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Criminal Procedure: Confessions, Searches, and Seizures

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

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I. INTRODUCTION

A review of cases involving confessions, searches, and seizures shows significant developments in search and seizure jurisprudence but no significant change in confession jurisprudence. Because there have been no significant changes in confession jurisprudence, this Survey includes a brief snapshot into cases decided by Texas's Courts of Appeals during the Survey period—December 1, 2015 to November 30, 2016. The U.S. Supreme Court and the Texas Court of Criminal Appeals continue to develop the law around warrantless blood draws and breath tests. The court

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of criminal appeals has also clarified ambiguities in the areas of standing and reasonable suspicion.

II. CONFESSIONS

A confession must be knowing and voluntary.[1] In Texas, a defendant may challenge the voluntariness of a custodial confession under three theories—failure to comply with Article 38.22 of the Texas Code of Criminal Procedure, failure to comply with *Miranda v. Arizona*, and due process violations.[2] A voluntariness claim based on the defendant's state of mind is cognizable under Article 38.22.[3] The latter two theories apply when there is law enforcement overreach, such as an excessive length of questioning or threats of violence.[4]

A defendant's mental illness is only a factor that may determine whether the custodial confession was involuntary based on a failure to comply with Article 38.22.[5] In *Williams v. State*, Williams claimed that his confession was rendered involuntarily because it was given while he suffered from post-traumatic stress disorder (PTSD).[6] Because Williams appeared to understand the warnings given before the confession, the First Houston Court of Appeals held that Williams's confession was voluntary despite his PTSD.[7] A person suffering from mental illness or substance abuse is still capable of providing a voluntary confession if it appears he understands the required warnings.[8]

A custodial confession is involuntary if coerced by violence, threats, or improper promises.[9] In Texas, a promise will render a confession involuntary if it is "positive, made or sanctioned by someone in authority, and of such an influential nature that it would cause a defendant to speak untruthfully."[10] In *Avellaneda v. State*, Avellaneda argued that his confession was coerced by the officer's promise that he would receive leniency.[11] Avellaneda's argument failed because the record supported the trial judge's finding that no improper promises were made.[12]

Confessions or statements made when not in custody are not required to comport with Article 38.22 or *Miranda*.[13] A defendant is in custody if a

1. TEX. CODE CRIM. PROC. ANN. art. 38.21 (West 2015).
2. Oursbourn v. State, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008).
3. *Id.* at 171.
4. *Id.* at 170–71.
5. Williams v. State, 502 S.W.3d 262, 272 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).
6. *Id.* at 271.
7. *Id.* at 274.
8. *Id.*
9. Martinez v. State, 127 S.W.3d 792, 796 (Tex. Crim. App. 2004) (citing Bram v. United States, 168 U.S. 532 (1897)).
10. Avellaneda v. State, 496 S.W.3d 311, 316 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
11. *Id.* at 315.
12. *Id.* at 317.
13. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 5 (West 2015).

reasonable person in his situation would not feel free to leave.[14] Curiously, in *Koch v. State*, the First Houston Court of Appeals held that Koch, who was in handcuffs and placed in the back of a patrol car, was not in custody.[15] Because Koch was told he was detained, not arrested, and was placed in the patrol car so officers could complete their investigation, the court of appeals held that he was not in custody and his statements were admissible.[16] This case is somewhat outside the norm.

III. SEARCHES AND SEIZURES

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures.[17] Although the Texas Constitution has its own similar protections,[18] the Texas Court of Criminal Appeals has, traditionally, followed the U.S. Supreme Court's jurisprudence in these cases.[19] During the Survey period, the court of criminal appeals wrestled with the ramifications of cell-site-location information and the Health Insurance Portability and Accountability Act (HIPAA). Both the Supreme Court and the court of criminal appeals continue to refine the law around warrantless blood draws.

A. Standing

A defendant must have standing before he can challenge a search or seizure.[20] Standing requires a person to have a reasonable expectation of privacy, meaning (1) he has a subjective expectation of privacy in the place or thing to be searched; and (2) his subjective expectation is objectively reasonable.[21] When analyzing a defendant's reasonable expectation of privacy, courts consider a number of factors including historical notions of privacy, precautions taken to preserve privacy, the defendant's possessory interest, and whether the defendant has dominion or control.[22]

1. Curtilage: State v. Rendon

The reasonable expectation of privacy attached to a person's home extends to the surrounding area—the curtilage.[23] Curtilage protects the area surrounding a home, such as a porch or small yard, but it will not protect large adjacent areas, such as fields.[24] Despite the curtilage protec-

14. Stansbury v. California, 511 U.S. 318, 324–25 (1994) (per curiam).
15. Koch v. State, 484 S.W.3d 482, 490–91 (Tex. App.—Houston [1st Dist.] 2016, no pet.).
16. *Id.* at 491.
17. U.S. Const. amend. IV.
18. Tex. Const. art. I, § 9.
19. Richardson v. State, 865 S.W.2d 944, 948 (Tex. Crim. App. 1993).
20. Rakas v. Illinois, 439 U.S. 128, 133–34 (1978).
21. *Richardson*, 865 S.W.2d at 948–49.
22. *See, e.g.*, State v. Batts, 397 S.W.3d 198, 203–04 (Tex. Crim. App. 2013).
23. Oliver v. United States, 466 U.S. 170, 180 (1984).
24. *See id.* at 179.

tions, police retain an implied license to enter the curtilage to knock on a person's door.[25]

When a defendant lives in a second-story apartment, a narcotics sniff at the threshold of the defendant's door is an unlawful search of the apartment's curtilage.[26] In *State v. Rendon*, officers investigating Rendon brought a drug-detecting dog to his apartment complex and conducted canine-narcotics sniffs at his car and the threshold of his apartment.[27] The canine-narcotics sniffs detected narcotics at both locations.[28] Based on both canine-narcotics sniffs, the officers obtained a search warrant.[29]

At trial, Rendon filed a motion to suppress and argued that the canine-narcotics sniff performed at his threshold was an unlawful search.[30] The trial judge granted Rendon's motion.[31] In the findings of fact and conclusions of law, the trial judge concluded that the landing directly in front of Rendon's door was curtilage, and because the canine-narcotics sniff intruded on the curtilage, it was an unlawful search in violation of the Fourth Amendment.[32] The judge ruled that, after the results of the canine-narcotics sniff at Rendon's threshold had been excluded, the remaining information did not establish probable cause and the search warrant was invalid.[33] The court of appeals affirmed.[34]

The Texas Court of Criminal Appeals affirmed, but did not reach whether Rendon's landing was curtilage.[35] Relying on *Florida v. Jardines*, the court of criminal appeals held that conducting a canine-narcotics sniff at a defendant's threshold or immediately outside his door was an unlicensed physical intrusion into the home's curtilage.[36] In *Jardines*, the U.S. Supreme Court held that conducting a canine-narcotics sniff on a defendant's front porch was an unlicensed physical intrusion into the home's curtilage.[37] Under *Jardines*, bringing a drug-detection dog onto the curtilage of a defendant's home to conduct a canine-narcotics sniff exceeds the scope of the implied invitation to enter the curtilage.[38] Similarly, in *Rendon*, the court of criminal appeals held that the officers exceeded any implied invitation when they brought a drug-detection dog to the threshold of Rendon's apartment to conduct a canine-narcotics sniff.[39] Bringing a drug-detection dog to an apartment's threshold was an unlicensed phys-

25. State v. Rendon, 477 S.W.3d 805, 809–10 (Tex. Crim. App. 2015).
26. *Id.* at 806.
27. *Id.* at 807.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 807–08.
36. *Id.* at 808.
37. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).
38. *Id.* at 1416 ("An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.").
39. *Rendon*, 477 S.W.3d at 811.

ical intrusion into a constitutionally protected area in violation of the Fourth Amendment.[40]

While the trial judge and court of appeals held that the landing outside of Rendon's apartment was curtilage, the court of criminal appeals did not reach that issue.[41] Because the court was able to resolve the opinion by deciding that the threshold of the apartment was curtilage, whether a landing is curtilage is still an open question.[42]

2. The Third-Party Doctrine: Ford v. State

Under the third-party doctrine, a defendant does not have standing to challenge searches and seizures that are performed on third parties.[43] When a defendant voluntarily discloses his information to a third party, that information is no longer private and no reasonable expectation of privacy exists.[44] This is true even if the initial disclosure was given on the assumption of limited use.[45] Under the third party doctrine, any information voluntarily disclosed to a third party can be obtained without a warrant because there is no reasonable expectation of privacy.[46]

The advent of cell phones has added a new wrinkle to the third-party doctrine. Cell phones operate by sending radio signals to and from cell-phone towers.[47] Whenever a cell phone is turned on, it continuously identifies its location in relation to the nearest tower.[48] The cell-phone service provider records the phone's location every time a call or text is sent.[49] This cell-site-location information is a record of that cell phone's, and conceivably its owner's, approximate location.[50] Prosecutors and investigators can use cell-site-location information to establish a defendant's presence near a crime scene or to contradict a defendant's claims.[51]

In *Ford v. State*, the Texas Court of Criminal Appeals held that the State could obtain four days of cell-site-location information from a service provider without a warrant.[52] In that case, evidence of Ford's cell-site-location information was admitted by the State to corroborate witness testimony and support the timeline it advanced at trial.[53] Ford challenged the admission of the evidence on Fourth Amendment grounds.[54]

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40. *Id.*
41. *Id.*
42. *Id.*
43. *See* United States v. Miller, 425 U.S. 435, 444 (1976).
44. Smith v. Maryland, 442 U.S. 735, 743–44 (1979).
45. *Id.* at 744.
46. *Id.* at 745–46.
47. Eric Lode, Annotation, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d 1, § 2 (2015).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Ford v. State, 477 S.W.3d 321, 322 (Tex. Crim. App. 2015).
53. *Id.* at 327.
54. *Id.*

At the court of appeals, the majority, relying on the third-party doctrine, held that obtaining four days of cell-site-location information did not violate the Fourth Amendment.[55] Since Ford's cell-site-location information was disclosed to his service provider through his cell phone use, the court of appeals held that the information had been voluntarily disclosed.[56] In contrast, the dissenting opinion of the court of appeals argued that a person has a reasonable expectation of privacy in his movements and location and that simply using a cell phone is not a voluntary disclosure of that information.[57]

The court of criminal appeals affirmed.[58] The court of criminal appeals held that Ford had no reasonable expectation of privacy in the information because it was held by a third party.[59] In fact, Ford never owned or possessed the records.[60] Further, Ford voluntarily used a cell-phone service that required certain information, including his location, be sent to and from cell towers.[61] The court of criminal appeals limited its holding to short-term cell-site-location information and noted that long-term cell-site-location information might raise Fourth Amendment concerns.[62]

With the abundance of cell phones and the amount of information disclosed through the internet, *Ford* may have far-reaching consequences. Cell-site-location information can now be seized from service providers without a warrant. Further, information disclosed to websites or corporations to use a service or play a game may also be discoverable. The limits of *Ford* are unclear at this time. For now, short-term cell-site-location information held by a service provider is subject to seizure without a warrant.

3. Health Insurance Portability and Accountability Act: State v. Huse

HIPAA sets strict security and privacy standards for personally identifiable health care information.[63] Under HIPAA, medical information is carefully secured and disclosure is closely monitored.[64] In *State v. Huse*, the Texas Court of Criminal Appeals considered HIPAA's effect on current Fourth Amendment jurisprudence.[65]

In *Huse*, officers took Huse to a hospital after he was in an accident.[66] At the hospital, his "blood was drawn for medical purposes."[67] His blood-

55. Ford v. State, 444 S.W.3d 171, 192 (Tex. App.—San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015).
56. *Id.* at 188–89.
57. *Id.* at 202–03 (Chapa, J., dissenting).
58. *Ford*, 477 S.W.3d at 330.
59. *Id.*
60. *Id.* at 330–31.
61. *Id.* at 331.
62. *Id.* at 334.
63. State v. Huse, 491 S.W.3d 833, 835 n.1 (Tex. Crim. App.), *cert. denied*, Huse v. Texas, 137 S. Ct. 1066 (2016).
64. *Id.*
65. *Id.* at 835–36.
66. *Id.*
67. *Id.*

alcohol concentration was .219%.[68] Prosecutors filed "a grand jury subpoena *duces tecum* to obtain [Huse's] medical records," and the hospital released the records.[69] Huse was charged by information with driving while intoxicated.[70] Huse, arguing that the subpoena violated state law and HIPAA, filed a motion to suppress his medical records.[71] While the motion was pending, the State dismissed the information and the grand jury issued a second subpoena *duces tecum*.[72] The trial judge granted Huse's motion to suppress on the grounds that a warrant was required and the grand jury subpoena was misused.[73]

The court of appeals, relying on *State v. Hardy*, reversed the trial judge and held that Huse did not have standing to pursue his Fourth Amendment claim.[74] In *Hardy*, the Texas Court of Criminal Appeals held that defendants have no reasonable expectation of privacy in blood-alcohol test results when the test was taken by medical personnel for medical purposes.[75] Sensitive to the *Hardy* holding, the court of appeals in *Huse* held that HIPAA may have broadened some privacy interests, but it did not extend those interests to blood-alcohol-test results obtained by medical personnel for medical purposes.[76] Further, the court of appeals noted that HIPAA explicitly allows the disclosure of medical records to law enforcement in certain circumstances.[77]

The court of criminal appeals affirmed and held that because the test was performed for legitimate medical purposes, Huse did not have a reasonable expectation of privacy in the blood-alcohol-test results.[78] Further, because HIPAA specifically allowed disclosure if required by grand jury subpoena and the first grand jury subpoena was lawful, HIPAA was not violated.[79]

HIPAA's effect on the seizure of medical records generally is unclear, but it does not affect the holding in *Hardy*.[80] Even under HIPAA, a defendant's blood-alcohol-test results are still subject to subpoena and seizure if the tests are performed by medical personnel for medical purposes.[81]

B. Reasonable Suspicion

A defendant's arrest must be supported by probable cause.[82] But a

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 836–37.
73. *Id.* at 837.
74. *Id.* at 839.
75. State v. Hardy, 963 S.W.2d 516, 527 (Tex. Crim. App. 1997).
76. *Huse*, 491 S.W.3d at 839.
77. *Id.*
78. *Id.* at 843.
79. *Id.*
80. *See Hardy*, 963 S.W.2d at 527.
81. *Huse*, 491 S.W.3d at 842–43.
82. Terry v. Ohio, 392 U.S. 1, 10 (1968).

temporary investigative detention need only be supported by reasonable suspicion.[83] With reasonable suspicion, an officer may perform a *Terry* stop—temporarily detain and frisk a defendant.[84] Reasonable suspicion exists when, based on the totality of the circumstances, an officer has "specific, articulable facts that, when combined with rational inferences therefrom, lead him to reasonably conclude that a particular person actually is, has been, or soon will be, engaged in criminal activity."[85] During this Survey period, the Texas Court of Criminal Appeals published two cases discussing reasonable suspicion.

1. Brodnex v. State

In *Brodnex v. State*, the Texas Court of Criminal Appeals held that the time of day, location in a high-crime area, and a defendant's status as a "known criminal" do not support a finding of reasonable suspicion.[86] In that case, an officer saw Brodnex leave a hotel in a high-crime area at two in the morning.[87] The officer approached him, asked his name and what he was doing, and handcuffed him.[88] Although the officer did not personally know Brodnex, he had been told that Brodnex was a known criminal.[89] After searching Brodnex, the officer discovered a cigar tube filled with crack cocaine.[90] Brodnex was charged with possession of a controlled substance.[91] The trial judge denied Brodnex's motion to suppress the cigar tube.[92]

The court of appeals affirmed.[93] It determined that the totality of the circumstances created a reasonable suspicion and supported Brodnex's investigative detention.[94] The court of appeals focused on the time of day, the narcotic activity in the area, and the officer's belief that Brodnex was a known criminal.[95] According to the court of appeals, although these facts alone were not sufficient, taken together they supported a finding of reasonable suspicion.[96]

The court of criminal appeals reversed and held that the time of day, narcotic reputation of the area, and Brodnex's status as a known criminal did not support a finding of reasonable suspicion.[97] The officer's belief that Brodnex was a known criminal was based on unsubstantiated ru-

83. United States v. Arvizu, 534 U.S. 266, 273 (2002).
84. *Id.*
85. Arguellez v. State, 409 S.W.3d 657, 663 (Tex. Crim. App. 2013) (citing Castro v. State, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007)).
86. Brodnex v. State, 485 S.W.3d 432, 437 (Tex. Crim. App. 2016).
87. *Id.* at 434.
88. *Id.*
89. *Id.* at 435.
90. *Id.* at 434.
91. *Id.*
92. *Id.* at 435.
93. *Id.* at 436.
94. *Id.* at 435.
95. *Id.*
96. *Id.*
97. *Id.* at 438.

mors, and there was no evidence that the officer saw Brodnex commit any crime.[98] Reasonable suspicion requires more than a good-faith belief.[99] There were no specific, articulable facts that supported whether Brodnex had committed, was committing, or was about to commit a crime.[100] Based on the evidence available at trial, the court of criminal appeals found that reasonable suspicion was not supported.[101]

2. Leming v. State

In *Leming v. State*, the Texas Court of Criminal Appeals held that failing to maintain a lane and driving slowly could support a finding of reasonable suspicion of driving while intoxicated.[102] In that case, an officer responded to a report that Leming was swerving and observed Leming swerve several times into the next lane while driving well-below the speed limit.[103] A dash cam corroborated the officer's observations, except it was unclear in the video whether Leming actually entered the adjacent lane.[104] The officer pulled Leming over and performed a field sobriety test.[105] He then arrested Leming for DWI.[106] Arguing that the officer did not have reasonable suspicion to support the temporary investigative detention, Leming filed a motion to suppress the traffic stop.[107] The trial judge overruled the motion, and the court of appeals reversed the trial judge.[108] The court of criminal appeals, in turn, reversed the court of appeals.[109]

The court of criminal appeals held that the facts supported a finding of reasonable suspicion.[110] The citizen's report and the officer's observations, which were supported by the dash-cam footage, both supported the reasonable suspicion that Leming committed the offense of driving while intoxicated.[111] Driving below the speed limit and encroaching on another lane will support an officer's reasonable suspicion for a temporary investigative detention.[112]

Note that in Section II of the opinion—in which Presiding Judge Keller and Judges Meyers and Richardson joined—Judge Yeary wrote that there was reasonable suspicion of failing to maintain a lane, which also supported the stop.[113] Judge Yeary reasoned that the officer's observation

98. *Id.*
99. *Id.* at 437.
100. *Id.* at 438.
101. *Id.*
102. Leming v. State, 493 S.W.3d 552, 564–65 (Tex. Crim. App. 2016).
103. *Id.* at 554.
104. *Id.*
105. *Id.* at 555.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 565.
110. *Id.* at 563–64.
111. *Id.*
112. *Id.* at 565.
113. *Id.* at 561.

that Leming came very close to entering an adjacent lane several times and the report that Leming was swerving together supported the reasonable suspicion that Leming failed to maintain his lane.[114] Four of the nine judges considered the above facts sufficient to support the temporary investigative detention of an individual for the traffic infraction of failing to maintain a single lane.[115]

C. Attenuation Doctrine: *Utah v. Strieff*

A Fourth Amendment violation is generally remedied by the exclusionary rule, which makes the fruits of an illegal search inadmissible.[116] In certain circumstances, however, the exclusionary rule does not apply and the fruits of an illegal search are admissible.[117] There are three recognized exceptions to the exclusionary rule: the independent-source exception; the inevitable-discovery exception; and the attenuation doctrine.[118] The independent-source exception applies if the evidence was acquired separately from a different, independent, and legal search.[119] The inevitable-discovery exception applies when the evidence would have been discovered without the Fourth Amendment violation.[120] Finally, the attenuation doctrine applies when the connection between the unconstitutional act and the discovery of evidence is interrupted by intervening circumstances and exclusion would not serve a constitutional purpose.[121] The U.S. Supreme Court revisited the attenuation doctrine in *Utah v. Strieff*. In *Strieff*, the Supreme Court was asked to decide whether the discovery of a valid warrant during an unconstitutional investigative stop was an intervening circumstance.[122] The Supreme Court concluded it was and the attenuation doctrine applied.[123]

In *Strieff*, an officer unlawfully performed a temporary investigatory detention of Strieff.[124] As a result of the unlawful detention, the officer discovered that there was a valid arrest warrant for Strieff.[125] The officer arrested Strieff and, in a search incident to the arrest, found methamphetamine and drug paraphenalia.[126] At trial, Strieff filed a motion to suppress the methamphetamine and drug paraphenalia as fruit of an illegal search.[127] The trial judge denied this motion, and the court of appeals affirmed.[128] The Utah Supreme Court reversed because there

114. *Id.*
115. *Id.*
116. Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 2062.
123. *Id.* at 2064.
124. *Id.* at 2060.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

was no voluntary act by the defendant to trigger the attenuation doctrine.[129] The Supreme Court reversed the Utah Supreme Court.[130]

The Supreme Court held that a valid warrant is an intervening factor and triggers the attenuation doctrine.[131] Whether the attenuation doctrine applies depends on the "temporal proximity," "presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct."[132] In this case, the temporal proximity did not support the application of the attenuation doctrine.[133] The unlawful stop and discovery of the evidence happened within a short time of each other, which tends not to support the attenuation doctrine.[134] But the presence of an intervening circumstance supported the application of the attenuation doctrine because the warrant was discovered before the evidence.[135] Finally, there was no evidence that the officer acted in a purposeful or flagrant manner, so the last factor tended toward the application of the attenuation doctrine.[136] Based on these factors, the Supreme Court determined that the arrest warrant was an intervening circumstance that triggered the attenuation doctrine.[137] *Utah v. Strieff* clarified that a valid arrest warrant acts as an intervening circumstance, triggers the attenuation doctrine, and exempts discovered evidence from the exclusionary rule.[138]

D. Warrantless Blood Draw and Breath Test

Drunk driving is a leading cause of traffic fatalities in the United States.[139] To combat this, states around the country have enacted proactive enforcement tools.[140] Driving while intoxicated is generally defined as driving with a blood alcohol content above a statutorily set percentage.[141] A person's blood-alcohol content is often determined through a blood or breath test; urine analysis is also available but used less frequently.[142] Many states have passed mandatory-blood-draw or breath-test statutes.[143] Under these statutes, a person's consent for a blood draw or breath test is either implied, or the person's refusal to consent is criminalized.[144] In this Survey period, the U.S. Supreme Court and the

129. *Id.*
130. *Id.*
131. *Id.* at 2064.
132. *Id.* at 2062–63.
133. *Id.* at 2062.
134. *Id.*
135. *Id.* at 2062–63.
136. *Id.* at 2063.
137. *Id.*
138. *Id.*
139. NCADD, *Driving While Impaired–Alcohol and Drugs* (June 26, 2015, 3:59 PM), https://www.ncadd.org/about-addiction/driving-while-impaired-alcohol-and-drugs [https://perma.cc/P2JM-96LC].
140. *Id.*
141. *Id.*
142. Birchfield v. North Dakota, 136 S. Ct. 2160, 2168 n.1 (2016).
143. *Id.* at 2169.
144. *Id.*

Texas Court of Criminal Appeals examined warrantless blood draws in relation to searches incident to arrest, mandatory-blood-draw statutes, and exigent circumstances.

1. Search Incident to Arrest: Birchfield v. North Dakota

In *Birchfield v. North Dakota*, the U.S. Supreme Court examined three cases involving warrantless blood draws and breath tests.[145] All three cases involved states that criminalized the defendant's refusal to consent to a blood alcohol test.[146] All three defendants were informed that refusing to consent to the test was a crime.[147] One of the defendants, Birchfield, refused to consent to a blood draw and was convicted of refusing to consent.[148] Another of the defendants, Bernard, refused to consent to a breath test and was also convicted.[149] The last defendant, Beylund, consented to a blood draw because of the possible criminal penalties.[150] The Supreme Court considered the legality of the threatened searches on Birchfield and Bernard, and the actual search of Beylund.[151]

Whether a search is a valid search incident to an arrest depends on the individual privacy interests at stake and the governmental need for the search.[152] The Supreme Court held that breath tests and blood draws implicate different privacy interests and analyzed each separately.[153] The Supreme Court held that breath tests, but not blood draws, could be performed as part of a search incident to an arrest.[154]

The Supreme Court has made clear that breath tests do not implicate significant individual privacy interests.[155] A breath test is minimally invasive—a person's skin is not broken and the test is not as intrusive as other procedures.[156] The breath test analyzes a person's exhalation, which is not part of the body and would have been released eventually.[157] Further, a breath test only determines the blood alcohol content of a person's breath and gives no other information.[158] Because the breath test is minimally invasive and provides little personal information, it does not implicate significant individual privacy rights.[159]

On the other hand, blood draws do implicate significant individual privacy interests.[160] A blood draw is an invasive procedure—the person's

145. *Id.* at 2174.
146. *Id.* at 2170–73.
147. *Id.*
148. *Id.* at 2170.
149. *Id.* at 2171.
150. *Id.* at 2172.
151. *Id.* at 2174.
152. *Id.* at 2176.
153. *Id.*
154. *Id.* at 2185.
155. *Id.* at 2176.
156. *Id.* at 2177.
157. *Id.*
158. *Id.*
159. *Id.* at 2177–78.
160. *Id.* at 2178.

skin is punctured and their blood is removed.[161] Unlike breath, which is exhaled naturally, a person's blood does not normally leave his body.[162] Further, a blood draw can give considerably more information than blood alcohol content, including other illicit substances present in the blood.[163] Because the blood draw is invasive and can provide considerable personal information, it implicates significant individual privacy rights.[164]

The Supreme Court also considered the State's need for blood draws and breath tests.[165] The States argued that these searches were necessary to protect citizens on public roads from drunk drivers.[166] The searches not only neutralized the threat of already drunk drivers, but acted as a deterrent for would-be drunk drivers.[167] Based on the threat of drunk drivers and the effect of these searches, the Supreme Court determined that the searches served an important government function.[168] The Supreme Court held that the individual privacy interests and governmental need for the searches extends only to breath tests as searches incident to arrest.[169]

In *Birchfield*, the States also argued that the searches were lawful under an implied-consent theory.[170] Because the Supreme Court held that breath tests were available as searches incident to arrest, it did not consider whether the implied-consent theory would allow for warrantless breath tests.[171] The Supreme Court did, however, consider whether warrantless blood draws were allowed under an implied-consent theory.[172] In Texas, this issue was decided in *State v. Villarreal*.[173]

The States in *Birchfield* argued that by driving on public roads all motorists impliedly consent to blood draws.[174] Although the Supreme Court has approved of an implied-consent theory which imposes civil or evidentiary penalties, the imposition of blood draws for criminal procedures was a bridge too far.[175] The Supreme Court held that motorists on public roads do not impliedly consent to blood draws and the implied-consent theory did not render the searches lawful.[176]

Birchfield v. North Dakota clarified that breath tests, but not blood draws, may be performed as searches incident to arrest. It also made clear

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 2179.
168. *Id.*
169. *Id.* at 2185.
170. *Id.*
171. *See id.*
172. *Id.*
173. 475 S.W.3d 784, 787 (Tex. Crim. App. 2015), *cert. denied*, Texas v. Villarreal, 136 S. Ct. 2544 (2016).
174. *See Birchfield*, 136 S. Ct. at 2185.
175. *Id.* at 2185–86.
176. *Id.* at 2186.

that although the implied-consent theory can impose civil or evidentiary consequences, it cannot impose criminal liability or require blood draws.

2. Mandatory-Blood-Draw Statute: State v. Villarreal

The Texas Court of Criminal Appeals also considered implied consent in *State v. Villarreal*.[177] The U.S. Supreme Court's decision in *Missouri v. McNeely*—holding that the natural dissipation of alcohol in a person's blood stream did not qualify as exigent circumstances and did not, without more, allow for a warrantless blood draw—left the validity of the Texas Transportation Code's mandatory-blood-draw statutes in question.[178] Under the mandatory-blood-draw statutes, individuals who operate motor vehicles in public places give their implied consent to give a sample of their blood or breath.[179] An officer is required to take such a sample if the individual refuses to consent to give a sample and certain criteria are met.[180] If the statutory criteria are met, the statutes ostensibly permit a warrantless blood draw.[181]

In *Villarreal*, an officer took a blood sample from Villarreal after he refused to consent.[182] Under the mandatory-blood-draw statutes, the officer was required to take a specimen from Villarreal because he had been convicted of several offenses of driving while intoxicated.[183] At trial, Villarreal moved to suppress the evidence by arguing that the mandatory-blood-draw statutes conflicted with *McNeely* and were unconstitutional.[184] The State argued that *McNeely* was limited to exigent circumstances and the mandatory-blood-draw statutes were based on implied consent and unaffected by *McNeely*.[185] The trial court granted Villarreal's motion to suppress and held that the mandatory-blood-draw statutes were unconstitutional.[186] The court of appeals affirmed, but did not hold that the mandatory-blood-draw statutes were unconstitutional.[187]

Affirming the court of appeals, the court of criminal appeals held that the mandatory-blood-draw statutes did not dispense with the warrant requirements.[188] The court of criminal appeals held that a warrantless blood draw must fit within a recognized warrant exception.[189] The following warrant exceptions were considered in this case: (1) the consent exception; (2) the automobile exception; (3) the special-needs exception; and (4) the search-incident-to-arrest exception.[190]

177. *Villarreal*, 475 S.W.3d at 787.
178. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1556 (2013).
179. TEX. TRANSP. CODE ANN. § 724.011(a) (West 2011).
180. *Id.* § 724.012(a)–(b).
181. *Id.* § 724.013.
182. *Villarreal*, 475 S.W.3d at 788.
183. *Id.*
184. *Id.* at 789.
185. *Id.*
186. *Id.*
187. *Id.* at 791.
188. *Id.* at 793.
189. *Id.* at 795–96.
190. *Id.* at 798.

The court of criminal appeals first addressed the State's implied-consent argument.[191] The State argued that when an individual drives on public roads he impliedly consents to give a sample of his blood and waives his Fourth Amendment rights.[192] The court of criminal appeals disagreed.[193] First, the court of criminal appeals noted that consent can be revoked at any time and the State's argument makes consent irrevocable after Villarreal began to drive.[194] Consent that cannot later be revoked or limited is not voluntary consent.[195] The court of criminal appeals then noted that the implied-consent theory had been rejected in a number of Texas courts of appeals and other states.[196] The court of criminal appeals held that Texas drivers do not impliedly consent to searches by using public roads.[197] This holding is consistent with the Supreme Court's subsequently delivered *Birchfield v. North Dakota* opinion.

Second, the court of criminal appeals rejected the State's argument that the search was valid under the automobile exception.[198] The automobile exception is limited to vehicle searches.[199] The court of criminal appeals refused to extend the exception to cover the search of a person.[200] Warrantless blood draws cannot be justified under the automobile exception.[201]

Third, the court of criminal appeals rejected the special-needs exception.[202] The special-needs exception allows warrantless searches if there are "special needs beyond normal law enforcement."[203] This exception requires that it be impractical to obtain a warrant.[204] The court of criminal appeals did not find any basis to support a special-needs exception in *Villarreal* because the case's facts did not extend beyond normal circumstances and it was not impractical to obtain a warrant.[205]

Finally, the court of criminal appeals rejected the argument that the warrantless blood draw qualified as a search incident to arrest.[206] Although the result is the same as in *Birchfield*, the court of criminal appeals' reasoning was distinct. The court of criminal appeals rejected this exception for three reasons.[207] First, the search was not performed contemporaneously with the arrest.[208] Second, the search was not of an area

191. *Id.*
192. *Id.*
193. *Id.* at 798–99.
194. *Id.* at 799.
195. *Id.*
196. *Id.* at 803–04.
197. *Id.* at 805.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* (quoting Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987)).
204. *Id.*
205. *Id.* at 806.
206. *Id.* at 807.
207. *Id.*
208. *Id.* at 807–08.

within Villarreal's control.[209] Third, there was neither a danger to the officer nor the evidence.[210] For these reasons, the court of criminal appeals determined that the search-incident-to-arrest exception was unwarranted.[211]

Although the court of criminal appeals affirmed the court of appeals, it did not expressly reach the constitutionality of the mandatory-blood-draw statutes.[212] Because the court of criminal appeals held that warrants were required in the mandatory-blood-draw statutes, it was not necessary to reach whether the statutes were constitutional.[213]

3. Exigent Circumstances: Cole v. State and Weems v. State

Under *State v. Villarreal*, a warrantless blood draw is unconstitutional under the Fourth Amendment unless it falls into one of the well-recognized exceptions to the warrant requirement, like the exigent-circumstances exception.[214] The exigent-circumstances exception applies when the character of a situation makes the law enforcement's needs compelling and provides no time to obtain a warrant.[215] In *Missouri v. McNeely*, the U.S. Supreme Court held that the natural dissipation of a substance in the human body is not an exigent circumstance.[216] The Texas Court of Criminal Appeals recently examined the exigent-circumstances exception in light of *McNeely* and *Villarreal*.

In *Cole v. State*, the Texas Court of Criminal Appeals found that the circumstances surrounding the warrantless blood draw were sufficiently exigent.[217] There, Cole caused a serious accident in a major intersection.[218] Fourteen officers were required to secure the scene and redirect traffic.[219] The accident investigation took three hours and had to be completed before the accident was cleared.[220] The accident was finally cleared seven and a half hours after it occurred.[221] While officers were securing the scene and investigating the accident, Cole was evaluated by emergency medical services and taken to the hospital by his detaining officer.[222] Cole told the detaining officer that he had taken methamphetamine, and his behavior was consistent with having taken methamphetamine.[223] At the hospital, the detaining officer obtained a

209. *Id.*
210. *Id.*
211. *Id.*
212. *See id.* at 815.
213. *See id.*
214. *Id.*
215. Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013).
216. *Id.* at 1568.
217. Cole v. State, 490 S.W.3d 918, 919 (Tex. Crim. App. 2016).
218. *Id.* at 920.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*

warrantless blood draw.[224] The blood-test results showed that the defendant's blood had "intoxicating levels of amphetamine and methamphetamine."[225]

At trial, Cole filed a motion to suppress the blood-test results.[226] At a hearing on the motion, the lead accident investigator testified that he was the only one who could perform the investigation and that he could not leave the scene to obtain the warrant.[227] Fourteen officers were required at the scene and the detaining officers could not abandon Cole, none of these officers were available to obtain a warrant.[228] The warrant process would take at least an hour, and "it was not feasible to wait until the accident investigation was entirely complete[d]" to obtain a warrant.[229] There was also a danger of medical intervention affecting the blood-test results.[230] The trial judge held that exigent circumstances existed outside of the natural dissipation and the warrantless blood draw was lawful and consistent with *McNeely*.[231] The court of appeals reversed the trial judge, holding that exigent circumstances did not exist because there was neither an attempt to secure a warrant nor an indication that no officers were available to secure a warrant.[232]

On discretionary review, however, the court of criminal appeals held that exigent circumstances existed.[233] The practical problems of obtaining a warrant created the exigency.[234] First, the lead accident investigator's three-hour investigation of the accident scene was a major obstacle in obtaining a warrant.[235] Second, because the accident occurred in a major intersection and involved substantial debris, fourteen officers were required to secure the scene and direct traffic.[236] Third, the lead accident investigator could not leave the scene to obtain a warrant before the investigation was complete.[237] Fourth, medical intervention may have altered the blood-draw results.[238] Finally, there is not a known elimination rate for methamphetamine, which means officers would have no way to work backwards and determine the original concentration in the blood.[239] The court of criminal appeals held that the totality of the circumstances supported the exigent-circumstances exception and the warrantless blood draw did not violate the Fourth Amendment.[240]

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224. *Id.* at 921.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 920–21.
229. *Id.* at 921.
230. *Id.*
231. *Id.*
232. *Id.* at 922.
233. *Id.* at 919.
234. *Id.* at 925.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 926.
239. *Id.*
240. *Id.* at 927.

On the other hand, in *Weems v. State*, the Texas Court of Criminal Appeals held that there were no exigent circumstances.[241] Weems caused a single-car accident and attempted to evade the police.[242] He was found and arrested by police forty minutes later.[243] Weems was then taken to the hospital where an officer filed mandatory-blood-draw paperwork.[244] Two hours later, Weems's blood was drawn without his consent and without a warrant.[245] The blood-test results showed he had a blood alcohol content of .18.[246] Weems filed a motion to suppress the blood-test results.[247] The trial judge denied this motion.[248] The court of appeals, however, reversed the trial judge.[249]

The court of criminal appeals affirmed the court of appeals and held that the State did not establish the exigent-circumstances exception.[250] As the court of criminal appeals discussed in *Cole*, the exigent-circumstances exception is only applicable when an objective *examination* of the totality of the circumstances shows that there is a compelling need for the search and no time to secure a warrant.[251] The U.S. Supreme Court made clear in *McNeely* that the natural dissipation of alcohol in a person's blood stream is not, on its own, a sufficiently exigent circumstance.[252] But, as seen in *Cole*, a warrantless blood draw can be justified under the exigent-circumstances exception if the other circumstances surrounding the blood draw are sufficiently exigent.[253]

In *Weems*, the court of criminal appeals found that Weems's attempted evasion, which lasted less than an hour, was evidence of exigency.[254] Although there was a two-hour delay at the hospital to obtain the blood draw, there was no evidence that the officer was aware of the delay when he arrived at the hospital and filed the mandatory-blood-draw paperwork.[255] As the court of criminal appeals made clear, considering this delay in the exigency analysis without evidence that the officer was aware of the delay "would impermissibly measure [the officer's] action against hindsight's omniscience."[256] However, because there was evidence that the delay was at least foreseeable, the two-hour delay was considered.[257]

241. Weems v. State, 493 S.W.3d 574, 575 (Tex. Crim. App. 2016, reh'g denied).
242. *Id.* at 575–76, 581.
243. *Id.* at 576, 581.
244. *Id.* at 576.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 582.
251. *Id.* at 578.
252. *Id.* at 580.
253. *Id.*
254. *Id.* at 581.
255. *Id.*
256. *Id.*
257. *Id.*

The evidence of delays alone does not present sufficient exigent circumstances, and evidence of practical problems in obtaining a timely warrant is also required.[258] Although the State presented evidence of routine warrant procedure, there was no evidence of what the warrant procedure is when a suspect is taken directly to a hospital.[259] The State also did not present evidence on whether the officer could have obtained a warrant or how long the warrant process would have taken.[260] Further, the officer's testimony suggested that a magistrate was available to issue a warrant if requested and that another officer was available to assist in obtaining a warrant.[261] Without evidence of practical problems that hinder an officer's ability to obtain a warrant, the evidence of a delay on its own did not establish sufficient exigency, and the court of criminal appeals held that there were no exigent circumstances.[262]

IV. CONCLUSION

During the Survey period, the most significant changes came in the law surrounding warrantless blood draws and breath tests. The Texas Court of Criminal Appeals and, to a lesser extent, the U.S. Supreme Court grappled with implied consent and exigent circumstances. Both courts also distinguished and clarified the law regarding standing, reasonable suspicion, and attenuation. There were no significant developments in confession law, and the Supreme Court and court of criminal appeals continue to rely on *Miranda* and its progeny.

258. *Id.* at 582.
259. *Id.* at 581.
260. *Id.*
261. *Id.* at 582.
262. *Id.*