sup>303</sup> Police searched the vehicle over Copeland's objections, discovered narcotics, and arrested Copeland.<sup>304</sup>

The Court identified that the principles that govern the case are those of "third-party consent"—situations where consent was not given by the defendant, but by another who possessed common authority over the space searched.<sup>305</sup> For homes, third-party consent by a co-tenant is valid when the fellow tenant is absent when consent is given.<sup>306</sup> Conversely, third-party consent is invalid when the fellow tenant is present and makes an express refusal of consent.<sup>307</sup> Copeland urged that these principles should be applicable to vehicles, as well, but the Court rejected this argument.<sup>308</sup> Unlike homes, the Court reasoned, where there is no generally recognized "hierarchy" of co-tenants, society recognizes the driver of a vehicle as the individual with a superior right with respect to the safety and control of a vehicle.<sup>309</sup> Unless circumstances indicate that a passenger actually retains control over the vehicle and its contents,<sup>310</sup> consent by the driver would be sufficient to justify a warrantless search as reasonable.<sup>311</sup>

While the Court of Criminal Appeals did not ultimately decide the case on its merits, it seems likely that the consent to search was voluntarily given by Danish, and Copeland's objections did not override that consent.<sup>312</sup> According to a police license plate check, Danish was the registered owner, and Copeland never provided proof that she was a co-owner or otherwise maintained control over the vehicle.<sup>313</sup> The Court's decision indicates that the greater protection for homes provided by the U.S. Supreme Court in consent cases does not apply to vehicular consent cases in Texas.<sup>314</sup> If a passenger-defendant wishes to revoke the driver's consent, he will have to ensure that the officer knew about the passenger's legitimate retention of possessory control over the vehicle.<sup>315</sup>

#### IV. CONCLUSION

Because the Texas Court of Criminal Appeals continues to analyze most

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302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 162 (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

306. *Matlock*, 415 U.S. at 170.

307. *Georgia v. Randolph*, 547 U.S. 547 U.S. 103, 122–23 (2006).

308. *Copeland*, 399 S.W.3d at 164.

309. *Id.*

310. For instance, the passenger might retain control where a driver is arrested and a passenger takes control of the vehicle or where an officer learns that a passenger owns the vehicle.

311. *Id.* at 164, 167.

312. *See id.* at 160, 167.

313. *State v. Copeland*, No. 13-11-00701-CR, 2013 WL 6588031, at \*1–2 (Tex. App.—Corpus Christi, Dec. 12, 2013, no pet. h.).

314. *See Copeland*, 399 S.W.3d at 164.

315. *See id.* at 160, 166.

issues under the United States Constitution, the cases decided by the U.S. Supreme Court during this Survey period will have significant impact upon Texas law. The resurgent property-based model of searches in particular, as set forth by the Supreme Court in the *Jones* and *Jardines* cases, represents a sea change in the most basic aspects of Fourth Amendment jurisprudence. The Court of Criminal Appeals cases decided during the survey period present few major changes to established precedent, but they do serve to expand or elaborate upon existing law in the areas of confessions, searches and seizures.