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## Criminal Procedure: Confessions, Searches, and Seizures

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# CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*The Honorable Barbara Parker Hervey\**  
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## TABLE OF CONTENTS

I. INTRODUCTION .....	48
II. CONFESSIONS .....	48
A. STANDARD OF REVIEW .....	49
1. <i>Lopez v. State</i> .....	49
III. SEARCHES & SEIZURES .....	51
A. REASONABLE EXPECTATION OF PRIVACY .....	52
1. <i>Cell Site Location Information</i> .....	52
a. Background .....	52
2. <i>Holder v. State</i> .....	53
3. <i>Dixon v. State</i> .....	55
B. REASONABLE SUSPICION .....	56
1. <i>Kansas v. Glover</i> .....	56
C. SEARCH WARRANTS .....	58
1. <i>Probable Cause</i> .....	59
a. <i>Crider v. State</i> .....	59
b. <i>Foreman v. State</i> .....	60
c. <i>Diaz v. State</i> .....	62

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2.	<i>Scope of a Warrant</i> .....	64
a.	<i>Lamb v. State</i> .....	64
3.	<i>Three Day Warrant Requirement</i> .....	65
4.	<i>Exceptions to the Warrant Requirement</i> .....	66
a.	Good Faith Exception .....	66
b.	Exigent Circumstances .....	68

## I. INTRODUCTION

This Article summarizes and analyzes important cases decided by the United States Supreme Court, the Texas Court of Criminal Appeals, and the Texas courts of appeals from December 1, 2019, to November 30, 2020.

## II. CONFESSIONS

Voluntariness has long been a prerequisite for the admission of a confession under both state and federal law.<sup>1</sup> The U.S. Supreme Court has recognized “two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.”<sup>2</sup>

Under the Fifth Amendment, a confession obtained through custodial interrogation is presumptively involuntary unless police advise a suspect of their *Miranda* rights and obtain a voluntary, knowing, and intelligent waiver.<sup>3</sup> Under the Due Process Clause, a defendant can establish that their confession was involuntary by showing that the police engaged in objectively coercive misconduct that overbore the defendant’s will and that the defendant confessed because of the misconduct.<sup>4</sup> Where *Miranda* is inapplicable, the traditional Due Process Clause standard of voluntariness still must be satisfied.<sup>5</sup>

Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure deal with confessions. Article 38.21 contains the general rule that, “[a] statement of an accused may be used in evidence against him if it appears that

1. *Hopt v. Utah*, 110 U.S. 574, 587 (1884) (applying the common law voluntariness standard). By 1857, Texas codified the voluntariness requirement in Article 661 of the 1857 Code of Criminal Procedure: “The confession of a defendant may be used in evidence against him, if it appear that the same was freely made without compulsion or persuasion, under the rules hereafter prescribed.” TEX. CODE CRIM. PROC. art. 661 (1857). That provision remains almost identical today. *See id.* art. 38.21.

2. *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (citing *Bram v. United States*, 168 U.S. 532, 542 (1897)) (stating that the Fifth Amendment right against self-incrimination controls when the question is whether a confession was voluntary); *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding that the Due Process Clause prohibited confessions obtained by physical coercion because they are involuntary). The Due Process Clause was the only remedy under federal law for a state defendant until 1964 when the Fifth Amendment right against self-incrimination was applied to the states. *Malloy v. Hogan*, 378 U.S. 1, 3–5 (1964).

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

4. *Lopez v. State*, 610 S.W.3d 487, 494 (Tex. Crim. App. 2020).

5. *Davis v. North Carolina*, 384 U.S. 737, 740 (1966).

the same was freely and voluntarily made without compulsion or persuasion . . . .”<sup>6</sup> Article 38.22 requires not only that statements be voluntary, but also it specifically addresses statements of an accused made during a custodial interrogation.<sup>7</sup>

Under both the Due Process Clause and Articles 38.21 and 38.22, the voluntariness of a confession is reviewed by examining the totality of the circumstances.<sup>8</sup>

## A. STANDARD OF REVIEW

### 1. *Lopez v. State*

In *Lopez v. State*, the appellant, Antonio Lopez, confessed to killing his eleven-month-old foster child.<sup>9</sup> He subsequently filed a motion to suppress, arguing that his confession was involuntary under the Due Process Clause and Article 38.21 of the Texas Code of Criminal Procedure.<sup>10</sup> According to Lopez, he only confessed because police threatened to arrest his wife if he did not and they also told him that, if that happened, Child Protective Services might remove their children.<sup>11</sup> The police investigation showed that the appellant and his wife were the only adults home, there was no evidence of a break-in, and the evidence showed that the children present in the home were not strong enough to cause the injuries that killed the victim.<sup>12</sup> The appellant’s motion was denied and findings of facts and conclusions of law were filed by the trial court.<sup>13</sup> The jury found him guilty of murder but acquitted him of capital murder and sentenced him to thirty-five years of incarceration.<sup>14</sup>

The appellant appealed. The Eighth El Paso Court of Appeals affirmed his conviction, concluding that the appellant’s confessions were volun-

6. TEX. CODE CRIM. PROC. ANN. art. 38.21.

7. Article 38.22, Section 2 governs the admission of written statements made in a custodial setting. *Id.* art. 38.22, § 2. Article 38.22, Section 3 deals with oral and sign language statements. *Id.* § 3. Both require that a person be warned before giving a statement that:

- (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
- (2) any statement he makes may be used as evidence against him in court;
- (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
- (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
- (5) he has the right to terminate the interview at any time.

*Id.* § 2(a) (written statements); *id.* § 3(a)(2) (oral and sign language statements). They also require that the accused knowingly, intelligently, and voluntarily waive those rights after being warned. *Id.* § 2(b) (waiver of warnings required for written statements); *id.* § 3(a)(2) (waiver of warnings required for oral and sign language statements).

8. *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985).

9. *Lopez*, 610 S.W.3d at 488.

10. *Id.*

11. *Id.*

12. *Id.* at 488–89, 491.

13. *Id.* at 488.

14. *Id.*

tary.<sup>15</sup> The court of appeals reached that result after adopting a probable-cause analysis under which it concluded a confession is always voluntary when it is based on police threats to arrest a close family member, so long as police have probable cause to arrest the close family member when the threat is made.<sup>16</sup>

The appellant subsequently filed a petition for discretionary review, arguing that the court of appeals erroneously concluded that his confession was voluntary. The Texas Court of Criminal Appeals began by noting that, to prevail on a Due Process Clause voluntariness claim, an appellant must show that the police engaged in objectively coercive conduct notwithstanding the appellant's mental condition.<sup>17</sup> The court referenced the U.S. Supreme Court's decision in *Colorado v. Connelly*, in which the Supreme Court held a confession voluntary even though the petitioner was driven by the voice of God when he confessed to police because police did nothing to coerce the petitioner.<sup>18</sup> But under Article 38.21 of the Texas Code of Criminal Procedure, the court explained, courts can consider not only police overreach, but also the defendant's state of mind.<sup>19</sup>

The court also noted that although the court of appeals correctly said that the voluntariness of a confession under the Due Process Clause and Article 38.21 is reviewed by examining the totality of the circumstances, it deviated from that standard when it concluded that the appellant's confession was voluntary because police had probable cause to arrest his wife when they threatened him.<sup>20</sup> The court observed that the court of appeals' adoption of the probable-cause analysis was due to a misreading of the court's earlier decision in *Contreras v. State*.<sup>21</sup> In that decision, the Texas Court of Criminal Appeals discussed in dicta that some jurisdictions have adopted a probable-cause analysis, but it specifically declined to decide the issue because it was not necessary to the disposition of the case.<sup>22</sup>

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15. *Id.*

16. *Id.* at 494–95. Probable cause is discussed more in Section III(c)(1).

17. *Id.*

18. *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167–70 (1986)).

19. “Claims of involuntariness under Article 38.22 can be, but need not be, predicated on police overreaching.” *Id.* at 495. They can also involve “‘sweeping inquiries into the state of mind of a criminal defendant who has confessed’ . . . that are not of themselves relevant to due process claims.” *Id.* (citations omitted). This is because the state voluntariness requirement protects suspects from themselves, not only police overreach, as does the Due Process Clause. *Id.*

20. *Id.* at 496–97.

21. *Id.* at 497; see *Contreras v. State*, 312 S.W.3d 566, 577 (Tex. Crim. App. 2010); see also *Diaz v. State*, No. 13-14-00675-CR, 2017 WL 4987665, at \*5 (Tex. App.—Corpus Christi–Edinburg Nov. 2, 2017, pet. ref'd) (mem. op., not designated for publication) (erroneously reading *Contreras* to adopt a probable-cause analysis, then relying on the analysis to find the confession voluntary).

22. *Contreras*, 312 S.W.3d at 577 n.27 (recognizing that some jurisdictions use a probable-cause analysis in assessing voluntariness under the Due Process Clause when police threaten to arrest a defendant's close family if the defendant does not confess); *id.* at 577 (declining to adopt a probable-cause analysis under Article 38.23(a) because the defendant only needed to show that there was an affirmative factual dispute about whether the police made the threat, which he did, not whether there is probable cause).

According to the court of criminal appeals, a voluntariness analysis is necessarily context driven, requiring all the circumstances to be considered, but it agreed that the existence of probable cause is but a factor in the analysis:<sup>23</sup> “[C]ourts must carefully consider, not only the complained-of statements, but also the context in which they were made, including the demeanor of the person who made them and the truth or falsity of the statements.”<sup>24</sup> The high court went on to explain the nuance,

Context is crucial because it informs what the police meant when they made the complained-of statements. For example, one officer might mean that police *could* arrest a suspect’s close family member “right then” because police had probable cause to do so when the statement was made. Another officer might mean that they *could* arrest the family member in the future because he is a legitimate suspect, although police do not yet have probable cause. Yet another might mean that they *could* arrest the close family member even though the family member is not suspected of wrongdoing to coerce the suspect into confessing.<sup>25</sup>

The court of criminal appeals concluded that all the circumstances showed that police meant the first possibility: they had probable cause to arrest the appellant’s wife when they told him that, if he did not confess, they might arrest his wife or both of them.<sup>26</sup> In addition to the existence of probable cause, however, the court noted that the record supported the trial court’s findings that the appellant voluntarily went to the police station to give the complained-of statement, where he was advised of his *Miranda*/Article 38.22 of the Texas Code of Criminal Procedure rights, which he waived.<sup>27</sup> It also supported the fact that the appellant was told that he was not under arrest; that he was not handcuffed; that he was told that he could leave at any time; that he never asked for food or water; that police offered the appellant a drink, which he refused; and that the complained-of interview only lasted about two hours and fifteen minutes.<sup>28</sup> Part of the time that the appellant was in the interrogation room he was alone.<sup>29</sup>

### III. SEARCHES & SEIZURES

The Fourth Amendment of the U.S. Constitution and article I, section 9 of the Texas constitution (article I, section 9) protect persons from unreasonable searches and seizures.<sup>30</sup> The language of the Fourth Amend-

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23. *Lopez*, 610 S.W.3d at 496–97.

24. *Id.* at 496.

25. *Id.*

26. *Id.* at 498. Police thought that the appellant acted alone, but given that he maintained his innocence, they could not rule out that the appellant’s wife killed the victim, especially since there was no evidence of a break-in, and it showed that the injuries were likely inflicted by an adult. The appellant and his wife were the only two adults home. *Id.*

27. *Id.* at 497.

28. *Id.*

29. *Id.*

30. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9.

ment and article I, section 9 are nearly identical.<sup>31</sup> Despite the similarity, however, and while the Texas Court of Criminal Appeals has relied on Fourth Amendment interpretations, the court has a duty to interpret the Texas constitution independently of the U.S. Constitution.<sup>32</sup>

The central inquiry of the Fourth Amendment and article I, section 9 is the reasonableness of the search or seizure.<sup>33</sup> The totality of the circumstances are considered when determining whether a search was reasonable.<sup>34</sup> The Fourth Amendment and article I, section 9 also protect certain privacy interests.<sup>35</sup> Under both provisions, a defendant must show that he had a subjective expectation of privacy in the thing searched and/or seized that society recognizes as objectively reasonable.<sup>36</sup> Both the U.S. Supreme Court and the Texas Court of Criminal Appeals have often held that a person has no objective expectation of privacy in information the person voluntarily turns over to a third-party, a standard which has been referred as the third party doctrine.<sup>37</sup>

#### A. REASONABLE EXPECTATION OF PRIVACY

##### 1. *Cell Site Location Information*

###### a. Background

The U.S. Supreme Court has explained how Cell Site Location Information (CSLI) records are generated and what information they contain:

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.<sup>38</sup>

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31. Compare U.S. CONST. amend. IV, with TEX. CONST. art. I, § 9.

32. Holder v. State, 595 S.W.3d 691, 697 (Tex. Crim. App. 2020) (citing DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 45 (Seth Shepard McKay ed. 1875)).

33. *Id.* at 704; see Riley v. California, 573 U.S. 373, 381–82 (2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

34. See, e.g., Foreman v. State, 613 S.W.3d 160, 164 (Tex. Crim. App. 2020).

35. See, e.g., Love v. State, 543 S.W.3d 835, 840 (Tex. Crim. App. 2016); Ford v. State, 477 S.W.3d 321, 322 (Tex. Crim. App. 2015).

36. See, e.g., Love, 543 S.W.3d at 840–41; Ford, 477 S.W.3d at 328.

37. Smith v. Maryland, 442 U.S. 735, 743–44 (1979); State v. Martinez, 570 S.W.3d 278, 287–88 (Tex. Crim. App. 2019).

38. Carpenter v. United States, 138 S. Ct. 2206, 211–12 (2018).

2. *Holder v. State*

In *Holder*, the “[a]ppellant and his girlfriend, Casey James, moved into Billy Tanner’s home with James’s two children.”<sup>39</sup> Tanner was James’s ex-stepfather.<sup>40</sup> A few months after they moved in, the appellant and James broke up, and the appellant moved out.<sup>41</sup> A month or so later, James asked the appellant if he had ever seen Tanner act inappropriately around her children because one of her daughters said that Tanner “was ‘nasty’ and that he slept without his underwear.”<sup>42</sup> The appellant and James did not speak for a few days, but when they spoke again, she told him that she was going out of town the following weekend and that her kids were going to stay with one of her friends.<sup>43</sup> When James returned home, she immediately sensed that something was wrong.<sup>44</sup> She entered the house and noticed some unusual things that scared her, so she went back to her car and called her mother, who told her to call police.<sup>45</sup>

Police found Tanner’s body in the house.<sup>46</sup> He had been stabbed twenty times and suffered blunt-force trauma to the head.<sup>47</sup> While looking around the house, police found two black latex gloves on the kitchen table, which James said were not hers or Tanner’s.<sup>48</sup> The next day police obtained historical CSLI for the appellant’s phone, then interviewed him.<sup>49</sup> Although the records showed that the appellant was near Tanner’s home when police thought that Tanner had been killed, he claimed that he was working at his shop in another town.<sup>50</sup> When police told the appellant about the CSLI, the appellant changed his story.<sup>51</sup> After developing more inculpatory evidence, the police arrested the appellant, and he was charged with capital murder.<sup>52</sup>

Police obtained the appellant’s CSLI through the federal Stored Communications Act, under which CSLI information can be obtained on a showing of “specific and articulable facts . . . that there are reasonable grounds to believe that the . . . records or other information sought, are relevant and material to an ongoing criminal investigation.”<sup>53</sup>

The appellant filed two motions to suppress, arguing that police violated the Stored Communications Act, the Fourth Amendment, and article I, section 9 when they searched and seized his historical CSLI records. The motions were denied, and the trial court’s ruling was affirmed on

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39. *Holder v. State*, 595 S.W.3d 691, 694 (Tex. Crim. App. 2020).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 695.

49. *Id.* at 695–96.

50. *Id.* at 696.

51. *Id.*

52. *Id.* at 693.

53. *Id.*; 18 U.S.C.A. § 2703(d) (West 2021).



appeal.<sup>54</sup>

The Texas Court of Criminal Appeals ruled against the appellant on the Stored Communications Act claim, relying on a case it decided shortly before in which it held that the Act specifically excluded suppression as a remedy in most scenarios, including this one.<sup>55</sup> It then turned to the article I, section 9 issue. The court noted that the Fourth Amendment and article I, section 9 are almost identically worded and that it had relied on Fourth Amendment jurisprudence before to interpret article I, section 9, especially in recent years.<sup>56</sup> The court also said that, even though it independently interprets the Texas constitution, it will not interpret the Texas constitution differently than the Fourth Amendment just because it can.<sup>57</sup> The court also considered the constitutional debates in Texas to determine if the founders expressed any views about the relationship between the Fourth Amendment and article I, section 9.<sup>58</sup> It concluded that the evidence showed that the framers intended for article I, section 9 to provide at least as much protection as the Fourth Amendment.<sup>59</sup>

The court then turned to *Carpenter* to determine whether the U.S. Supreme Court's reasoning was persuasive, and it concluded that it was.<sup>60</sup> According to the Supreme Court, CSLI implicated two lines of cases: those dealing with a person's expectation of privacy in their physical location and movements and the third-party doctrine.<sup>61</sup> The court said that both lines of cases were distinguishable, however, because neither dealt with the "the qualitatively different category of cell-site records."<sup>62</sup> It reasoned that a cell phone is "almost a 'feature of human anatomy'" that "tracks nearly exactly the movements of its owner" and that, because wireless carriers keep those constantly and automatically generated records for up to five years, "[w]hoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years."<sup>63</sup>

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54. *Holder v. State*, No. 05-15-00818-CR, 2016 WL 4421362, at \*10–13 (Tex. App.—Dallas Aug. 19, 2016, pet. granted) (not designated for publication).

55. *Holder*, 595 S.W.3d at 697 (citing *Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019)). Even if the "specific and articulable facts" standard in the Stored Communications Act was violated, suppression is available only for constitutional violations. *Id.*

56. *Id.* at 697–98.

57. *Id.* at 701–02.

58. *Id.* at 702.

59. *Id.* at 702–03.

60. *Id.* at 701.

61. *Carpenter v. United States*, 138 S. Ct. 2206, 2215–16 (2018).

62. *Id.* at 2216–17; see *United States v. Knotts*, 460 U.S. 276, 285 (1983) (the monitoring of a person's location through a beeper was not a search under the Fourth Amendment if the transmitter is in a public place); *United States v. Jones*, 565 U.S. 400, 404 (2012) (expectation of privacy violated when GPS device was attached to defendant's private property); see also *United States v. Miller*, 425 U.S. 435, 436–37 (1976) (copies of financial documents under government subpoena not a Fourth Amendment search in case of tax evasion); *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (third-party doctrine applies to dialed phone numbers in which a person has no reasonable expectation of privacy because they run through the phone company).

63. *Carpenter*, 138 S. Ct. at 2218.

Convinced of the logic of the Supreme Court’s reasoning, the court of criminal appeals held “that the third-party doctrine alone cannot defeat a [defendant’s] expectation of privacy in at least [twenty-three] days of [his] historical CSLI under [a]rticle I, [s]ection 9.”<sup>64</sup> The next question was whether the search was reasonable.<sup>65</sup> The court concluded that it was not because even the State conceded that the petition for the records did not allege probable cause, and police did not allege exigent circumstances or some other special law enforcement need to conduct a warrantless search and seizure.<sup>66</sup> The police were simply following up on a claimed alibi and petitioned to obtain the records of the cell phone, claiming that the cell phone “was used by a possible suspect to communicate with unknown persons and obtaining the locations of the handset will allow investigators to identify if this suspect was in the area at the time of the offense and will provide investigators leads in this case.”<sup>67</sup>

The court subsequently remanded the case to the Fifth Dallas Court of Appeals to conduct a harm analysis.<sup>68</sup> The concurring and dissenting opinion agreed that the appellant was not entitled to suppress the historical CSLI under the Stored Communications Act, but he disagreed with the court’s decision to no longer apply the third-party doctrine.<sup>69</sup> He accused the majority of “slavishly following *Carpenter*,” and he asserted that the court of criminal appeals has no authority to reconsider its own decisions interpreting the Texas constitution.<sup>70</sup> According to the author, if the court errs in interpreting the Texas constitution, the only recourse is for the people to amend the Texas constitution.<sup>71</sup>

### 3. *Dixon v. State*

In *Dixon v. State*, the appellant was accused of hiring an acquaintance to kill someone who was dating his ex-girlfriend.<sup>72</sup> As part of their investigation, police obtained historical CSLI records for the appellant’s cell phone. Records showed the appellant was in the same area of Lubbock as the victim, but on a different day and months apart.<sup>73</sup> Police believed that the records were still probative to support a theory that the appellant was collaborating with his co-conspirator when they were both in Lubbock.<sup>74</sup>

The appellant filed a motion to suppress the historical CSLI, citing the Fourth Amendment; article I, section 9; Article 38.23 of the Texas Code of Criminal Procedure; and the federal Stored Communications Act.<sup>75</sup>

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64. *Holder*, 595 S.W.3d at 703.

65. *Id.* at 704.

66. *Id.*

67. *Id.* at 704 n.27.

68. *Id.* at 704.

69. *Id.* at 705–09 (Yeary, J., concurring in part and dissenting in part).

70. *Id.* at 705.

71. *Id.*

72. *Dixon v. State*, 595 S.W.3d 216, 218 (Tex. Crim. App. 2020).

73. *Id.* at 218–19.

74. *Id.* at 218.

75. *Dixon v. State*, 566 S.W.3d 348, 363 (Tex. App.—Amarillo 2018, pet. granted).

Although the trial court denied the motion, the Seventh Amarillo Court of Appeals reversed and remanded based on *Carpenter*.<sup>76</sup> According to the court of appeals, the historical CSLI was used as complicity and impeachment evidence, and without the historical CSLI, there was no evidence that the appellant was ever in the area with his friend “for any purpose.”<sup>77</sup>

On discretionary review, the Texas Court of Criminal Appeals reversed.<sup>78</sup> It concluded that, even if admission of the records violated the appellant’s expectation of privacy, he was not harmed and that the court of appeals misapplied the constitutional harm standard.<sup>79</sup> According to the high court, while the State used the historical CLSI to impeach the appellant’s credibility, other impeachment evidence was also admitted.<sup>80</sup> Also, the records supported the appellant’s argument that he was not present when the victim was murdered, but the court said that the appellant’s location on the day in question was not material to his case-in-chief because this was a murder-for-hire offense, and the appellant conceded that he hired someone “to track and photograph the victim.”<sup>81</sup>

In a concurring opinion, agreeing with the disposition of the case, it was separately opined that article I, section 9 claims, unlike Fourth Amendment claims, should be analyzed for non-constitutional harm, and according to her, the court should overrule its decision in *Love* to the contrary.<sup>82</sup> While the Fourth Amendment exclusionary rule is inherent in the Fourth Amendment, it was stated that, the court of criminal appeals has held that there is no exclusionary rule inherent in article I, section 9; rather, the general exclusionary rule in Texas is statutory, and a statutory violation is reviewed for non-constitutional harm.<sup>83</sup>

## B. REASONABLE SUSPICION

### 1. Kansas v. Glover

In *Kansas v. Glover*, a sheriff’s deputy ran a license plate check on a pickup truck and saw that the registered owner’s driver’s license had been revoked.<sup>84</sup> The deputy could not see who was driving the truck, but assuming that it was the registered owner, the deputy initiated a traffic

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76. *Id.* at 363–64.

77. *Dixon*, 595 S.W.3d at 218–19.

78. *Id.* at 217.

79. *Id.* at 219.

80. *Id.*

81. *Id.* at 220.

82. *Id.* at 225–26 (Hervey, J., concurring) (citing *Love v. State*, 543 S.W.3d 835, 845 (Tex. Crim. App. 2016)). After remand, the court of appeals again affirmed the ruling of the trial court, finding that the constitutional harm standard had been satisfied. It noted Judge Hervey’s concurring opinion but said that it was required to follow *Love* as binding precedent. *Holder v. State*, No. 05-15-00818-CR, 2020 WL 7350627, at \*3 (Tex. App.—Dallas Dec. 15, 2020). The State filed a petition for discretionary review, citing Judge Hervey’s concurring opinion, and the court granted the State’s petition. The case is currently pending at the court.

83. *Id.* at 226; see TEX. CODE CRIM. PROC. ANN. art. 38.23; TEX. R. APP. P. 44.2(a).

84. *Kansas v. Glover*, 140 S. Ct. 1183, 1187–88 (2020).

stop.<sup>85</sup> It turned out that the petitioner was driving his vehicle, so the deputy arrested him, and the petitioner was charged with driving as a habitual violator.<sup>86</sup> He moved to suppress the evidence, claiming that the deputy lacked reasonable suspicion to initiate the stop.<sup>87</sup> The trial court granted the motion, but the court of appeals reversed because “there were specific and articulable facts from which the officer’s common-sense inference gave rise to a reasonable suspicion.”<sup>88</sup> The Supreme Court of Kansas then reversed the court of appeals because it found the officer’s inference that the petitioner was committing a crime was merely on “a hunch.”<sup>89</sup>

The State petitioned the U.S. Supreme Court for a writ of certiorari. The Supreme Court agreed to hear the case, and it agreed with the court of appeals and reversed the Kansas Supreme Court. According to it, the deputy’s inference that the registered owner of the truck was probably driving was reasonable,<sup>90</sup> and because the registered owner’s driver’s license had been revoked, it followed that the deputy had reasonable suspicion to believe that the petitioner was committing a crime by driving while his license was revoked.<sup>91</sup> The Supreme Court did not believe that “[t]he fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness”<sup>92</sup> of the deputy’s inference, and it noted that reasonable-suspicion determinations “depend[ ] on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”<sup>93</sup> Instead, police officers are permitted to make “commonsense judgments and inferences about human behavior.”<sup>94</sup>

The Supreme Court also rejected the idea raised by the concurring and dissenting opinions (Justice Kagan and Justice Sotomayor, respectively) that it was unreasonable to infer that the petitioner was driving his truck because people whose driver’s licenses are suspended are less likely to drive.<sup>95</sup> According to it, empirical data supported its conclusion, showing that drivers whose licenses are suspended or revoked often continue driving.<sup>96</sup> One study it cited asserted that 75% of such drivers continue to drive.<sup>97</sup> The Supreme Court also relied on Kansas statutes directed at people whose licenses had been suspended multiple times or revoked as evidence that the Kansas Legislature also believed that many of those

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85. *Id.*

86. *Id.* at 1186.

87. *Id.* at 1187.

88. *Id.*

89. *Id.*

90. *Id.* at 1188.

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Navarette v. California*, 572 U.S. 393, 402 (2014)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

people will continue to drive.<sup>98</sup>

The Supreme Court was careful to emphasize the narrow scope of its holding and to point out that the presence of other facts might change the outcome.<sup>99</sup> One example it gave is if the registered owner was an older man, but a young woman was driving.<sup>100</sup> At the time of this Article, only two Texas courts have cited to this opinion.<sup>101</sup>

Justice Kagan wrote a concurring opinion in which Justice Ginsburg joined.<sup>102</sup> Justice Kagan agreed with the majority that, generally, a person could reasonably infer that the owner of a vehicle is probably driving it, but she did not think that held true if the owner did not have a valid driver's license because it is not clear whether drivers whose licenses have been suspended or revoked would continue driving.<sup>103</sup> Nonetheless, she agreed with the majority's reliance on studies showing that they do.<sup>104</sup> Ultimately, she agreed with the majority that the deputy had reasonable suspicion to initiate the traffic stop.<sup>105</sup>

Justice Sotomayor wrote in dissent.<sup>106</sup> She disagreed with the majority's reliance on studies because it shifted the analysis from whether there is individualized reasonable suspicion to a general suspicion that must be dispelled by the petitioner: If police run the license plate of a car and see that the owner's license is revoked, they can initiate a traffic stop without any other information.<sup>107</sup> She also believed that a reasonableness determination under the Fourth Amendment should not turn on the common sense of an ordinary person, but from the perspective of a reasonable officer's assessment.<sup>108</sup>

### C. SEARCH WARRANTS

“The cornerstone of the Fourth Amendment and its Texas equivalent is that a magistrate shall not issue a search warrant without first finding probable cause that a particular item will be found in a particular location.”<sup>109</sup> There are two exceptions to the warrant requirement addressed in this Article: searches incident to arrest and the good-faith exception.

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98. *Id.* at 1188–89.

99. *Id.* at 1191.

100. *Id.*

101. *See* Garcia v. State, No. 08-19-00176-CR, 2021 WL 235658, at \*10 (Tex. App.—El Paso Jan. 25, 2021, no pet.) (not designated for publication); State v. Zubiate, No. 08-19-00215-CR, 2020 WL 5105805, at \*8 (Tex. App.—El Paso Aug. 31, 2020, no pet.) (mem. op., not designated for publication).

102. *Glover*, 140 S. Ct. at 1191–94 (Kagan, J., concurring).

103. *Id.* at 1191–92.

104. *Id.* at 1192.

105. *Id.* at 1194.

106. *Id.* at 1194–98 (Sotomayor, J., dissenting).

107. *Id.* at 1195 (“For starters, the majority flips the burden of proof. It permits Kansas police officers to effectuate roadside stops whenever they lack ‘information negating an inference’ that a vehicle’s unlicensed owner is its driver.”).

108. *Id.* at 1196.

109. Foreman v. State, 613 S.W.3d 160, 163 (Tex. Crim. App. 2020); *see* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *see also* TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (“No search warrant shall issue for any purpose in this state unless sufficient facts are first

Under the Fourth Amendment, probable cause exists when the facts and circumstances known to law enforcement are “sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”<sup>110</sup> Thus, a probable-cause affidavit for a search warrant is sufficient if the facts therein “justify a conclusion that the property that is the object of the search probably is on the . . . premises to be searched at the time the warrant issues.”<sup>111</sup> Reviewing courts should give great deference to a magistrate’s finding of probable cause and should defer to all reasonable inferences that the magistrate could have made.<sup>112</sup> “In determining whether a warrant sufficiently establishes probable cause, this Court is bound by the four corners of the affidavit.”<sup>113</sup>

Generally, “a search warrant must be executed within three days from the time of its issuance” except that it “shall be executed within a shorter period if so directed in the warrant by the magistrate.”<sup>114</sup> A warrant must be executed within fifteen whole days if it issued solely to search for and seize specimens from a specific person for DNA analysis and comparison, including blood and saliva samples, and a warrant must be executed within ten whole days if it issued under Article 18B.354 of the Texas Code of Criminal Procedure, which deals with access to stored communications and other stored customer data.<sup>115</sup>

### 1. *Probable Cause*

#### a. *Crider v. State*

In *Crider v. State*, the issue was whether the police had probable cause to seize and test blood samples.<sup>116</sup> Robert Lee Crider, Jr., the appellant, was arrested for suspicion of driving while intoxicated (DWI) and the arresting officer sought and received a warrant to take a sample of his blood.<sup>117</sup> The warrant did not include an express authorization to test his blood-alcohol concentration (BAC), only its extraction.<sup>118</sup> In a motion to suppress, the appellant challenged the admission of the results of his BAC test, but the trial court denied his motion.<sup>119</sup>

On appeal, the appellant did not attack the validity of the search warrant to obtain his blood, but he challenged the admission of his BAC test

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presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance.”).

110. *Brinegar v. United States*, 338 U.S. 160, 176–77 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

111. *Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996) (quoting *Hass v. State*, 790 S.W.2d 609, 612 (Tex. Crim. App. 1990)).

112. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

113. *State v. Elrod*, 538 S.W.3d 551, 556 (Tex. Crim. App. 2017).

114. TEX. CODE CRIM. PROC. ANN. arts. 18.06(a), 18.07(a)(3).

115. *Id.* art. 18.07(a)(1), (a)(2); *see* TEX. CODE CRIM. PROC. ANN. art. 18B.354.

116. *Crider v. State*, 607 S.W.3d 305, 305–06 (Tex. Crim. App. 2020).

117. *Id.* at 306.

118. *Id.*

119. *Id.*

under *State v. Martinez*.<sup>120</sup> In *Martinez*, the Texas Court of Criminal Appeals reaffirmed that the physical extraction and the testing of blood are two distinct invasions of privacy under the Fourth Amendment.<sup>121</sup> The appellant therefore challenged the chemical testing of the blood.<sup>122</sup> The Fourth San Antonio Court of Appeals acknowledged the dual privacy interest distinction for the extraction and the testing of blood, but found that it was a reasonable inference that the blood is being drawn to test it.<sup>123</sup>

On discretionary review, the appellant argued that the court of appeals erred, and he renewed his argument that the results of the blood testing should have been suppressed.<sup>124</sup> The Texas Court of Criminal Appeals held, however, that the warrant issued by the magistrate was based on probable cause to justify the seizure of the appellant's blood for its evidentiary value that he was intoxicated and that the same determination is sufficient to also justify the testing of the blood.<sup>125</sup> The court of criminal appeals also addressed the information relied on by the magistrate to issue the warrant.<sup>126</sup> According to the court, "[t]he officer noticed that [the] [a]ppellant exhibited a strong odor of alcohol, glassy and bloodshot eyes, an unsteady gait, and slow, slurry speech."<sup>127</sup>

In a concurring opinion, the author stated that, under a common sense reading of the warrant, the seizure of the appellant's blood and the testing of it for BAC was within the scope of both the search warrant and affidavit.<sup>128</sup> In affirming the judgment of the court of appeals, the court deferred to the reasonable inferences that the magistrate made when authorizing the seizure of the blood as to also authorize its testing.<sup>129</sup> The dissent expressed concern that, although there was "probable cause to test the blood," he disagreed that the warrant authorized testing the blood.<sup>130</sup>

The petitioner filed a petition for a writ of certiorari in the U.S. Supreme Court. A response was filed, and the petition was distributed to the justices during the February 19, 2021 conference. On February 22, 2021, the Supreme Court denied certiorari.

b. *Foreman v. State*

In *Foreman v. State*, the appellant and some accomplices retaliated against two men who tried to run a money scam on him by torturing the

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120. *Id.*; see *State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019).

121. *Martinez*, 570 S.W.3d at 291.

122. *Crider*, 607 S.W.3d at 306; see *Martinez*, 570 S.W.3d at 290.

123. *Crider*, 607 S.W.3d at 307.

124. *Id.* at 306.

125. *Id.* at 308.

126. *Id.*

127. *Id.* at 306.

128. *Id.* at 310 (Newell, J., concurring).

129. *Id.* at 309–11.

130. *Id.* at 312 (Walker, J., dissenting).

two men in his auto shop.<sup>131</sup> The police obtained a warrant to search the business, and the warrant authorized the police to seize “‘any and all . . . surveillance video and/or video equipment’ from the business.”<sup>132</sup> The warrant also stated that “any and all items constituting evidence constituting aggravated assault and robbery that may be found” at the auto shop could be seized.<sup>133</sup> Surveillance footage from a confiscated hard drive showed the offense occurring inside the auto shop.<sup>134</sup>

The appellant filed a motion to suppress and argued that the admission of the footage violated the Fourth Amendment; article I, section 9; and Article 18 of the Texas Code of Criminal Procedure because there was no probable cause to obtain the footage based on the warrant issued (i.e., the search was unreasonable). The trial court denied the motion.<sup>135</sup>

On direct appeal, Foreman argued that the trial court erred, but a divided appeals panel affirmed.<sup>136</sup> The Fourteenth Houston Court of Appeals, however, granted en banc review and reversed, holding that the affidavit failed to support a finding of probable cause to seize the surveillance equipment and footage.<sup>137</sup> Under a “common knowledge” rule, the court found that it was not so-well known to the public as to be beyond dispute that the auto shop would contain surveillance equipment.<sup>138</sup> The State argued that the equipment was properly seized because it was in plain view, but the court of appeals disagreed. Turning to the harm issue, the court of appeals found that the erroneous admission of the footage was harmful and reversed the conviction.<sup>139</sup>

The State filed a petition for discretionary review,<sup>140</sup> arguing that it was a reasonable inference for the magistrate to believe that there would be surveillance equipment inside the auto shop.<sup>141</sup> The Texas Court of Criminal Appeals began its analysis by noting different standards applied to the Fourth Amendment; article I, section 9; and Article 18.01 Texas Code of Criminal Procedure.<sup>142</sup> While the language of the Fourth Amendment and article I, section 9 is similarly worded, the majority noted, probable cause under the Fourth Amendment requires that the facts submitted to the magistrate must be “sufficient to justify [the] conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued.”<sup>143</sup> The test only demands that there is a “fair

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131. *Foreman v. State*, 613 S.W.3d 160, 161–62 (Tex. Crim. App. 2020).

132. *Id.* at 161.

133. *Id.* at 162.

134. *Id.*

135. *Id.*

136. *Id.* at 162–63.

137. *Id.* at 163.

138. *Id.*

139. *Id.*

140. The State advanced three arguments, but the court addressed only one of them because it granted relief.

141. *Id.* at 163–64.

142. *Id.* at 163.

143. *Id.* (quoting *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006)).



probability” that the location would yield a particular item.<sup>144</sup> Under article I, section 9, however, the proper test is “[w]hether, under the totality of the circumstances and in light of the ‘public and private interests that are at stake,’ the search or seizure was ‘reasonable.’”<sup>145</sup>

The court observed that magistrates are allowed to draw reasonable inferences from facts articulated in the affidavit<sup>146</sup> and that they can use “common knowledge.”<sup>147</sup> The court found that the magistrate reasonably inferred that facts articulated in the affidavit supported a common-knowledge conclusion that a business like an auto shop would probably have surveillance equipment.<sup>148</sup> Thus, the court reversed the judgment of the court of appeals and affirmed the appellant’s conviction.<sup>149</sup>

c. *Diaz v. State*

In *Diaz v. State*, Nelson Garcia Diaz was convicted of burglary of a habitation. He and another person broke into an off-duty police officer’s home.<sup>150</sup> The appellant shared information about the incident with an acquaintance—a confidential informant working for the Drug Enforcement Agency (DEA)—and the DEA learned that the appellant had outstanding warrants in Georgia for armed robbery and kidnapping. A multi-agency task force subsequently arrested the appellant.<sup>151</sup> The appellant had five cell phones, all of which were seized. Only three of the phones were at issue in this case.<sup>152</sup> After a hearing, the trial court credited the testimony of the officers and denied the motion. Subsequently, the data pulled from the appellant’s cell phones, directly linking him to the home invasion, was admitted.<sup>153</sup>

On appeal, the appellant made several arguments.<sup>154</sup> First, he argued that there was an insufficient nexus between the cell phones and the home invasion to support a search warrant for the cell phones.<sup>155</sup> The Fourteenth Houston Court of Appeals found, however, that a magistrate could have reasonably inferred from the allegations in the probable-cause affidavit that three of the cell phones likely were used before, during, or after the commission of the home invasion.<sup>156</sup> The affidavit said that police found parts of a broken cell phone or phones and a pair of sunglasses at the scene, that the sunglasses had DNA on them, and that the appel-

144. *Id.* (quoting *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007)).

145. *Id.* at 164 (quoting *Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020)).

146. *Id.* at 166 (citing *Illinois v. Gates*, 462 U.S. 213, 240 (1983)).

147. *Id.*

148. *Id.*

149. *Id.* at 167.

150. *Diaz v. State*, 604 S.W.3d 595, 598 (Tex. App.—Houston [14th Dist.] 2020, pet. granted).

151. *Id.* at 599.

152. *Id.*

153. *Id.* at 599–600.

154. *Id.* at 600.

155. *Id.* at 603.

156. *Id.* at 603–04 (citing *Foreman v. State*, 561 S.W.3d 218, 237–38 (Tex. App.—Houston [14th Dist.] 2018, pet. granted)).

lant could not be excluded as the donor.<sup>157</sup> According to the court, the magistrate could have reasonably inferred that the DNA evidence “directly” tied the appellant to the crime scene and that the “appellant was the owner of both the sunglasses and the cell phone or phones from which pieces detached during the offense and were left at the scene.”<sup>158</sup> The court continued that, because “the affidavit provided that appellant was associated with at least two phone numbers and that police recovered a total of five cell phones in [the] appellant’s immediate possession or control upon his arrest,” “[t]he magistrate reasonably could infer that [the] appellant utilized these phones interchangeably and that evidence of criminal activity on one phone could have been transferred to another.”<sup>159</sup>

The appellant also asserted that the State violated *Franks v. Delaware* when the officer who drafted the affidavit claimed to rely on an anonymous source from a criminal informant when, in fact, the informant was not anonymous. According to the appellant, misrepresenting the source of the information was a material misstatement.<sup>160</sup> Under *Franks* (and *Janecka v. State*):

any evidence obtained pursuant to [an] arrest warrant must be suppressed if (1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the warrant contains a material misstatement that the affiant made knowingly, intentionally, or with reckless disregard for the truth; and (2) excising the false statement, the affidavit’s remaining content is insufficient to establish probable cause.<sup>161</sup>

The court of appeals acknowledged the misrepresentation, but it said that the misrepresentation was not material to the probable-cause analysis under *Janecka* if the information from the informant is “essentially true,” which it was here.<sup>162</sup>

The appellant filed a petition for discretionary review presenting the Texas Court of Criminal Appeals with two grounds for review, but the court granted only the first one, which states, “Does intentionally misdescribing an untested confidential informant as an ‘anonymous source’ in a probable cause affidavit cause the informant’s uncorroborated incriminating information to be excised pursuant to *Franks*?”<sup>163</sup>

The parties have filed their briefs, and the Court will hand down an opinion in the future.

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157. *Id.* at 604.

158. *Id.*

159. *Id.*

160. *Id.* at 600 (citing *Franks v. Delaware*, 438 U.S. 154, 154 (1978)).

161. *Id.* at 600 (citing *Franks*, 438 U.S. at 155–56; *Janecka v. State*, 937 S.W.2d 456, 462 (Tex. Crim. App. 1996)).

162. *Id.* at 602 (citing *Janecka*, 937 S.W.2d at 463).

163. Brief for Appellant at 6, *Diaz v. State*, No. 14-17-00685-CR (Tex. Crim. App. filed Dec. 8, 2020).

## 2. Scope of a Warrant

### a. *Lamb v. State*

In *Lamb v. State*, the appellant had been exchanging sexually explicit messages on social media with a fifteen-year-old girl.<sup>164</sup> When her mother found out, the girl attempted suicide, and law enforcement became involved.<sup>165</sup> Officer Jeremy Massey drafted a probable-cause affidavit to search the appellant's property.<sup>166</sup> A warrant was issued instructing officers to search the address specified in the affidavit "and there search for the property described in said affidavit and to seize same named in the affidavit."<sup>167</sup> Investigating officers then executed the warrant at the property. While the search was underway, the appellant pulled up in his car somewhere near or on his property.<sup>168</sup> The investigating officer thought that the appellant parked on the property, and even though he knew the warrant did not authorize a search of the appellant's person, he seized the cell phone in the appellant's back pocket and directed the other officers to search his vehicle.<sup>169</sup> Police discovered a second cell phone and digital recording equipment along with a pistol.<sup>170</sup> The appellant confessed and was arrested at the scene.<sup>171</sup> He was charged with online solicitation of a minor.<sup>172</sup>

The appellant filed a motion to suppress in which he argued that the scope of the warrant did not include his vehicle or the cell phone on his person. The trial court denied the motion and the appellant appealed.

The appellant claimed that the trial court erred, and he renewed his argument about his vehicle and person being outside the scope of the search warrant. The Sixth Texarkana Court of Appeals said that the rule was that an "officer must show that [he was] properly in the place where the item was found" based on the warrant (or an exception to the warrant requirement),<sup>173</sup> and here, the court explained, the area being searched was on a rural country road and the investigating officer did not know where the property lines were and believed that the appellant pulled onto the property in his car.<sup>174</sup> It also noted that the warrant specifically authorized the search of any and all motor vehicles located on the premises<sup>175</sup> and that, even though the officer might have been mistaken about

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164. *Lamb v. State*, 603 S.W.3d 152, 155 (Tex. App.—Texarkana 2020, no pet.).

165. *Id.*

166. *Id.*

167. *Id.* at 156. The investigating officer said that he had probable cause to believe that he would find cell phones, computers, and digital media storage devices that may contain "sexually explicit material and messages with a minor child," and he requested "a search warrant for the described property, including any and all outbuildings and motor vehicles." *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 155.

173. *Id.* at 157 (citing *Snider v. State*, 681 S.W.2d 60, 63 (Tex. Crim. App. 1984)).

174. *Id.*

175. *Id.*

whether or not the appellant's vehicle was actually on the premises, the court could not find the search constitutionally impermissible unless it was unreasonable.<sup>176</sup> The court concluded that the officer's search of the appellant's car was reasonable and within the scope of the warrant because the warrant authorized the search of all vehicles on the property.<sup>177</sup> The test is one of sufficient probability and not certainty.<sup>178</sup>

On the other hand, the court of appeals found that the investigator's search of the appellant violated the Fourth Amendment.<sup>179</sup> The appellant argued that *Ybarra v. Illinois* requires a special connection to the premises, which he did not have, and that police had no other basis to search him.<sup>180</sup> The court of appeals disagreed because the affidavit described the appellant as having control over the premises,<sup>181</sup> but it said that he was only subject to detention incident to the execution of the search warrant; he was not, however, subject to be searched.<sup>182</sup> It further said that, because the State did not introduce evidence that an exception to the warrant requirement applied, and the court could find no applicable exception to the warrant requirement evidence, the search was unconstitutional.<sup>183</sup> Having found error, the court of appeals turned to the issue of harm, and it held that the appellant was harmed under the constitutional-harm standard.<sup>184</sup> It reasoned that there was no record evidence to show what was on the phone, so the court could not say beyond a reasonable doubt that the error was harmless, and it reversed the judgment of the trial court and remanded for a new trial.<sup>185</sup>

### 3. *Three Day Warrant Requirement*

In *Ramirez v. State*, the appellant, Stephen Ramirez, was convicted of a felony DWI. In his motion to suppress, one argument concerned whether a search warrant is considered executed when police seize a blood sample within the warrant-execution window, but the chemical analysis was not performed until the window closed.<sup>186</sup> The trial court denied the motion, and the appellant appealed.

According to the Fourteenth Houston Court of Appeals, the issue was "what it means to 'execute' a search warrant pursuant to [c]hapter 18 of

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176. *Id.* at 158.

177. *Id.*

178. *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990)).

179. *Id.* at 161.

180. *Id.* at 159; see *Ybarra v. Illinois*, 444 U.S. 85, 90–91 (1979) (finding that the search of the petitioner was invalid because officers had no reason to believe Ybarra had any special connection to the premises).

181. *Lamb*, 603 S.W.3d at 159–60.

182. *Id.* at 160 (citing *Michigan v. Summers*, 452 U.S. 692, 695 (1981)).

183. *Id.*

184. *Id.* at 162; TEX. R. APP. P. 44.2(a); see also *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001).

185. *Lamb*, 603 S.W.3d at 162–63.

186. *Ramirez v. State*, 611 S.W.3d 645, 647 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd).

the Code of Criminal Procedure.”<sup>187</sup> Does it mean to seize the blood sample within the warrant-execution window for later chemical analysis? Or does it mean to seize and analyze the blood sample within the warrant-execution window? The court of appeals concluded that “the three-day requirement for the execution of a search warrant sets the limit for the actual search for and seizure of the evidence by a peace officer, not the timing for any subsequent forensic analysis that may be conducted on the seized evidence.”<sup>188</sup> The court reasoned that, under Article 18.09 of the Texas Code of Criminal Procedure, once the items have been seized under a warrant, they must be taken before the magistrate<sup>189</sup> and chapter 18 of the Code of Criminal Procedure only governs searches and seizures, not what happens to the evidence that is searched and/or seized.<sup>190</sup> It also pointed that its “conclusion fits within the purpose of time restrictions on the execution of search warrants, which is to ensure that probable cause, as found by the neutral magistrate who signs the warrant, continues to exist.”<sup>191</sup> After disposing of the appellant’s other grounds, the court affirmed the judgment of the trial court.<sup>192</sup>

#### 4. *Exceptions to the Warrant Requirement*

##### a. Good Faith Exception

In *State v. Arellano*, the magistrate’s signature on a search warrant was illegible.<sup>193</sup> The question was whether the officer who executed the warrant acted in good faith even though the magistrate’s signature was illegible.<sup>194</sup>

Arellano was detained, then arrested and subsequently charged with DWI.<sup>195</sup> After his arrest, a probable-cause affidavit was obtained to search the appellant’s blood.<sup>196</sup> The magistrate issued a warrant to search, and it was executed. The magistrate was not identified on the warrant except where it was illegibly signed on the line stating, “Magistrate, Victoria County, Texas.”<sup>197</sup> The appellee argued that the search warrant was “facially invalid because the magistrate’s signature was illegible in violation of [Article 18.04(5) of the Texas Code of Criminal Procedure].”<sup>198</sup> Article 18.04(5) requires that, along with the signature, the magistrate’s name must also clearly appear on the warrant either handwritten or typed.<sup>199</sup> At the hearing, the appellee offered the affidavit and warrant

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187. *Id.* at 651.

188. *Id.* at 651–52.

189. TEX. CODE CRIM. PROC. ANN. art. 18.09.

190. *Ramirez*, 611 S.W.3d at 651–52.

191. *Id.* at 652.

192. *Id.* at 654.

193. *State v. Arellano*, 600 S.W.3d 53, 54–55 (Tex. Crim. App. 2020).

194. *Id.* at 54.

195. *Id.* at 54–55.

196. *Id.* at 54.

197. *Id.*

198. *Id.* at 55.

199. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 18.04(5).

into evidence.<sup>200</sup> The State did not rebut the appellee’s argument that the magistrate’s signature on the warrant was illegible,<sup>201</sup> but it argued that the good-faith exception in Article 38.23(b) of the Texas Code of Criminal Procedure controlled.<sup>202</sup> Article 38.23(b) allows for the exemption of evidence from suppression when the “evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.”<sup>203</sup> The State argued that the illegible signature should be treated like any other technical defect and should not be invalidated because the sworn affidavit also provides support that the officer acted in good faith reliance on the warrant.<sup>204</sup> The trial court granted the motion and issued written findings of fact and conclusions of law.<sup>205</sup> The trial court found the good-faith exception inapplicable, reasoning that there cannot be good-faith reliance on a warrant that is facially invalid.<sup>206</sup> It further found that, even if the good-faith exception applied, there was no abuse of discretion because there was insufficient evidence to support that the executing officer relied on the warrant in good faith.<sup>207</sup> The Thirteenth Corpus Christi–Edinburg Court of Appeals agreed with the trial court that the warrant was facially invalid and that, therefore, the good-faith exception was inapplicable.<sup>208</sup>

The State filed a petition for discretionary review to the Texas Court of Criminal Appeals, which was granted to consider whether the magistrate’s illegible signature invalidated the warrant, and whether the good-faith exception could apply to a facially invalid warrant.<sup>209</sup> The court held that, while the signature was illegible, the executing officer relied on the warrant in good faith.<sup>210</sup> It reasoned that the signature defect was one of the reasons that there are statutory exceptions to the suppression rule found in Article 38.23(b) of the Texas Code of Criminal Procedure.<sup>211</sup> The court also pointed out that the court of appeals erroneously plucked a statement out of a Texas Court of Criminal Appeals opinion that, “[i]n executing a warrant, [the] officer ‘act[s] in objective good faith reliance upon’ the warrant, as long as the warrant is facially valid.”<sup>212</sup> The court of criminal appeals found that the lower court wrongly construed this to mean that an officer could not act in good faith on a facially invalid war-

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200. *Arellano*, 600 S.W.3d at 55.

201. *Id.*

202. *Id.*

203. TEX. CODE CRIM. PROC. ANN. art. 38.23(b).

204. *Arellano*, 600 S.W.3d at 55.

205. *Id.* at 56.

206. *Id.*

207. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 28.01(6) (Suppression hearings are within the discretion of the trial court.).

208. *Arellano*, 600 S.W.3d at 56.

209. *Id.* at 57.

210. *Id.*

211. *Id.* (citing *Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997)).

212. *Id.* at 59–60 (citing *McClintock v. State*, 541 S.W.3d 63, 72–73 (Tex. Crim. App. 2017)).

rant.<sup>213</sup> In distinguishing this case, the court of criminal appeals held that Article 15.02 of the Texas Code of Criminal Procedure only required the signature of a magistrate for an arrest warrant to be sufficient.<sup>214</sup> The court of appeals was found to have erred, and the case was remanded to address appellee's remaining issues.<sup>215</sup>

b. Exigent Circumstances

In *Igboji v. State*, the Fourteenth Houston Court of Appeals had to decide whether the warrantless seizure of the appellant's cell phone was unreasonable under the Fourth Amendment.<sup>216</sup>

Jerel Chinedu Igboji, the appellant, participated in a robbery of a Kentucky Fried Chicken where he worked as an employee.<sup>217</sup> During the investigation, an employee shared a Snapchat video with a detective posted by the appellant showing law enforcement present at the scene after the robbery.<sup>218</sup> After the appellant agreed to provide a statement at the police department, police seized his cell phone without a warrant.<sup>219</sup> A warrant was obtained two days later, and the appellant was arrested about a month later.<sup>220</sup> He was charged with aggravated robbery.<sup>221</sup>

The appellant filed a motion to suppress, which the trial court denied, and a jury found him guilty.<sup>222</sup> The appellant appealed, arguing that his cell phone was not only unreasonably seized but also unreasonably searched because police did not have a warrant and no warrant exception applied.<sup>223</sup> The court of appeals concluded, however, that the appellant did not preserve his claim that the search of his cell phone was unreasonable.<sup>224</sup> It proceeded to consider the merits of the appellant's argument that the seizure of his phone was unreasonable.

The investigating detective testified that Snapchat is an application that allows the sharing of videos or images for a period of time chosen by the sender and that, before the video or image expires, the recipient can save the video or image.<sup>225</sup> He also said that he interviewed the appellant because of the video he posted on Snapchat<sup>226</sup> and that the appellant's phone was seized after he refused to consent for police to search the contents of his phone to "preserve whatever was on the device."<sup>227</sup> The

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213. *Id.* at 61.

214. *Id.* at 60.

215. *Id.* at 62.

216. *Igboji v. State*, 607 S.W.3d 157, 162–63 (Tex. App.—Houston [14th Dist.] 2020, pet. granted).

217. *Id.* at 161.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 161–62.

224. *Id.*

225. *Id.* at 163.

226. *Id.*

227. *Id.* at 166.

detective testified that he did not obtain a search warrant before the interview because he hoped that the appellant would consent to the search.<sup>228</sup> A forensic examiner also testified to the workings of Snapchat supporting the officer's opinion that any evidence would quickly be deleted but could be recovered if done swiftly.<sup>229</sup>

The court first considered whether the seizure of the cell phone was consensual or exigent circumstances applied.<sup>230</sup> The court readily concluded that the appellant did not consent to a search of his phone; that evidence was undisputed.<sup>231</sup> But it also found that the exigent circumstances did not exist to support a reasonable inference that the appellant would have taken affirmative steps to delete content stored in his cell phone.<sup>232</sup> According to the court of appeals, the State had to either prove that the evidence will naturally dissipate or that the evidence may be destroyed through the affirmative conduct of the suspect,<sup>233</sup> and it found the evidence insufficient in both respects.<sup>234</sup> The court found the State's evidence insufficient because it did not prove that the officer who seized the phone had a reasonable belief at the time that he seized it that the video on the appellant's phone would expire if the phone was not seized.<sup>235</sup> The court noted there was no evidence "showing the specific details of the Snapchat application" with respect to the appellant's cell phone, and the court noted, the phone was not seized until three days after the robbery when the video was posted.<sup>236</sup>

Turning to the argument that the evidence might have been intentionally destroyed by the appellant if his phone was not seized, the court of appeals relied on the Texas Court of Criminal Appeals's decision in *Turrubiate v. State* and its own decision in *Gutierrez v. State*, and concluded that the evidence had to show "proof of imminent destruction based on affirmative conduct,"<sup>237</sup> not only that the evidence might or might not be destroyed. Here, the court of appeals said that it found no evidence that the appellant took any affirmative steps to destroy evidence on his phone.<sup>238</sup> The court further noted that there was no evidence that the video could not have been obtained from other sources. The court concluded that the appellant was harmed.<sup>239</sup> It determined that it could not say that the error was harmless beyond a reasonable doubt because, with-

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228. *Id.* at 163.

229. *Id.* at 164.

230. *Id.* at 166–70.

231. *Id.* at 166.

232. *Id.* at 170.

233. *Id.* at 167.

234. *Id.* at 167, 170.

235. *Id.* at 167.

236. *Id.*

237. *Id.* at 168–69 (citing *Turrubiate v. State*, 399 S.W.3d 147, 153 (Tex. Crim. App. 2013); *Gutierrez v. State*, 585 S.W.3d 599, 610 (Tex. App.—Houston [14th Dist.] 2019, no pet.)).

238. *Id.* at 169.

239. *Id.* at 170–72.



out the phone evidence, the other evidence was merely circumstantial.<sup>240</sup> Accordingly, the court of appeals reversed the ruling of the trial court and remanded for a new trial.<sup>241</sup>

The author of the dissent took issue with the majority's application of both *Turrubiate* and *Gutierrez*.<sup>242</sup> He found *Turrubiate* distinguishable because it dealt with the warrantless search of a home, not the warrantless seizure of personal property<sup>243</sup> and that the seizure was based on exigent circumstances under *Gutierrez* because the defendants knew they were suspects.<sup>244</sup> The author also noted that other jurisdictions tracked his analysis.<sup>245</sup>

The State Prosecuting Attorney's Office filed a petition for discretionary review, which the Texas Court of Criminal Appeals granted. In its brief on the merits, the State Prosecuting Attorney argues that the court of appeals erred because its dissipation analysis was wrong, and precedent does not support an "affirmative conduct" or an "alternative sources" analysis.<sup>246</sup> The case is pending.

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240. *Id.* at 171–72.

241. *Id.* at 172; TEX. R. APP. P. 44.2(a).

242. *Igboji*, 607 S.W.3d at 172 (Christopher, J., dissenting).

243. *Id.*

244. *Id.* at 173.

245. *Id.* at 173–74.

246. Brief for State Prosecuting Attorney at 20–29, *Igboji v. State*, No. PD-0936-20 (Tex. Crim. App. filed Dec. 29, 2020).