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Criminal Procedure: Confessions, Searches, and Seizures

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Texas Courts

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

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*The Honorable Michael E. Keasler***

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I. INTRODUCTION

This article summarizes and analyzes cases regarding confessions, searches, and seizures decided by the U.S. Supreme Court and by the Texas Court of Criminal Appeals during the past year.

Subpart II addresses confessions jurisprudence. Because there were no significant changes in this facet of Fifth Amendment law, this article will analyze cases decided by Texas's courts of appeals that apply established law to novel fact scenarios. Subpart III will examine important developments in search and seizure jurisprudence. The Supreme Court addressed nuances related to the reasonable expectation of privacy. Additionally, the Texas Court of Criminal Appeals continued to clarify the law of reasonable suspicion and exceptions to the warrant requirement.

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II. CONFESSIONS

Confessions jurisprudence stems from the Fifth Amendment privilege against self-incrimination which guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself."[1] In the landmark case *Miranda v. Arizona*, the Supreme Court held that this privilege requires the authorities to inform suspects of their right to remain silent, that any statement they make may be used as evidence against them, and that they have the right to the presence of an attorney.[2] These protections are also enshrined as a matter of state law in Texas Code of Criminal Procedure Article 38.22.[3] *Miranda* warnings are required whenever a person in custody is subjected to interrogation, either in the form of express questioning or its functional equivalent.[4] A defendant must prove both the "custody" element and the "interrogation" element to successfully claim that a statement is inadmissible due to a *Miranda* violation.[5] Article 38.22 sets several additional preconditions for the admissibility of a defendant's statement, including that it is electronically recorded; that it is made only after designated warnings set out in section 2(a) are given; and that the defendant "knowingly, intelligently, and voluntarily" waived the rights set out in the warnings.[6]

Defendants may also waive their *Miranda* rights if the waiver is "voluntarily, knowingly, and intelligently" done.[7] Voluntariness has two distinct dimensions.[8] First, relinquishment of the right must have been voluntary in the sense that it was the product of a "free and deliberate choice rather than intimidation, coercion, or deception."[9] Second, the waiver must have been made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[10] Only if the "totality of the circumstances surrounding the interrogation" reveal both the absence of coercion and the requisite level of comprehension may a court properly conclude that the suspect's *Miranda* rights have been waived.[11]

Neither the Supreme Court nor the Texas Court of Criminal Appeals decided any significant confession cases during the Survey period. Therefore, this Subpart will briefly survey cases where Texas courts of appeals

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1. U.S. CONST. amend. V.

2. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

3. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(a); *see* Herrera v. State, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

4. *See Herrera*, 241 S.W.3d at 526.

5. *See id.*

6. TEX. CODE CRIM. PROC. ANN. art. 38.22 §§ 2, 3; *see* Thai Ngoc Nguyen v. State, 292 S.W.3d 671, 676 (Tex. Crim. App. 2009).

7. *Miranda*, 384 U.S. at 444, 475.

8. Leza v. State, 351 S.W.3d 344, 349 (Tex. Crim. App. 2011) (citing Ripkowski v. State, 61 S.W.3d 378, 384 (Tex. Crim. App. 2001)).

9. Moran v. Burbine, 475 U.S. 412, 421 (1986); *Leza*, 351 S.W.3d at 349.

10. *Moran*, 475 U.S. at 421; *Leza*, 351 S.W.3d at 349.

11. Fare v. Michael C., 442 U.S. 707, 725 (1979).

applied well-settled Fifth Amendment jurisprudence to novel fact scenarios.

A. Involuntary Admissions—*Castruita v. State*

In *Castruita*, appellant Luis Castruita made several statements to detention officers while in jail awaiting trial for murder.[12] On one occasion, he met with Officer Otomi Cortez to request a cell transfer and sought to be housed with a known gang member. During the meeting, Officer Cortez asked why Castruita wanted a transfer. As part of his answer to this question, Castruita communicated that he had shot someone who was bothering him, and that he expected to be sentenced to no more than twenty-five years because he was not charged with capital murder.[13] These statements were later admitted into evidence at trial.[14]

On appeal, Castruita argued that the transfer-meeting statements were inadmissible because they were the product of custodial interrogation where he did not receive *Miranda* warnings.[15] The El Paso Court of Appeals decided the case under the "interrogation" requirement.[16] Applying *Rhode Island v. Innis*, the court of appeals noted that an interrogation includes more than just express questioning; it also includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[17] But the *Innis* interrogation test includes a proviso: the police may ask questions "normally attendant to arrest and custody" without making an interrogation.[18] This is generally referred to as the "booking question" exception.[19] Under the exception, questions normally attendant to "administrative 'booking' procedure" do not constitute interrogation.[20] To determine whether a query is an administrative booking question, the relevant inquiry is whether the question "reasonably relates to a legitimate administrative concern, applying an objective standard."[21]

The court of appeals noted that jails have a legitimate administrative interest in segregating members of different gangs to maintain order.[22] Because Castruita was asking to be housed with a known gang member, Officer Cortez's inquiry into why Castruita wanted to change cells was related to the jail's legitimate administrative concern in maintaining or-

12. Castruita v. State, No. 08-16-00030-CR, 2018 WL 3629382, at *5 (Tex. App.—El Paso July 31, 2018, no pet.) (not designated for publication).
13. *Id.*
14. *Id.* at *3.
15. *Id.* at *5–6.
16. *Id.* at *6.
17. *Id.* (quoting Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980)).
18. *Id.* (quoting Alford v. State, 358 S.W.3d 647, 653 (Tex. Crim. App. 2012)).
19. *See Alford*, 358 S.W.3d at 654.
20. *Castruita*, 2018 WL 3629382, at *6 (quoting Cross v. State, 144 S.W.3d 521, 524 n.5 (Tex. Crim. App. 2004)).
21. *Id.* (quoting *Alford*, 358 S.W.3d at 659–60).
22. *Id.* at *7.

der.[23] This made it more like a booking question rather than an interrogation designed to elicit an incriminating response.[24] As such, the officer's questioning fell under the *Innis* proviso and could not be considered an interrogation.[25] The court of appeals also determined that, even if it was an interrogation, "a statement which is unrelated to the custodial interrogation is not a product of the investigation, and thus is not governed by *Miranda* . . . ."[26] In either case, *Miranda* warnings were not required, so the trial court did not err in admitting the statements.

B. Spontaneous Statements—*Gibbs v. State*

In *Gibbs*, appellant Joseph Gibbs was convicted of capital murder and sentenced to life in prison.[27] After his arrest, Gibbs participated in three custodial interrogations.[28] In his first conversation with detectives, Gibbs was read his *Miranda* rights then waived them by proceeding to speak with detectives. The first conversation focused on Gibbs's involvement in a previous shooting.[29] During this conversation, Gibbs attempted to blame the shooting on another man, Stank.[30] Officers told Gibbs that they did not believed Stank existed and that, if he did, he did not participate in the crime.[31] When Gibbs did not capitulate, the officers theorized that Stank would be mad at Gibbs for implicating him and would "whoop" him.[32] Officers suggested that they could bring Stank into the interrogation room to beat him up or that they could release Gibbs and let Stank find him on his own, saying, "Brother, right now if we release you . . . you're dead."[33] The first conversation ended shortly afterward.

Approximately twenty-four hours later, Gibbs communicated a desire to speak with the detectives again.[34] He received another round of *Miranda* warnings and engaged in two more conversations. In the course of these later conversations, he admitted that he had "fucked up bad" but did not explicitly confess to the shooting.[35] At trial, Gibbs moved to suppress all three conversations under various theories.[36] The trial court concluded that, in all three interviews, appellant knowingly and voluntarily waived his *Miranda* rights.[37] It suppressed the first conversation but admitted the second and third conversations into evidence.[38]

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23. *Id.*
24. *Id.*
25. *See id.*
26. *Id.*
27. Gibbs v. State, 555 S.W.3d 718, 722 (Tex. App.—Houston [1st Dist.] 2018, no pet.).
28. *Id.* at 724.
29. *Id.* at 724–25.
30. *Id.* at 725.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.* at 724.
35. *Id.* at 727.
36. *Id.* at 732.
37. *Id.* at 727.
38. *Id.*

Gibbs argued on appeal that, despite receiving *Miranda* warnings at the beginning of each conversation, his statements to the officers were involuntary under the Due Process Clause.[39] An accused's confession is involuntary under the Due Process Clause if there was official, coercive conduct of such a nature that the defendant's will was "overborne" by it.[40] Gibbs asserted that the officer's statements in the first conversation amounted to threats of violence and bodily harm.[41] These threats were coercive police activity in that they were meant to frighten him into participating in later interrogations.[42] And because the second and third conversations were involuntary, the trial court erred in admitting them.[43]

In determining whether the detectives made credible coercive threats, the First Houston Court of Appeals considered the totality of the circumstances.[44] The court of appeals noted that the detectives did not believe Stank existed and thus could not actually beat up Gibbs.[45] Additionally, the court of appeals considered the imminence of these potential threats.[46] Because the second and third conversations occurred a full day after the close of the first conversation, the twenty-four-hour delay undermined the immediacy of any threat.[47] Furthermore, Gibbs was the one who reinitiated contact after the first conversation and sought to participate in subsequent interrogations.[48] These circumstances suggested either that the detectives did not make credible threats, or alternatively, that the threats did not have a coercive effect on Gibbs.[49] Either way, the detectives' conduct was not so coercive that Gibbs's will was "overborne" by any police coercion.[50] As such, the statements in the second and third conversations were voluntary, and the trial court did not err by admitting them.[51]

III. SEARCHES AND SEIZURE

The Fourth Amendment guarantees the right of individuals "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[52] In addition to protecting property interests,

39. *Id.* at 733–34.

40. *Id.* at 734 (citing Oursbourn v. State, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008); Alvarado v. State, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995)).

41. *Id.* at 725.

42. *Id.* at 735.

43. *Id.*

44. *Id.* at 736–37.

45. *Id.* at 737.

46. *Id.*

47. *Id.* (citing Zuliani v. State, 903 S.W.2d 812, 822 (Tex. App.—Austin 1995, pet. ref'd) ("An interruption in the stream of events between the initial coercion and the confession has been recognized as significant.")).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. U.S. CONST. amend. IV.

the Fourth Amendment also recognizes certain expectations of privacy.[53] The U.S. Supreme Court has described this right as "essential to individual liberty."[54] While the right is undeniably important, it does embrace some critical limitations. For example, the Amendment does not protect every individualized expectation of privacy. Rather it only protects expectations of privacy that "society is prepared to recognize as 'reasonable.'"[55] Additionally, a person may be temporarily detained by law enforcement officials without running afoul of the Fourth Amendment if the official maintains a "reasonable suspicion" of criminal activity.[56] Furthermore, while the Fourth Amendment generally requires the government to obtain a search warrant before searching or seizing a person or their affects, the warrant requirement contains its own numerous exceptions. This subpart will analyze recent cases addressing the limitations of the Fourth Amendment including the reasonable expectation doctrine, reasonable suspicion, and exceptions to the warrant requirement.

A. Reasonable Expectations of Privacy

The Fourth Amendment does not forbid all searches and seizures, only unreasonable searches and seizures. As such, reasonableness is the touchstone for determining the constitutionality of a governmental search.[57] This standard is not tied solely to an individual's subjective expectations of privacy. Rather, the Amendment is implicated when a defendant demonstrates "an actual . . . expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"[58] When an expectation of privacy is reasonable, "official intrusion into that . . . sphere generally qualifies as a search and requires a warrant supported by probable cause."[59] The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted."[60] However the application of that standard is not mechanical; the protections of the Fourth Amendment expand and adapt to fit modern realities.[61] The U.S. Supreme Court addressed the "reasonable expectation of privacy" standard in two important cases this year.

1. Carpenter v. United States

In *Carpenter*, the U.S. Supreme Court reckoned with the ability of law enforcement to chronicle a person's past movements through the record

53. Katz v. United States, 389 U.S. 347, 350–51 (1967).
54. Byrd v. United States, 138 S. Ct. 1518, 1526 (2018).
55. *Katz*, 389 U.S. at 361.
56. United States v. Sokolow, 490 U.S. 1, 7 (1989); York v. State, 342 S.W.3d 528, 536 (Tex. Crim. App. 2011).
57. Maryland v. King, 569 U.S. 435, 448 (2013).
58. *Katz*, 389 U.S. at 361.
59. Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)).
60. Carroll v. United States, 267 U.S. 132, 149 (1925).
61. *See Carpenter*, 138 S. Ct. at 2213–14.

of his cell phone signals.[62] Those kinds of records are created when a cellular device makes contact with wireless networks when searching for the best available signal.[63] This occurs several times a minute whenever the signal is on, even if the owner is not using one of the phone's features.[64] Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI).[65] The government obtained CSLI data for Carpenter's phone via court orders issued under the Stored Communications Act, which required the government to show "reasonable grounds" for seeking these records.[66] The first order sought 152 days of CSLI from his service provider, MetroPCS. The second order requested seven days of CSLI from Sprint.[67] Carpenter argued that this constituted a search under the Fourth Amendment requiring the government to get a search warrant that satisfied probable cause and not merely a court order meeting the lower burden of reasonable suspicion.[68]

Whether CSLI is protected by the Fourth Amendment warrant requirement turns on whether cell phone owners maintain a "reasonable expectation of privacy" in these records.[69] CSLI does not fit neatly under existing precedent.[70] Rather it represents a crossroads of two lines of privacy cases.[71] The first line of cases "addresses a person's expectation of privacy in his physical location and movements."[72] The Supreme Court began by looking at *United State v. Jones*, where it held that long-term GPS monitoring of a car impinged on the expectation of privacy.[73] While CSLI data currently yields approximate physical surveillance, the court expressed concern that the pervasive use of cell phones and the growing concentration of cell towers could lead to near-perfect location tracking.[74] The Supreme Court resolved the first line of inquiry by determining that CSLI tracking shares many of the qualities of the GPS monitoring considered in *Jones* in that it is "detailed, encyclopedic, and effortlessly compiled."[75] It thus implicated the reasonable expectation of privacy in one's physical movement.[76]

The second line of cases addresses an individual's "expectation of privacy in information conveyed to third parties."[77] Under the third-party

62. *See id.* at 2211.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2212 (citing 18 U.S.C. § 2703(d)).
67. *Id.* at 2226.
68. *Id.* at 2212.
69. *Id.* at 2213–14.
70. *Id.* at 2209.
71. *Id.*
72. *Id.*
73. *Id.* at 2209 (citing United States v. Jones, 565 U.S. 400, 404 (2012)).
74. *Id.* at 2211–12.
75. *Id.* at 2216.
76. *Id.* at 2219.
77. *Id.* at 2209.

doctrine, an individual has a reduced expectation of privacy in information conveyed to third parties.[78] The government advocated a mechanical application of the doctrine arguing that, because CSLI is conveyed to third party cell-service providers, phone owners cannot assert a reasonable expectation of privacy.[79] However, the Supreme Court declined to follow this mechanical approach and instead focused on an underlying rationale of the doctrine: voluntary exposure.[80] The Supreme Court reasoned that, since cell phones create CSLI without any affirmative act by the owner (beyond turning on the device), the conveyance of this information to third-party providers is not truly voluntary.[81] Therefore, the expectation of privacy is not diminished.[82]

The Supreme Court produced a narrow decision, holding that there is a reasonable expectation of privacy in seven or more days of historic-CSLI data.[83] As such, the acquisition of these records is a search within the meaning of the Fourth Amendment and the government must generally obtain a warrant supported by probable cause to seize these records from cell-service providers.[84] The Supreme Court declined to express views on real-time CSLI, "tower dumps," security cameras, and other business records that might incidentally reveal location information.[85]

2. Byrd v. United States

In *Byrd v. United States*, the U.S. Supreme Court resolved a federal circuit split on the issue of whether a driver has a reasonable expectation of privacy in a rental car, even when he or she is not listed as an authorized driver on the rental agreement.[86] Pennsylvania State Troopers stopped a rental car driven by appellant, Terrence Byrd. The troopers discovered that Byrd had the renter's permission to operate the vehicle but was not listed on the rental agreement as an authorized driver. The rental agreement specifically noted that permitting an unauthorized driver to operate the vehicle violated the agreement. The troopers searched the car and found body armor and forty-nine bricks of heroin in the trunk. Byrd was charged with distribution and possession of heroin with the intent to distribute and possession of body armor by a prohibited person.[87]

78. *See* United States v. Miller, 425 U.S. 435, 442–43 (1976) (finding no expectation of privacy in financial records held by a bank); Smith v. Maryland, 442 U.S. 735 (1979) (finding no expectation of privacy in records of dialed telephone numbers conveyed to telephone company).
79. *Carpenter*, 138 S. Ct. at 2219.
80. *Id.* at 2219–20.
81. *Id.* at 2220.
82. *Id.*
83. *Id.* at 2217 n.3.
84. *Id.* at 2221.
85. *Id.* at 2220.
86. Byrd v. United States, 138 S. Ct. 1518, 1523–24 (2018).
87. *Id.* at 1523.

Before trial, Byrd moved to suppress the evidence found in the car, arguing that the search violated his Fourth Amendment rights and that the evidence was the fruit of an unlawful search.[88] The trial court denied the motion, concluding that because Byrd was not listed on the rental agreement, "he lacked a reasonable expectation of privacy in the car."[89]

But the Supreme Court reversed.[90] In reaching its decision, the Supreme Court emphasized the historical understanding of the Fourth Amendment and its roots in property rights.[91] Citing *Rakas v. Illinois*, the Supreme Court reiterated the link between the concepts that "one of the main rights attaching to property is the right to exclude others," and "[o]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude."[92] The driver and sole occupant of a car arguably possesses it, but whether that individual maintains a reasonable expectation of privacy turns on the lawfulness of that possession.[93] Because Byrd acted with the permission of the original renter, the Supreme Court determined that he had lawful possession of the vehicle.[94] Further, the Supreme Court was not convinced by the government's argument that Byrd lost his expectation of privacy by violating the rental agreement.[95] Here, the contract terms had no effect on the expectations of privacy in the car.[96] Resolving the circuit split, the Supreme Court articulated a clear rule: "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy."[97]

B. Reasonable Suspicion

Traffic stops are "seizures" within the meaning of the Fourth Amendment and implicate its protections.[98] "Police officers are justified in stopping a vehicle when the officers have reasonable suspicion to believe that a traffic violation has occurred."[99] During a traffic stop, the officer may take actions that are "reasonably required to complete the mission of issuing a ticket for the violation."[100] This includes requesting certain information from a driver, such as the driver's license, vehicle registration, and

88. *Id.* at 1525.
89. *Id.* at 1523.
90. *Id.* at 1524.
91. *Id.* at 1526 ("Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects.'") (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).
92. *Id.* at 1527 (citing Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)).
93. *Id.* at 1529.
94. *See id.* at 1531.
95. *See id.* at 1529.
96. *Id.*
97. *Id.* at 1531.
98. United States v. Williams, 804 F. Supp. 2d 659, 662 (M.D. Tenn. 2011).
99. Lerma v. State, 543 S.W.3d 184, 190 (Tex. Crim. App. 2018).
100. *Id.* at 193 (citing Rodriguez v. United States, 135 S. Ct. 1609, 1612 (2015)).

proof of insurance, and running a computer check on that information.[101] An officer is also permitted to ask drivers and passengers about matters unrelated to the purpose of the stop, so long as the questioning does "not measurably extend the duration of the stop."[102] Once these matters are resolved, the detention must end, and the driver must be permitted to leave; otherwise the stop will become unlawful and evidence uncovered by the stop will be rendered inadmissible.[103] But if, during the initial stop, an officer develops additional reasonable suspicion that the driver or an occupant of the vehicle is involved in criminal activity, the officer may continue questioning the individual without unlawfully prolonging the detention.[104] Texas courts have expressed that reasonable suspicion exists if "the officer has specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaged in criminal activity."[105] A reasonable suspicion determination is reviewed in light of the totality of the circumstances.[106] The Texas Court of Criminal Appeals published two cases discussing reasonable suspicion during the Survey period.

1. State v. Cortez

In *Cortez*, the Texas Court of Criminal Appeals examined how a lack of reasonable suspicion for initiating a traffic stop can invalidate a subsequent search.[107] A State Trooper observed Jose Luis Cortez driving a minivan down Interstate 40. The officer initiated a stop, obtained permission to search the vehicle, and found drugs in the car.[108] Cortez filed a motion to suppress the drug evidence.[109]

At the hearing on the motion to suppress, the Trooper testified that he stopped the minivan because he believed it had twice driven on the "fog line" which he believed constituted a violation of Texas Transportation Code Section 545.058(a), describing the offense of driving on an improved shoulder.[110] The trial court granted Cortez's motion to suppress, finding that (1) it was not clear from the Trooper's dashcam video whether Cortez's vehicle even touched the fog line; (2) even if Cortez's vehicle touched the fog line, there was no proof that he crossed over the fog line and drove on the improved shoulder; and (3) even if Cortez drove on the improved shoulder, he was statutorily entitled to do so. Under these facts, the Trooper could not have formed a reasonable suspicion to believe that a traffic violation had occurred, and therefore the

101. Kothe v. State, 152 S.W.3d 54, 63–64 (Tex. Crim. App. 2004).
102. Arizona v. Johnson, 555 U.S. 323, 333 (2009).
103. *Kothe*, 152 S.W.3d at 63–64.
104. *Lerma*, 543 S.W.3d at 191.
105. Jaganathan v. State, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015).
106. Garcia v. State, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001).
107. *See* State v. Cortez, 543 S.W.3d 198, 201 (Tex. Crim. App. 2018).
108. *Id.* at 200.
109. *Id.*
110. *Id.* at 202.

stop was unlawful. The Amarillo Court of Appeals affirmed, concluding that driving on an improved shoulder requires more than the mere touching of the fog line.[111]

On appeal, the State argued that the fog line is part of the improved shoulder, so that driving on the fog line is tantamount to driving on the improved shoulder. The Texas Court of Criminal Appeals declined to address this question definitively.[112] Instead, the court of criminal appeals strictly circumscribed its analysis to the "core issue" of the case: the legality of the stop.[113] The court of criminal appeals justified this course of action as being consistent with other Fourth Amendment cases requiring a reasonableness inquiry premised on the totality of the circumstances.[114] Courts have consistently emphasized the "fact-specific nature of the reasonableness inquiry," resulting in narrowly-drawn Fourth Amendment decisions.[115]

Citing judicial economy, the court of criminal appeals looked beyond the lower court of appeals's decision and opted to review the trial court's findings, asking whether these findings were supported by the record.[116] The court of criminal appeals affirmed on three grounds. First, it held that the record did not support a finding that Cortez crossed the fog line.[117] Second, even if Cortez touched the fog line, this would not establish a reasonable suspicion of driving on improved shoulder, which requires that a driver "cross over the fog line."[118] That Cortez merely touched the fog line did not equate to him crossing over it.[119] And third, even if Cortez "crossed over" the fog line, he was statutorily permitted to do so.[120] The court of criminal appeals determined that Cortez's conduct arguably fell within two statutory exceptions allowing a driver to drive on an improved shoulder both to "decelerate before making a right turn" and to "allow another vehicle traveling faster to pass."[121] These circumstances vitiated the Trooper's reasonable suspicion for the stop, making the evidence obtained from subsequent search inadmissible.[122]

2. Lerma v. State

In *Lerma*, a police officer stopped a car after observing a minor traffic violation.[123] During the stop, the officer observed passenger/appellant

111. *Id.* at 200.
112. *Id.* at 206.
113. *Id.* at 201.
114. *Id.*
115. *See, e.g.*, Kothe v. State, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004); Ohio v. Robinette, 519 U.S. 33, 39 (1996).
116. *Cortez*, 543 S.W.3d at 200 (citing Davison v. State, 405 S.W.3d 682, 691–92 (Tex. Crim. App. 2013)).
117. *Id.* at 204–05.
118. *Id.* at 205–06.
119. *Id.* at 205.
120. *Id.* at 207–08.
121. *Id.* at 208–09 (citing TEX. TRANSP. CODE ANN. § 545.058(a)(3), (5)).
122. *Id.* at 209.
123. Lerma v. State, 543 S.W.3d 184, 187 (Tex. Crim. App. 2018).

Ernesto Lerma acting nervously and attempting to access his pockets.[124] Before running a license check of the driver, the officer asked Lerma to exit the vehicle and began to interview him separately.[125] Less than nine minutes after the initial stop, Lerma attempted to flee the scene.[126] Officers caught Lerma, searched him, and recovered a bag of synthetic marijuana and a "Tupperware bowl" containing seventeen crack cocaine rocks.[127] Lerma indicated that there was additional cocaine in the vehicle. After a search of the car yielded nothing, the officer terminated the traffic stop without issuing a citation to the driver.

Lerma moved to suppress the drug evidence, but the trial court denied the motion without making any findings of fact.[128] The Corpus Christi-Edinburg Court of Appeals reversed, holding that the officer did not have reasonable suspicion to justify either the stop or the prolonged interview with Lerma.[129] That court of appeals relied heavily on *St. George v. State*, which had near-identical facts.[130] In *St. George*, police officers stopped a vehicle for a minor traffic violation.[131] After the officers issued a citation, they continued to speak with the car's occupants. It was at that point that the officers formed a reasonable suspicion that the passenger, St. George, was engaged in criminal activity. The *St. George* court held that, by issuing a citation to the driver, the officers signaled that the traffic stop was complete.[132] Because the traffic stop was complete, information gathered after the stop could not create the reasonable suspicion necessary to justify a prolonged detention.[133]

On discretionary review, the Texas Court of Criminal Appeals reversed and held that the detention was not unlawfully prolonged.[134] Distinguishing the case from *St. George*, the court of criminal appeals paid particular attention to the order of events.[135] In *St. George*, officers did not begin questioning the appellant until after they had completed a computer check on the driver and issued a citation. In contrast, the officer began interviewing Lerma while the traffic stop was ongoing: he had yet to run a license check on the driver, issue a citation, or otherwise complete the traffic stop. Because the officer formed a reasonable suspicion of criminal activity during the stop, the prolonged detention was justified and the resulting evidence was admissible.[136]

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124. *Id.*
125. *Id.*
126. *Id.* at 188.
127. *Id.* at 188–89.
128. *Id.* at 189.
129. *Id.*
130. *Id.*
131. St. George v. State, 237 S.W.3d 720, 721–22 (Tex. Crim. App. 2007).
132. *Id.* at 726.
133. *Id.*
134. *Lerma*, 543. S.W.3d at 195.
135. *Id.* at 197.
136. *Id.*

C. Exceptions to the Warrant Requirement

The Fourth Amendment generally requires police to obtain a warrant before executing a search or seizure.[137] A warrantless search is presumptively unreasonable under the Fourth Amendment unless it falls within a recognized exception to the warrant requirement.[138] Because searches and seizures implicate dearly-held rights, these exceptions are "jealously and carefully drawn."[139] However, the courts have recognized important exceptions to the warrant requirement.[140] This subpart will examine developments in the jurisprudence of the exigent circumstances exception and the automobile exception.

1. The Exigent Circumstances Exception—Garcia v. State

The "exigent circumstances" exception 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."[141] Under this exception, a law enforcement officer may be justified in conducting a warrantless search to prevent the imminent destruction of evidence.[142]

This exception is frequently referenced in cases involving warrantless blood draws because the natural dissipation of alcohol in the blood stream is often likened to the destruction of evidence.[143] The U.S. Supreme Court recently addressed the exigent circumstances requirement with regard to warrantless blood draws in *Missouri v. McNeely*.[144] It clarified that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . it does not do so categorically."[145] Instead, exigency in the context of alcohol-related blood draw cases should be informed by the totality circumstances and analyzed under an objective standard of reasonableness.[146] The Texas Court of Criminal Appeals held that a Fourth Amendment reasonableness inquiry should be informed by the facts that were "available" to the officer when he conducted the contested search.[147]

In *State v. Garcia*, appellee Joel Garcia was involved in a fatal car crash

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137. Terry v. Ohio, 392 U.S. 1, 20 (1968).

138. Katz v. United States, 389 U.S. 347, 357 (1967).

139. Jones v. United States, 357 U.S. 493, 499 (1958); Ford v. State, 477 S.W.3d 321, 328 (Tex. Crim. App. 2015).

140. *See Jones*, 357 U.S. at 449.

141. Kentucky v. King, 563 U.S. 452, 459–60 (2011).

142. Missouri v. McNeely, 569 U.S. 141, 149 (2013) (citing Cupp v. Murphy, 412 U.S. 291, 296 (1973); Ker v. California, 374 U.S. 23, 40–41 (1963) (plurality opinion)).

143. Schmerber v. California, 384 U.S. 757, 770–71 (1966).

144. *McNeely*, 569 U.S. at 144.

145. *Id.* at 156.

146. *Id.* at 148–49.

147. *See* Weems v. State, 493 S.W.3d 574, 579 (Tex. Crim. App. 2016) (citing Brigham City v. Stuart, 547 U.S. 398, 404 (2006); Cole v. State, 490 S.W.3d 918, 923 (Tex. Crim. App. 2016)).

and was taken to a hospital.[148] Law-enforcement officers suspected that Garcia was intoxicated and accompanied him.[149] As they observed his treatment, they expressed concern that he might receive an intravenous treatment that would dilute blood-alcohol evidence.[150] Officers took a sample of his blood without a warrant.[151] Garcia moved to suppress the evidence gathered from the officers' warrantless blood draw.[152] The State claimed that this action was necessitated by exigent circumstances.

At the suppression hearing, the trial judge made several oral and written fact-findings regarding what the officers were "aware of" at the time of the blood draw.[153] Specifically, the trial judge emphasized that, at the time the officers ordered the phlebotomist to take a sample of Garcia's blood, all medical treatment of Garcia had stopped.[154] The trial judge also found that the officers were aware of this historical fact at the time they initiated the search.[155] Together, these facts articulated that, at the time of the blood draw, the officers knew there was no impending I.V., so there was no risk that blood evidence would be destroyed and therefore no exigency. In light of these circumstances, the trial court suppressed the blood evidence.[156] But the El Paso Court of Appeals reversed and remanded.[157]

On discretionary review, the Texas Court of Criminal Appeals noted that the trial judge's findings of historical fact are entitled to deference if they are supported by the record.[158] While the record contained numerous disputed facts, the court of criminal appeals acknowledged that the trial judge is the trier of the facts and can accept or reject the testimony of the witnesses when resolving these disputes.[159] The trial judge has discretion to make credibility determinations when reaching his decision.[160]

The court of criminal appeals explicitly rejected a *per se* rule that any time a person suspected of committing a serious drunk-driving offense is taken to a hospital for medical treatment, exigent circumstances will justify a warrantless search.[161] Rather it opted to craft a deliberately narrow decision, and determined that the trial judge acted within his discretion to find that, at the time of the search, the officers were "collectively aware of facts that would lead an objectively reasonable officer to conclude that

148. State v. Garcia, PD-0344-17, 2018 WL 6521579, at *1 (Tex. Crim. App. Dec. 12, 2018).
149. *Id.*
150. *Id.*
151. *Id.* at *2.
152. *Id.*
153. *Id.*
154. *Id.* at *9.
155. *Id.*
156. *Id.* at *3.
157. *Id.*
158. *Id.* at *9.
159. *Id.* (citing Sawyers v. State, 724 S.W.2d 24, 35 (Tex. Crim. App. 1986), *overruled on other grounds by* Watson v. State, 762 S.W.2d 591, 599 (Tex. Crim. App. 1988)).
160. Villarreal v. State, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).
161. *Garcia*, 2018 WL 6521579, at *12.

any exigency presented by the possibility of medical care had passed."[162]

2. The Automobile Exception—Marcopoulos v. State

Automobiles are treated differently than other property under search and seizure law. Due to their uniquely public nature, automobiles carry a reduced reasonable expectation of privacy.[163] This lowered expectation of privacy serves as the predicate for the automobile exception to the warrant requirement. Under the exception, if an automobile is readily mobile and there is probable cause to believe that it contains contraband, then officers may search it without a warrant.[164]

The Texas Court of Criminal Appeals examined the boundaries of the "probable cause" requirement for the automobile exception in *Marcopoulos v. State*.[165] In *Marcopoulos*, an undercover police officer observed appellant, Andreas Marcopoulos, enter a known narcotics establishment.[166] Three to five minutes later, he exited the building and drove away.[167] Officers noticed him making "furtive gestures" around the center console.[168] They initiated a stop, arrested Marcopoulos, and searched the vehicle, discovering three "baggies" of cocaine.[169] Marcopoulos moved to suppress the drug evidence but the trial court denied his motion. On appeal, the First Houston Court of Appeals upheld the search under the automobile exception to the Fourth Amendment warrant requirement.[170]

The court of criminal appeals granted Marcopoulos's petition for discretionary review to address whether the facts gave rise to probable cause that would satisfy the automobile exception.[171] Probable cause exists where the facts and circumstances known to law enforcement officers are "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[172] The court of criminal appeals focused its analysis on the State's two main grounds for establishing probable cause: the furtive gestures made by Marcopoulos prior to the search and his brief appearance at a known narcotics establishment.[173]

While furtive gestures alone do not give rise to probable cause, such gestures "coupled with reliable information or other suspicious circum-

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162. *Id.* at *11.
163. *See* California v. Carney, 471 U.S. 386, 392 (1985); Keehn v. State, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009).
164. Carroll v. United States, 267 U.S. 132, 153 (1925); Neal v. State, 256 S.W.3d 264, 282 (Tex. Crim. App. 2008), *cert. denied*, 129 S. Ct. 1037 (2009).
165. 538 S.W.3d 596, 599 (Tex. Crim. App. 2017).
166. *Id.* at 598.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 599.
171. *Id.*
172. *Id.* at 600 (quoting Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).
173. *Id.*

stances relating the suspect to the evidence of crime" can.[174] The court of criminal appeals noted two cases where furtive gestures coupled with some concrete indicator of drug activity did establish probable cause, but found them distinguishable.[175] Instead it determined that, although Marcopoulos made furtive movements before police stopped his vehicle and had made a brief appearance at a known narcotics establishment, the officers were not privy to the defendant's business inside of the establishment and did not witness the defendant participate in any transaction or handle any drug paraphernalia.[176] Lacking some concrete indicator of drug activity, the circumstances did not rise to the level of probable cause and the automobile exception could not justify the warrantless search.[177] Notably, the court of criminal appeals repeatedly emphasized the closeness of the probable-cause question and the narrowness of the opinion, and strictly conscribed the holding to the facts of the case.[178]

IV. CONCLUSION

While confessions jurisprudence remained largely unchanged during the Survey period, the U.S. Supreme Court made significant changes to the Fourth Amendment principles associated with historical cell phone location information. These changes will have resounding implications on future search and seizure jurisprudence as Texas courts define the boundaries of the reasonable expectation of privacy in CSLI. Additionally, the Texas Court of Criminal Appeals narrowly refined other discrete search and seizure topics, particularly the reasonable suspicion doctrine and the exigent-circumstances and automobile exceptions to the warrant requirement.

174. *Id.* (quoting Smith v. State, 542 S.W.2d 420, 421–22 (Tex. Crim. App. 1976)).
175. *Id.* at 602 (citing Wiede v. State, 214 S.W.3d 17, 27–28 (Tex. Crim. App. 2007); Turner v. State, 550 S.W.2d 686, 688 (Tex. Crim. App. 1977)).
176. *Id.* at 603–04.
177. *Id.* at 604.
178. *Id.*