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Criminal Procedure: Confessions, Searches, and Seizures

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

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I. INTRODUCTION

A REVIEW of the past year's cases involving confessions, searches, and seizures shows significant developments made by the United States Supreme Court in all areas. Besides the major cases announced by the Supreme Court, the United States Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals continued to clarify established law. The court of criminal appeals continued to analyze issues mostly under the United States Constitution, except where state law provides differently. This article presents the most important decisions handed down during the Survey period in two sections: (1) confessions, and (2) searches and seizures.

II. CONFESSIONS

The Fifth Amendment to the Constitution of the United States guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[1] Procedural safeguards under the United States Constitution and federal and state statutes protect this right. The Sixth Amendment to the Constitution of the United States affords criminal defendants the right to the assistance of counsel in their defense.[2] Texas law

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1. U.S. CONST. amend. V.
2. U.S. CONST. amend. VI.

also provides for the exclusion of statements made by defendants if certain procedural safeguards are not followed or if police obtain the evidence unlawfully.[3]

A. VOLUNTARINESS

While *Miranda v. Arizona*, discussed below, changed the landscape of the admissibility of incriminating statements made by suspects, the United States Supreme Court never abandoned voluntariness as a prerequisite for admissibility.[4] Voluntariness is also a prerequisite to admissibility under the Texas Code of Criminal Procedure.[5]

Corley v. United States

In *Corley v. United States*, the United States Supreme Court addressed "whether Congress intended 18 U.S.C. § 3501 to discard, or merely to narrow, the rule in *McNabb v. United States*, and *Mallory v. United States*, under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge."[6] The Court held that the law limits, but does not eliminate, the *McNabb–Mallory* rule.[7]

In *Dickerson v. United States*, the United States Supreme Court held that 18 U.S.C. § 3501(a)-(b), a law Congress designed to overrule *Miranda*, did not supersede *Miranda*.[8] Section 3501(a) dictates that a confession "shall be admissible in evidence if it is voluntarily given."[9] Subsection (c) took aim at the *McNabb–Mallory* rule by authorizing the admission of a voluntary confession given within six hours of arrest.[10] The six-hour timeframe is not absolute; it may be extended depending on the means of transportation and distance to the nearest magistrate.[11] In relevant part, the statute reads, "[A] confession made . . . shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily and . . . if such confession was made or given by such person within six hours immediately following his arrest or other detention."[12]

Corley argued that subsection (c) of 18 U.S.C. § 3501 creates a six-hour period where *McNabb–Mallory* is not applicable, but that after that period passes, the exclusionary rule applies to any later confession if the delay in presenting the defendant to a magistrate was unnecessary or unreasonable.[13] The Government argued that subsection (a) eliminated

3. TEX. CODE CRIM. PROC. ANN. arts. 38.22-.23 (Vernon 2005).
4. Dickerson v. United States, 530 U.S. 428, 434 (2000).
5. TEX. CODE CRIM. PROC. ANN. art. 38.21, art. 38.22 § 6 (2005).
6. Corley v. United States, 129 S. Ct. 1558, 1562 (2009) (internal citations omitted).
7. *Id.*
8. *Dickerson*, 530 U.S. at 444.
9. 18 U.S.C. § 3501(a), *invalidated by Dickerson*, 530 U.S. at 444.
10. *Corley*, 129 S. Ct. at 1564.
11. *See id.*
12. 18 U.S.C. § 3501(c).
13. *Corley*, 129 S. Ct. at 1566.

McNabb–Mallory. The Government attempted to convert the argument into one of voluntariness by arguing that where the statute reads "shall not be inadmissible," it should mean "shall not be involuntary." In reaching its holding that subsection (c) limited but did not supersede *McNabb–Mallory*, the Court reasoned that the rules of statutory construction required it to give subsection (c) effect.[14] It also pointed out that even voluntary confessions made outside the six-hour window are inadmissible under *McNabb–Mallory*, and it refused to "rewrit[e] (c) into a bright-line rule doing nothing more than applying (a)."[15]

The United States Supreme Court has stated that 18 U.S.C. § 3501(c) applies only to arrests on federal charges.[16] Thus, the rule announced by the Texas Court of Criminal Appeals in *Cantu v. State*[17] still applies in state cases. In *Cantu*, the court of criminal appeals observed that "the failure to take an arrestee before a magistrate in a timely manner will not invalidate a confession unless there is proof of a causal connection between the delay and the confession," and that such a delay "will not vitiate an otherwise voluntary confession if the arrestee was properly advised of his *Miranda* rights."[18]

B. Custodial Interrogation

As noted above, the United States Constitution forbids compelling a suspect to incriminate himself. In *Miranda v. Arizona*, the United States Supreme Court held that before a suspect is subjected to custodial interrogation, the suspect must be informed: (1) of the right to remain silent; (2) that anything the suspect says can and will be used against the suspect in court; (3) of the right to an attorney and to have the attorney present during interrogation; and (4) of the right to have an attorney appointed if the suspect is unable to afford one.[19] Texas codified the *Miranda* warnings in article 38.22 of the Texas Code of Criminal Procedure.[20]

Martinez v. State

In *Martinez v. State*, the Texas Court of Criminal Appeals interpreted the United States Supreme Court's holding in *Missouri v. Seibert*.[21] The court of criminal appeals applied the exclusionary rule to "question first, warn later" interrogations when "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."[22]

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14. *Id.* at 1566-68.
15. *Id.* at 1567.
16. United States v. Alvarez-Sanchez, 511 U.S. 350, 358 (1994).
17. 842 S.W.2d 667 (Tex. Crim. App. 1992).
18. *Id.* at 680.
19. 384 U.S. 436, 467-73 (1966).
20. Tex. Code Crim. Proc. Ann. art. 38.22 § 2(a) (Vernon 2005).
21. Martinez v. State, 272 S.W.3d 615, 627 (Tex. Crim. App. 2008); *see* Missouri v. Seibert, 542 U.S. 600, 617 (2004).
22. *Martinez*, 272 S.W.3d at 621 (citing *Seibert*, 542 U.S. at 619 (Kennedy, J., concurring)).

Martinez was arrested after he was identified by a robbery and murder victim. The police took him to the police station and questioned him without giving *Miranda* warnings. At first, Martinez denied involvement in the crime. After a polygrapher tested Martinez, the police told him he had failed the test. They then took Martinez to a municipal court where a magistrate gave Martinez *Miranda* warnings for the first time. At the station, the police warned him a second time and questioned him again. Martinez then gave a videotaped statement implicating himself in the crime.[23]

In reaching its conclusion, the court of criminal appeals quoted at length from Justice Kennedy's concurrence in *Seibert*. The majority favored Justice Kennedy's approach, which dictated that unless the two-step tactic was used purposefully to undermine the *Miranda* warning, the United States Supreme Court's earlier holding in *Oregon v. Elstad* is applicable.[24] *Elstad* held that a *Miranda* violation did not preclude a later, warned confession from being admitted as evidence.[25] Limiting the application of *Elstad*, the court of criminal appeals held that if police deliberately use a two-step process for interrogations, the confession is inadmissible, unless "curative measures" are undertaken to emphasize the importance of the *Miranda* warnings to the suspect.[26] Curative measures listed by the court of criminal appeals are:

> (1) a substantial break in time and circumstances between the unwarned statement and the *Miranda* warning (Kennedy); (2) explaining to the defendant that the unwarned statements, taken while in custody, are likely inadmissible (Kennedy); (3) informing the suspect that, although he previously gave incriminating information, he is not obligated to repeat it (plurality); (4) the interrogating officers refrain from referring to the unwarned statement unless the defendant refers to it first (plurality); or (5) if the defendant does refer to the pre-*Miranda* statement, the interrogating officer states that the defendant is not obligated to discuss the content of the first statement (plurality).[27]

At the outset, the court noted that in 2003, it addressed similar facts in *Jones v. State*.[28] In that case, the court of criminal appeals held that admitting statements made before and after warning, but "during a nearly undifferentiated single event, taking place in the same room as an uninterrupted and continuous process," would "undermine the spirit and intent of *Miranda*."[29] It therefore declined to apply *Elstad* to the *Jones* case.[30]

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23. *Id.* at 617-18.
24. *Id.* at 621.
25. Oregon v. Elstad, 470 U.S. 298, 308 (1985).
26. *Martinez*, 272 S.W.3d at 628.
27. *Id.* at 626-27.
28. *See* 119 S.W.3d 766, 770-72 (Tex. Crim. App. 2003).
29. *Martinez*, 272 S.W.3d at 622 (quoting *Jones*, 119 S.W.3d at 775).
30. *Id.*

The adoption of Justice Kennedy's concurrence in *Seibert* by the court of criminal appeals in *Martinez* comports with the decision in *Jones*. Justice Kennedy's approach is more workable. It has a threshold requirement that the defendant show that the two-step system was deliberately used to undermine *Miranda*. It then incorporates some of the *Seibert* plurality's reasoning as examples of possible curative measures. The decision of the court of criminal appeals will render statements that are the product of deliberate efforts to undermine *Miranda* inadmissible, without resorting to the exclusionary rule for less-serious violations.

Gobert v. State

In *Gobert v. State*, the Texas Court of Criminal Appeals considered whether a suspect, once his *Miranda* rights were read to him, unequivocally requested a lawyer.[31] Police suspected Gobert of murder. They arrested him for a parole violation and assault. Officers interrogating Gobert first read him his *Miranda* rights. When they asked Gobert if he understood his rights, he answered, "I don't want to give up any right, though, if I don't got no lawyer." One officer asked, "You don't want to talk?" Another officer asked, "You don't want to talk to us?" Gobert then told the officers he would speak with them. During the interrogation, Gobert confessed to committing the murder. The trial judge determined that Gobert had unequivocally invoked his Fifth Amendment right to counsel; he therefore suppressed Gobert's statement.[32] The Austin Court of Appeals reversed the ruling on an interlocutory appeal taken by the State.[33] The court of criminal appeals granted discretionary review to determine whether Gobert's statement was an unequivocal invocation of his right to counsel.[34]

The court of criminal appeals noted that under *Edwards v. Arizona*, once a suspect invokes the Fifth Amendment right to counsel, police interrogation must cease until counsel has been provided, unless the suspect reinitiates contact with the police.[35] Officers need not clarify ambiguous or equivocal statements regarding counsel.[36] The court of criminal appeals agreed with the court of appeals that Gobert "did not make a direct and straightforward request for a lawyer."[37] But it concluded that Gobert made his "desire to deal with his police interrogators only through, or at least in the presence of, counsel" "abundantly clear."[38]

Gobert's statement made "absolutely crystal clear" the fact that he did

31. 275 S.W.3d 888, 889-90 (Tex. Crim. App. 2009).
32. *Id.* at 890.
33. *Id.*
34. *Id.* at 889.
35. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).
36. *Gobert*, 275 S.W.3d at 892 (citing Davis v. United States, 512 U.S. 452, 461-62 (1994)).
37. *Id.* at 893.
38. *Id.*

not desire to waive any of his *Miranda* rights without counsel present.[39] The court of criminal appeals observed, "Just because a statement is conditional does not mean it is equivocal, ambiguous, or otherwise unclear."[40] Gobert's statement, the court of criminal appeals concluded, was an "indirect expression of a possible willingness to waive" *Miranda* rights other than the right to counsel.[41] His willingness to talk, elicited by the interrogating officers after he had invoked his right to counsel, could not be used to second-guess the initial invocation of his right.[42]

Nguyen v. State

As discussed above, article 38.22 of the Texas Code of Criminal Procedure codifies the *Miranda* warnings and controls the admissibility of statements given by suspects during custodial interrogation.[43] In *Nguyen v. State*, the Texas Court of Criminal Appeals considered how to apply article 38.22 and any relevant exceptions.[44]

An accused's oral statement made as a result of custodial interrogation is inadmissible under article 38.22 section 3(a) unless certain procedural requirements are met.[45] First, the police must make an "electronic recording" of the statement.[46] Second, they must give the warning in article 38.22 section 2(a) while the recording is in progress but before the accused makes the statement, and the accused must knowingly, intelligently, and voluntarily waive the rights set out in the warning.[47] Third, the recording device must be capable of making an accurate recording, the operator must be competent, and the recording must be accurate and unaltered.[48] Fourth, all voices on the recording must be identified.[49] Fifth, by the twentieth day before the date of the proceeding, the accused's counsel has to be provided with a copy of all recordings.[50] The accused must be given the following warnings before making a statement:

> (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;

39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.* at 893-94.
43. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005).
44. 292 S.W.3d 671, 676-81 (Tex. Crim. App. 2009).
45. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a) (2005).
46. *Id.* art. 38.22 § 3(a)(1).
47. *Id.* art. 38.22 § 3(a)(2).
48. *Id.* art. 38.22 § 3(a)(3).
49. *Id.* art. 38.22 § 3(a)(4).
50. *Id.* art. 38.22 § 3(a)(5).

(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.[51]

A police officer stopped Nguyen and a companion, Sanchez, for traffic violations.[52] The police officer, suspicious about the pair, asked for and obtained consent to search the vehicle, which was owned by Sanchez. After discovering methampethamine in the car, the officer arrested Sanchez, who informed the officer that the contraband belonged to Nguyen. The officer then placed Nguyen under arrest and gave him the following warning: "Just like I told your friend, you have the right to remain silent, anything you say or do can and will be used against you in a court of law. You have the right to have an attorney present too."[53] Notably, Nguyen was not informed of his right to terminate the interview. Nguyen then invoked his right to counsel.

Sanchez talked Nguyen into taking responsibility for the methamphetamine. Nguyen told the officer that the drugs were his. The officer subsequently found a tablet of ecstasy near or in something of Sanchez's. Nguyen also tried to take responsibility for the ecstasy. The officer took both Nguyen and Sanchez to the station. Nguyen was charged with hindering apprehension because he falsely told the officer the drugs were his.

Nguyen moved to suppress the statements made to the officer. Nguyen claimed that the statement was taken in violation of article 38.22 because he had invoked his right to counsel and he was not told he could terminate the interview. The trial court overruled the motion.[54] The Dallas Court of Appeals held that the trial judge erred in admitting Nguyen's statement because Nguyen was not fully advised under article 38.22.[55] The court of appeals found harm, and it reversed Nguyen's conviction.[56] The court of criminal appeals granted the State's petition for discretionary review.[57]

The State argued that the violation of article 38.22 should be considered as a violation of the law under Texas's exclusionary rule, article 38.23 of the code of criminal procedure. The State posited that because the evidence that Nguyen was hindering the apprehension of Sanchez arose after the violation of article 38.22, it should not have been suppressed. The court of criminal appeals concluded that the argument was without merit.[58] Article 38.22 is not applied the same way as article

51. *Id.* art 38.22 § 2(a).
52. Nguyen v State, 292 S.W.3d 671, 673 (Tex. Crim. App. 2009) (not designated for publication).
53. *Id.*
54. *Id.* at 674.
55. Nguyen v. State, No. 05-07-00030-CR, 2008 Tex. App. LEXIS 1991, at *13 (Tex. App.—Dallas Mar. 19, 2008, pet. granted).
56. *Id.* at *14-15.
57. *Nguyen*, 292 S.W.3d at 675.
58. *Id.* at 677.

38.23: "Article 38.22 is a procedural evidentiary rule, independent of the statutory exclusionary rule set out in Article 38.23."[59] On the other hand, article 38.23 is a substantive rule that requires exclusion of evidence when it has been unlawfully obtained.[60] Thus, as the court of criminal appeals explained, when police violate article 38.22, this "does not mean that the statement was necessarily obtained as a result of any legal or constitutional violation, and art. 38.22 mandates exclusion by its own terms and without reference to art. 38.23."[61]

Responding to the State's argument that article 38.22 applies only to statements admitted for their truth, the court of criminal appeals further held that "the express language of Article 38.22 does not include an exception for statements that are not confessional in nature, do not implicate the accused for the offense prosecuted, or constitute an offense."[62]

The holding of the court of criminal appeals in *Nguyen* is well reasoned and signals a strict construction of article 38.22. Nothing in the language of article 38.22 would lead to a different result. Nevertheless, as a procedural evidentiary rule, article 38.22 could be subject to amendment or repeal by the legislature.

Resendez v. State

In light of *Nguyen v. State*, parties must remain cognizant that while article 38.22 is a discrete rule of admissibility, its similarity to the requirements of *Miranda* can cause problems when it comes to preserving error for appellate review. In *Resendez v. State*, the Texas Court of Criminal Appeals considered whether a claim that a statement was taken in violation of *Miranda* would also invoke article 38.22.[63]

Police took a statement from Resendez without first giving him his *Miranda* warnings. Resendez moved to suppress the statement. At the suppression hearing, Resendez made an argument based on *Miranda* and the "State Constitution."[64] However, he made no specific mention of article 38.22. The trial judge denied his motion.[65] The Houston Fourteenth Court of Appeals reversed, concluding that the trial judge erred because warnings were not given on the recording, and it was clear that Resendez was making that argument at the hearing on the motion to suppress.[66]

The court of criminal appeals reversed.[67] It reasoned that a violation of article 38.22 is distinct from a violation of *Miranda*: "Even if a suspect is given *Miranda* warnings and his constitutional rights have not been vio-

59. *Id.*
60. *Id.* at 676.
61. *Id.* at 677 (quoting Davidson v. State, 25 S.W.3d 183, 186 n.4 (Tex. Crim. App. 2000)).
62. *Id.* at 681.
63. 306 S.W.3d 308, 309-10 (Tex. Crim. App. 2009).
64. *Id.* at 311.
65. *Id.* at n.5.
66. *Id.* at 312.
67. *Id.* at 317.

lated, an oral confession may still be inadmissible if the police fail to comply with the purely statutory requirement that they capture the *Miranda* warnings on the electronic recording."[68] However, Resendez's objection that the police did not warn him on tape was not specific as to article 38.22. The court of criminal appeals observed that "a complaint that could, in isolation, be read to express more than one legal argument will generally not preserve all potentially relevant arguments for appeal."[69] The court of criminal appeals therefore held that Resendez had not preserved his article 38.22 complaint because he did not object under article 38.22 at the hearing.[70]

In *Resendez*, the court of criminal appeals honed its error-preservation jurisprudence. One of the requirements to preserve error is to make a timely, specific objection.[71] The complaint here that Resendez was not given *Miranda* warnings was not specific enough.[72] *Resendez* makes clear that although federal and state grounds for objecting might be similar or even overlap, the parties must object specifically on each issue to preserve the issue for appeal.[73]

C. Sixth Amendment Right to Counsel

The United States Supreme Court recently reaffirmed that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[74] The Sixth Amendment right extends to all "critical" stages of criminal proceedings.[75]

Montejo v. Louisiana

In *Montejo v. Louisiana*, the United States Supreme Court overruled *Michigan v. Jackson*, which, under the Sixth Amendment, forbade police from initiating interrogation of a defendant once he requests counsel at an arraignment or similar proceeding.[76]

Montejo was arrested for capital murder. He waived his rights under *Miranda* and was interrogated by the police. Police took Montejo before a judge, where he was charged with the murder and appointed an attorney. On the same day, police reinitiated contact with Montejo and requested that he go with them to look for the murder weapon. He agreed, and police once again read him his *Miranda* rights. During the trip, he

68. *Id.* at 315.
69. *Id.* at 314.
70. *Id.* at 317.
71. Tex. R. App. Proc. 33.1(a)
72. *Resendez*, 306 S.W.3d at 314.
73. *Id.*
74. Rothgery v. Gillespie County, 128 S. Ct. 2578, 2592 (2008).
75. United States v. Wade, 388 U.S. 218, 224 (1967).
76. Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009) (overruling Michigan v. Jackson, 475 U.S. 625, 642 (1986)).

wrote a letter of apology to the victim's widow.[77] The letter was admitted into evidence at trial. Montejo was convicted and sentenced to death.

Writing for the majority, Justice Scalia observed, "*Jackson* represented a 'wholesale importation of the *Edwards* rule into the Sixth Amendment.'"[78] The *Edwards* rule requires that once an arrestee has invoked the right to counsel, police interrogation must cease until counsel has been made available or unless the arrestee reinitiates contact.[79] Justice Scalia reasoned that the prophylactic measures adopted under *Miranda–Edwards* are adequate to protect the rights of a defendant.[80] "If that regime suffices to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence' before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached."[81]

Dissenting, Justice Stevens criticized the notion that the *Miranda* warning is sufficient to alert an accused of his Sixth Amendment right to counsel.[82] Justice Stevens stated, "I remain convinced that the warnings prescribed in *Miranda*, while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution."[83] Justice Stevens also opined that there could be a problem with delivering the *Miranda* warning to an accused who has already retained counsel: "[P]roviding that same warning to a defendant who has *already* secured counsel is more likely to confound than enlighten."[84]

The Texas Court of Criminal Appeals followed *Montejo* in *Hughen v. State*.[85] After an initial appearance before a magistrate, an officer read Hughen his *Miranda* rights, and he waived the right to have counsel present. The court of criminal appeals held that the resulting statement was admissible under *Montejo*.[86]

Kansas v. Ventris

In *Kansas v. Ventris*, the United States Supreme Court addressed "whether a defendant's incriminating statement to a jailhouse informant, concededly elicited in violation of Sixth Amendment strictures, is admissible at trial to impeach the defendant's conflicting statement."[87] Under

77. *Id.* at 2082.
78. *Id.* at 2086 (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)).
79. *Id.* at 2085 (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).
80. *Id.* at 2090.
81. *Id.* (quoting *Cobb*, 532 U.S. at 175 (Kennedy, J., concurring) (internal citation omitted)).
82. *Id.* at 2100 (Stevens, J., dissenting).
83. *Id.*
84. *Id.* at 2101 (emphasis in original).
85. 297 S.W.3d 330, 335 (Tex. Crim. App. 2009).
86. *Id.* at 335.
87. 129 S. Ct. 1841, 1844 (2009).

Massiah v. United States, statements by the defendant deliberately elicited by law enforcement after attachment of a defendant's Sixth Amendment right to counsel cannot be used against the defendant by the prosecution at trial.[88] Applying the same logic as in *Harris v. New York*,[89] which held that statements taken in violation of *Miranda* are admissible for impeachment purposes, the Court held that statements taken in violation of *Massiah* are admissible to challenge the defendant's inconsistent testimony at trial.[90]

Ventris and a codefendant were charged with murder and robbery. Police planted an informant in Ventris's cell before trial. The informant gleaned from Ventris that he had committed the murder and robbery. Ventris testified at trial that his codefendant was responsible for both the robbery and the murder. Over Ventris's objection, the prosecutor elicited contradictory testimony from the jailhouse informant.[91]

Justice Scalia, writing for the majority, concluded that "the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the 'Assistance of Counsel' is denied."[92] Once a violation has occurred, the question that presents itself is the remedy for the violation. Justice Scalia pointed out the difference between prohibiting the government from using illegally obtained evidence in its case in chief and allowing the defendant to testify without the threat that a contradictory statement, albeit illegally obtained, could be used to refute his testimony.[93] The Court concluded that depriving the prosecution of the truth-seeking device of cross-examination is too high a price to achieve "little appreciable deterrence."[94]

Justice Stevens dissented, stating, "The use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect."[95]

Pecina v. State

In *Pecina v. State*, the Texas Court of Criminal Appeals held that after an accused has invoked his right to counsel, answering "yes" when asked if he would like to speak to detectives was not an initiation of contact with the police for the purposes of *Edwards*.[96]

Pecina was a suspect in a murder. Police also suspected that he attempted suicide after committing the murder. Police went to the hospital to interview him. They took a magistrate with them. The magistrate ap-

88. 377 U.S. 201, 202-03, 207 (1964).
89. 401 U.S. 222, 225-26 (1971).
90. *Ventris*, 129 S. Ct. at 1847.
91. *Id.* at 1844.
92. *Id.* at 1846.
93. *Id.*
94. *Id.* at 1846-47.
95. *Id.* at 1848 (Stevens, J., dissenting).
96. Pecina v. State, 268 S.W.3d 564, 568-69 (Tex. Crim. App. 2008).

proached Pecina and told him that the police were there and wanted to speak to him, to which Pecina either nodded his head or said "yes." The magistrate then read Pecina his rights and asked him if he wanted an attorney appointed. He said he did. The magistrate asked Pecina if he wanted to speak to the detectives, and he responded, "Yes." The police warned Pecina and proceeded to interview him. During the interview, Pecina made incriminating statements.[97] He was later found guilty.

The court of criminal appeals analyzed the case under *Michigan v. Jackson*.[98] It determined that Pecina had invoked his right to counsel when he answered "yes" after the magistrate asked him if he wanted appointed counsel.[99] After doing so, answering "yes" when the magistrate then asked if he wanted to speak to the police was not an initiation of contact with the police. This would have been required to satisfy the *Edwards* rule. The court of criminal appeals therefore reversed and remanded.[100]

The outcome of *Pecina* deserves more thought in light of the United States Supreme Court's holding in *Montejo*.[101] Since Pecina invoked his Sixth Amendment right to counsel, it is unclear whether the officers' approach of him would be prohibited under *Montejo*.[102]

III. SEARCHES AND SEIZURES

A. Arrest, Stop, or Inquiry Without Warrant

"There are three recognized categories of interaction between the police and citizens: encounters, investigative detentions and arrests."[103] An encounter, which is consensual in nature, does not trigger scrutiny under the Fourth Amendment unless it becomes non-consensual.[104] Unlike an encounter, when conducting an investigative detention, a police officer may briefly detain and investigate a person if the officer has reasonable suspicion that the person is involved in criminal activity.[105] An officer may also conduct a limited "pat-down" of the person if the officer has a reasonable belief that the person is armed and dangerous.[106] During an investigative detention, or "*Terry* stop," a citizen is not free to leave.[107] For an arrest, the most serious interaction between the police and citizens, an officer must have probable cause that a suspect has engaged in or is engaging in criminal activity.[108]

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97. *Id.* at 565.
98. *Id.* at 567-78 (referencing Michigan v. Jackson, 475 U.S. 625 (1986)), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009).
99. *Id.* at 568.
100. *Id.* at 569.
101. *See Montejo*, 129 S. Ct. at 2091.
102. *See id.* at 2090; *Pecina*, 268 S.W.3d at 565.
103. Francis v. State, 922 S.W.2d 176, 178 (Tex. Crim. App. 1996).
104. Florida v. Bostick, 501 U.S. 429, 434 (1991).
105. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968).
106. *Id.* at 27-28.
107. *Francis*, 922 S.W.2d at 178.
108. Henry v. United States, 361 U.S. 98, 102-03 (1959).

Arizona v. Johnson

In *Arizona v. Johnson*, the United States Supreme Court held that the first condition of *Terry*, a lawful stop, is met when police make a lawful traffic stop.[109] Police need not have reasonable suspicion that any occupant of a motor vehicle is involved in criminal activity to conduct a *Terry* pat-down of the driver or a passenger, but they must have reasonable suspicion that the person is armed and dangerous.[110]

Further, the Court noted, "An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[111] Under the Court's reasoning, a driver or passenger seized and questioned about an unrelated matter does not become "un-seized," and therefore exempt from the pat-down, under the holding of the case.[112] But the Court added the qualifying language, "so long as those inquiries do not measurably extend the duration of the stop."[113] The United States Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals did not apply *Johnson* during the Survey period.

United States v. Rangel-Portillo

In *United States v. Rangel-Portillo*, the Fifth Circuit considered an appeal of a district court's denial of a motion to suppress evidence based on an unconstitutional stop by a United States Border Patrol agent.[114] The court of appeals concluded that the district court had erred in denying the motion.[115]

A border patrol agent on patrol must have reasonable suspicion to make an investigative detention of a vehicle.[116] Reasonable suspicion is determined by examining the totality of the circumstances.[117] A border patrol agent stopped Rangel-Portillo in Starr County, Texas. The agent initially encountered Rangel-Portillo's vehicle at a Wal-Mart store parking lot located within 500 yards of the Texas–Mexico border. Rangel-Portillo was subsequently charged with unlawfully transporting undocumented aliens. A motion to suppress was denied by the trial judge, who found reasonable suspicion based on the following facts:

> (1) the proximity of the stop to the border; (2) the fact that Wal-Mart is frequently used as a staging area for alien smuggling and there had been numerous apprehensions of aliens in the area over previous months; (3) the fact that [the agent] observed two vehicles driving in

109. 129 S. Ct. 781, 784 (2009); *see Terry*, 392 U.S. at 12.
110. *Johnson*, 129 S. Ct. at 784.
111. *Id.* at 788 (citing Muehler v. Mena, 544 U.S. 93, 100-101 (2005)).
112. *See id.*
113. *Id.*
114. 586 F.3d 376, 378 (5th Cir. 2009).
115. *Id.*
116. *Id.* at 379.
117. *Id.* at 379-80 (citing United States v. Hernandez, 477 F.3d 210, 213 (5th Cir. 2007)).

> tandem; (4) the fact that the passengers of [Rangel-Portillo's vehicle] failed to converse with one another and sat rigidly; (5) the absence of shopping bags in the [vehicle]; (6) the fact that the passengers were sweaty; (7) the fact that the rear passengers wore seat belts; and (8) the fact that the backseat passengers made no eye contact with [the agent], while the driver made repeated eye contact.[118]

The Fifth Circuit concluded that the border patrol agent lacked reasonable suspicion to stop Rangel-Portillo's vehicle.[119] Proximity to the border is accorded "great weight" when determining whether reasonable suspicion for a stop existed, but it does not constitute reasonable suspicion itself.[120] In *Rangel–Portillo*, even when supplemented by the other factors, proximity to the border was insufficient to support reasonable suspicion.[121] The Fifth Circuit therefore vacated and remanded to the district court.[122]

In its reasoning, the Fifth Circuit stated, "Were we to rule otherwise, law enforcement agents would be free to stop any vehicle on virtually any road anywhere near the Texas–Mexico border."[123] The holding in *Rangel–Portillo* is in keeping with *Terry*'s requirement that there must be something more than a "hunch" to find reasonable suspicion.[124] However, while the Fifth Circuit noted that it considers the totality of the circumstances in determining whether or not there was reasonable suspicion for a stop,[125] it appears to have implemented a divide-and-conquer approach by evaluating the facts individually in reaching its conclusion.[126]

State v. Sheppard

In *State v. Sheppard*, the Texas Court of Criminal Appeals considered "whether a person is 'arrested' for purposes of the Fourth Amendment if he is temporarily handcuffed and detained, but then released."[127] The court of criminal appeals held that a person who has been handcuffed is seized but not necessarily arrested.[128]

A deputy sheriff handcuffed Sheppard and informed him that he was being detained until the deputy secured the scene, a mobile home. The deputy testified that he handcuffed Sheppard for "officer safety" while he walked through the mobile home. As soon as he secured the premises, the deputy removed the handcuffs.[129]

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118. *Id.* at 379.
119. *Id.* at 380.
120. *Id.*
121. *Id.* at 380-81.
122. *Id.* at 383.
123. *Id.* (quoting United States v. Diaz, 977 F.2d 163, 165 (5th Cir. 1992)).
124. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968); *Rangel-Portillo* 586 F.3d at 380.
125. *Rangel-Portillo*, 586 F.3d at 379-80.
126. *See id.* at 381-382.
127. 271 S.W.3d 281, 283 (Tex. Crim. App. 2008).
128. *Id.*
129. *Id.* at 284.

The court of criminal appeals noted that under the Fourth Amendment, an arrest "is a greater restraint upon a person's freedom to leave or move than is a temporary detention."[130] There is no bright-line rule to differentiate between an arrest or an investigative detention, but the court of criminal appeals provided factors to weigh when attempting to categorize an interaction: "the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent . . . and any other relevant factors."[131] The court of criminal appeals stated that a detention likely becomes an arrest if the restraint is more than necessary to ensure officer safety and prevent the suspect from fleeing.[132] The court of criminal appeals concluded that because the deputy told Sheppard that he was handcuffing him while he secured the trailer, told him he was not under arrest, and removed the handcuffs as soon as he conducted a sweep of the trailer, Sheppard was detained, but not under arrest, for Fourth Amendment purposes.[133]

B. Warrantless Searches

When police conduct a search without a warrant, the general rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[134] One such exception is the "search incident to a lawful arrest."[135] Under *Chimel v. California*, police may search incident to an arrest the area within the arrestee's "immediate control."[136] The United States Supreme Court construed that area to mean "the area from within which he might gain possession of a weapon or destructible evidence."[137] A lawful arrest establishes the authority to search.[138] In *United States v. Robinson*, the Court observed that the legitimacy of a search "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[139] The Court held that a search incident to a lawful arrest is not only an exception to the warrant requirement but is also a reasonable search under the Fourth Amendment.[140] Applying *Chimel* to searches of automobiles in *New*

130. *Id.* at 290.
131. *Id.* at 291.
132. *Id.*
133. *Id.* at 291.
134. Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).
135. *See* Chimel v. California, 395 U.S. 752, 755 (1969).
136. *Id.* at 762-63.
137. *Id.* at 763.
138. United States v. Robinson, 414 U.S. 218, 235 (1973).
139. *Id.*
140. *Id.*

York v. Belton, the Court created a bright-line rule: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[141] The holding in *Belton*, while creating an easy-to-follow rule, stretched the twin rationales of *Chimel*, officer safety and evidence preservation.[142]

Justice Scalia harshly criticized *Belton* in *Thornton v. United States*.[143] In *Thornton*, the Court extended *Belton*'s bright-line rule to include searches of automobiles incident to arrest when the arrestee is a "recent occupant" of a vehicle.[144] Justice Scalia observed, "There is nothing irrational about broader police authority to search for evidence," but he argued that the Court should "at least be honest" about its reasons for continuing to allow *Belton* searches.[145] Justice Scalia argued that *Belton* searches should be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[146] As recently as 2008, the Fifth Circuit declined to address a claim that *Belton* was wrongly decided.[147]

Arizona v. Gant

In *Arizona v. Gant*, the United States Supreme Court granted certiorari to consider the question, "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?"[148]

Gant was arrested for driving with a suspended license.[149] After handcuffing him and locking him in the back of a patrol car, police searched his vehicle. They found cocaine in the passenger compartment. Because he was secured in the back of the patrol car—and therefore could not retrieve a weapon from or destroy evidence in his vehicle—the Supreme Court of Arizona held that *Chimel* and *Belton* did not authorize the search.[150] The United States Supreme Court agreed and held that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."[151] The Court further held that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in

141. 453 U.S. 454, 460 (1981) (footnotes omitted).
142. *See id.* at 457.
143. *See* 541 U.S. 615, 631 (2004) (Scalia, J., concurring).
144. *See id.* at 617, 623-24 (majority opinion).
145. *Id.* at 630-31 (Scalia, J., concurring).
146. *Id.* at 632.
147. *See* United States v. Casper, 536 F.3d 409, 412 n.1 (5th Cir. 2008).
148. 128 S. Ct. 1443, 1443-44 (2008) (granting certiorari).
149. Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009).
150. *Id.*
151. *Id.*

the vehicle."[152]

The majority noted, "Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."[153] Perhaps this observation was made in anticipation of the development of police procedures to circumvent the Court's holding.[154] The majority noted other exceptions to the warrant requirement that could allow police to search, even in the absence of authority under the Court's new holding under *Gant*.[155] An officer may search a vehicle's passenger compartment when the officer has reasonable suspicion that a person is dangerous and might access the vehicle to get a weapon.[156] Additionally, an officer may search if the officer has probable cause to believe that a vehicle contains evidence of criminal activity, even if that evidence is relevant to a crime other than that for which the arrestee has been detained.[157]

Concurring, Justice Scalia expressed misgivings about the holding.[158] "I believe that this standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search."[159] Justice Scalia would prefer to overrule the "charade" of officer safety set out in *Belton* and *Thorton*.[160] "I would hold that a vehicle search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."[161]

Justice Scalia's point is well taken. The majority's holding gives police an incentive to leave an arrestee unsecured so that the arrestee's vehicle can be searched.[162] How the lower courts will apply *Gant* remains to be seen. The United States Court of Appeals for the Fifth Circuit remanded *United States v. Casper*, the same case in which it declined to address whether *Belton* was wrongly decided,[163] for a hearing on whether the contested search in that case fell under one of the other exceptions to the Fourth Amendment's warrant requirement.[164] The trial judge found that the evidence would inevitably have been discovered.[165] It is important to

152. *Id.*
153. *Id.* at 1719 n.4.
154. *See id.* at 1714.
155. *See id.* at 1721.
156. *Id.* (citing Michigan v. Long, 463 U.S. 1032, 1049 (1983)).
157. *Id.* (citing United States v. Ross, 456 U.S. 798, 820-21 (1982)).
158. *See id.* at 1724-25 (Scalia, J., concurring).
159. *Id.*
160. *Id.* at 1725.
161. *Id.*
162. *See id.* at 1721 (majority opinion).
163. *See* United States v. Casper, 536 F.3d 409, 412 n.1 (5th Cir. 2008).
164. United States v. Casper, 332 F. App'x 222, 223 (5th Cir. 2009) (per curiam).
165. United States v. Casper, No. 06-11381, 2009 U.S. App. LEXIS 26133, at *1-2 (5th Cir. 2009) (per curiam).

note that there is no inevitable discovery exception in Texas.[166]

In *Hill v. State*, the Fort Worth Court of Appeals applied the rule that police may search the passenger compartment of a vehicle incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.[167] Police arrested Hill for a crime involving narcotics; a search incident to arrest was therefore reasonable under *Gant*'s interpretation of the Fourth Amendment.[168] In another Texas case, the San Antonio Court of Appeals held that where a defendant was tried before *Gant*, he could not make an argument under *Gant* on appeal because he had not made an objection under *Belton* at trial.[169]

Club Retro, L.L.C. v. Hilton

In *Club Retro, L.L.C. v. Hilton*, the United States Court of Appeals for the Fifth Circuit considered the constitutionality of a S.W.A.T. raid on a nightclub.[170] The Fourth Amendment prohibits unreasonable searches and seizures of commercial premises.[171] "Absent a warrant, consent, or other exigent circumstances, law enforcement officers act unreasonably and thus unconstitutionally when they enter a commercial property to conduct a search for contraband or evidence of a crime."[172] Law enforcement officers executed "Operation Retro-Fit," a preplanned S.W.A.T. team raid of Club Retro, a nightclub in Alexandria, Louisiana.[173] The government claimed (1) that the police "had the same right to enter the club as any other patron," or (2) that the police "conducted a permissible administrative inspection."[174] The Fifth Circuit concluded that neither theory rendered the search reasonable under the Fourth Amendment.[175]

The Fifth Circuit observed that police may accept an establishment's public invitation to enter the establishment.[176] However, the entry in this case "far exceeded" the scope of Club Retro's public invitation.[177] The court noted that the police officers did not enter as members of the public; they entered with guns drawn on a preplanned S.W.A.T. raid.[178] In searching the club, its attic, an apartment, and all of the people on the premises, the police lacked any particularized suspicion or probable cause.[179] To hold otherwise, the Fifth Circuit stated, "would be an invitation for S.W.A.T. team raids by law enforcement officers of any business that is open to the public and would severely undermine the *Fourth*

166. *See* State v. Daugherty, 931 S.W.2d 268, 273 (Tex. Crim. App. 1996).
167. 303 S.W.2d 863, 875-76 (Tex. App.—Fort Worth 2009, pet. ref'd).
168. *Id.*
169. Bishop v. State, 308 S.W.3d 15, 18-19 (Tex. App.—San Antonio 2009, pet. ref'd).
170. 568 F.3d 181, 189 (5th Cir. 2009).
171. *Id.* at 195 (citing New York v. Burger, 482 U.S. 691, 699 (1987)).
172. *Id.* (citing Donovan v. Dewey, 452 U.S. 594, 598 n.6 (1981)).
173. *Id.* at 189.
174. *Id.* at 195.
175. *Id.*
176. *Id.* at 196.
177. *Id.*
178. *Id.*
179. *Id.* at 196-97

Amendment protections afforded to owners of commercial premises."[180]

The Fifth Circuit likewise declined to accept the second justification for the search—that it was an administrative inspection.[181] Although inspections of commercial premises may be permissible under Louisiana state law, the "scope and manner" of the raid in this case was not permitted.[182] The Fifth Circuit noted that any other conclusion would allow administrative inspections to "swallow the Fourth Amendment's warrant requirement for searches of private property."[183]

United States v. Ward

In *United States v. Ward*, the United States Court of Appeals for the Fifth Circuit considered whether a prison escapee "enjoyed a Fourth Amendment right to privacy that was violated by a warrantless search of his motel room."[184] Ward was mistakenly released from federal custody after receiving a ten-year prison sentence. Police tracked him to a motel. After confirming that Ward was registered as a guest, police obtained the key to his room from the motel clerk. Officers searched his room and found contraband. Ward, who was later apprehended, moved to suppress the evidence found in his motel room. The district court denied the motion.[185]

The Fifth Circuit noted that a prisoner does not have an expectation of privacy in a prison cell.[186] The Fourth Amendment, therefore, does not restrict searches and seizures of prison cells.[187] Extending the United States Supreme Court's holding in *Hudson v. Palmer*, the Fifth Circuit concluded that "the balance of interests weighs against finding a constitutionally protected reasonable expectation of privacy."[188] The Fifth Circuit noted that the Supreme Court has held that probationers and parolees have diminished expectations of privacy.[189] An escapee should not be rewarded with greater rights than those who are lawfully on parole or probation, reasoned the court.[190] The Fifth Circuit stated that it was "important" that the police searched the room registered to Ward.[191] Furthermore, the Fifth Circuit cautioned that "in recapturing escaped prisoners, law enforcement may well encounter the hurdles of the Fourth

180. *Id.* at 197.
181. *Id.*
182. *Id.*
183. *Id.* at 201.
184. 561 F.3d 414, 415 (5th Cir. 2009).
185. *Id.* at 415-16.
186. *Id.* at 417 (citing Hudson v. Palmer, 468 U.S. 517, 525-26 (1984)).
187. *Id.*
188. *Id.*
189. *Id.* at 419 (citing United States v. Knights, 534 U.S. 112 (2001) (upholding search of a probationer's apartment on probable cause but without a warrant); Samson v. California, 547 U.S. 843, 846 (2006) (upholding search of a parolee without a warrant and reasonable suspicion)).
190. *Id.*
191. *Id.* at 420.

Amendment rights of third parties."[192]

Though the United States Supreme Court has not addressed this issue, the Fifth Circuit's extension of Supreme Court precedent is solid.[193] It would be paradoxical to hold that an escapee has a privacy interest superior to a probationer or a parolee.[194] The Fifth Circuit also does well to caution law enforcement that while an escapee cannot invoke the Fourth Amendment to suppress a warrantless search, it must be aware of third parties' Fourth Amendment rights.[195]

Keehn v. State

In *Keehn v. State*, the Texas Court of Criminal Appeals considered whether the automobile exception to the warrant requirement applies to vehicles parked in driveways of residences.[196] The automobile exception permits police to "conduct a warrantless search of a vehicle if it is readily mobile and there is probable cause to believe that it contains contraband."[197] Two justifications exist for the automobile exception: (1) an exigency exists because of the ready mobility of automobiles, and (2) there is a reduced expectation of privacy in vehicles.[198]

A police officer investigating a theft looked into the window of a van parked in front of Keehn's house. The van contained a propane tank, which appeared to the officer to contain anhydrous ammonia, a factor in the production of methamphetamine. The officer called a drug task force officer to assist him. Police entered the van and seized the tank. The contents of the tank tested positive as anhydrous ammonia.[199]

Keehn argued that the automobile exception did not apply because the vehicle was in his driveway. He encouraged the court of criminal appeals to adopt a narrow reading of the automobile exception based on the following excerpt from the United States Supreme Court's opinion in *California v. Carney*: "When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception come into play."[200] The court of criminal appeals declined the invitation, noting that *Carney* involved the search of a recreational vehicle parked in a public place in an urban center.[201] The court of criminal appeals explained that "*Carney*'s reference to 'a place not regularly used for residential purposes' in no way stands as a per se bar on the application of the automobile exception to a vehicle parked in

192. *Id.*
193. *See id.* at 417.
194. *See id.* at 419.
195. *See id.* at 420.
196. 279 S.W.3d 330, 334-35 (Tex. Crim. App. 2009).
197. *Id.* at 335 (citing California v. Carney, 471 U.S. 386, 393 (1985)).
198. *Id.*
199. *Id.* at 332.
200. *Id.* at 335 (quoting *Carney*, 471 U.S. at 392-93).
201. *Id.*

the driveway of a private residence."[202] The van qualified as an automobile; therefore, the court of criminal appeals concluded that the automobile exception rendered the search lawful.[203]

The holding in *Keehn* is a logical application of *Carney*. In *Carney*, the Supreme Court considered that "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."[204] Here, Keehn could not claim that an objective observer would conclude that the van was being used as a residence.[205]

Baldwin v. State

In *Baldwin v. State*, the Texas Court of Criminal Appeals considered whether an officer, after asking a handcuffed suspect where his identification was, exceeded his authority by reaching into the suspect's pocket to get it.[206] In *Baldwin*, an officer detained Baldwin on less than probable cause. The officer handcuffed him for officer safety and asked him where his identification was. Baldwin told the officer it was in his pocket. The deputy found Baldwin's wallet and removed his driver's license. The wallet also contained a small baggie containing cocaine.[207]

An investigative detention, while allowing for a pat-down for weapons, does not permit police to search a suspect.[208] The court of criminal appeals observed that while the Fourth Amendment permits state laws that require a suspect to identify himself or herself to police during a detention, police may not automatically search a suspect's person to obtain his or her identification.[209] The court of criminal appeals concluded that when the officer asked Baldwin where his identification was, Baldwin's response did not constitute consent to search his person, but merely an answer to the question posed.[210] Therefore, the officer exceeded his authority.[211]

The holding of the court of criminal appeals in *Baldwin* was consistent with the United States Supreme Court's Fourth Amendment jurisprudence.[212] Perhaps the most important part of the holding is that Baldwin's act of answering the officer's query about the location of his identification did not constitute consent for the officer to search him for it.[213]

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202. *Id.* at 336.
203. *Id.*
204. *Carney*, 471 U.S. at 393.
205. *See Keehn*, 279 S.W.3d at 336.
206. 278 S.W.3d 367, 369 (Tex. Crim. App. 2009).
207. *See id.* at 370-71.
208. *See id.* at 371-72.
209. *Id.* at 372.
210. *Id.*
211. *Id.* at 369.
212. *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (limiting the "plain-feel" doctrine as applied to *Terry* stops); Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 186-87 (2004) (upholding the constitutionality of a state statute requiring a detainee to identify himself during a *Terry* stop).
213. *See Baldwin*, 278 S.W.3d at 372.

C. ARTICLE 38.23—TEXAS'S EXCLUSIONARY RULE

The Texas Code of Criminal Procedure provides its own exclusionary rule, article 38.23.[214] Article 38.23(a) provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.[215]

State v. Iduarte

In *State v. Iduarte*, the Texas Court of Criminal Appeals considered article 38.23.[216] It observed that while the exclusionary rule protects individuals from evidence that was obtained unlawfully, it does not "provide limitless protection to one who chooses to react illegally to an unlawful act by a state agent."[217]

Police made an unlawful entry into Iduarte's residence. Once the police were inside the residence, Iduarte raised a gun, either to shoot himself or an officer. An officer then shot Iduarte. Iduarte was charged with aggravated assault on a peace officer. Before trial, Iduarte moved to suppress the evidence of the alleged assault on the police officer. The trial judge granted Iduarte's motion.[218] The Fort Worth Court of Appeals reversed, finding that the entry of the residence was legal.[219] The court of criminal appeals granted discretionary review to determine whether suppression of evidence of an offense occurring after an unlawful search is required.[220]

The court of criminal appeals affirmed the decision of the Fort Worth Court of Appeals, but it applied a different analysis.[221] The court of criminal appeals explained that the evidence of the assault did not exist before the unlawful entry because the assault had not yet occurred.[222] If Iduarte did point the gun at the police officer, doing so constituted a discrete criminal offense.[223] The evidence of the assault was therefore "not causally connected" to the unlawful entry of Iduarte's residence.[224]

The reasoning of the court of criminal appeals is sound. While the assault would not have happened if the officer had not unlawfully entered Iduarte's residence, the entry itself did not cause the assault on the police

214. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005).
215. *Id.*
216. 268 S.W.3d 544, 549-51 (Tex. Crim. App. 2008).
217. *Id.* at 551.
218. *Id.* at 548.
219. State v. Iduarte, 232 S.W.3d 133, 140 (Tex. App.—Fort Worth 2007, pet. granted).
220. *Iduarte*, 268 S.W.3d at 548-49.
221. *See id.* at 551-52.
222. *Id.* at 551.
223. *Id.*
224. *Id.*

officer.[225] The court of criminal appeals refused to extend exclusion to an individual who reacts unlawfully to police action, even if that action itself is unlawful.[226]

D. Searches or Seizures Pursuant to Warrant

Herring v. United States

In *Arizona v. Evans*, the United States Supreme Court applied the good-faith exception to a warrantless arrest made by police who reasonably relied on mistaken warrant information in a court's database.[227] The Court held that a mistake made by a judicial employee does not trigger the exclusionary rule.[228] Although *Evans* did not decide whether evidence obtained as a result of an error by *police* personnel should be excluded, the Court addressed that question in *Herring v. United States*.[229]

Herring was arrested in Coffee County, Alabama on a warrant from neighboring Dale County. Police found drugs and a pistol in his vehicle during a search incident to arrest. Within minutes, the Dale County warrant clerk notified the Coffee County warrant clerk that the warrant had actually been recalled. By the time this information reached the arresting officers, Herring had been arrested, and the evidence had been found.[230]

Herring moved to suppress the evidence, claiming that his arrest was illegal because there was no valid warrant. The district court denied the motion, because the arresting officers acted in good-faith reliance upon the purported warrant from Dale County.[231] The Eleventh Circuit upheld the district court's ruling.[232]

The Supreme Court noted that the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands."[233] It pointed out that the exclusionary rule is "judicially created" and that it is "designed to safeguard Fourth Amendment rights generally through its deterrent effect."[234] The Court further observed that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.'"[235] The benefits of the deterrence achieved must outweigh the costs imposed by applying the exclusionary rule.[236] The Court remarked that the "extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."[237]

225. *See id.*
226. *See id.*
227. 514 U.S. 1, 16 (1995).
228. *Id.*
229. 129 S. Ct. 695, 701 (2009).
230. *Id.* at 698.
231. *Id.* at 699.
232. *Id.*
233. *Id.* (quoting *Evans*, 514 U.S. at 10).
234. *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
235. *Id.* at 700 (quoting United States v. Leon, 468 U.S. 897, 909 (1984)).
236. *Id.*
237. *Id.* at 701.

The Court ultimately set out a two-part rule: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[238] Applying the rule to the facts of the case, the Court concluded that when police mistakes occur due to negligence, any marginal deterrence achieved by applying the exclusionary rule would not be warranted.[239] However, the Court stated that if police are reckless in keeping records of valid warrants or knowingly falsify those records to build a predicate for false arrests, the exclusionary rule would apply.[240]

Dissenting, Justice Ginsburg noted that the majority's argument that negligence cannot be effectively deterred contradicts the fundamentals of tort law.[241] In tort law, of course, liability for negligence exists, and, in theory, deters individuals from acting negligently. Justice Ginsburg cautioned that the Court's holding in *Herring* could have major adverse consequences.[242] She noted, "Electronic databases form the nervous system of contemporary criminal justice operations."[243] Among the databases maintained by the government are the National Crime Information Center and terrorist watchlists.[244] Without an incentive against the negligent maintenance of current and future law enforcement databases, individual liberty could be threatened.[245]

How the Fifth Circuit and the Texas courts apply *Herring* remains to be seen. The Supreme Court's requirement that conduct be "sufficiently culpable that such deterrence is worth the price paid by the justice system" suggests that Fourth Amendment jurisprudence is moving toward an approach that balances the costs of police misconduct against letting a guilty defendant go free.[246]

IV. CONCLUSION

The decisions during the Survey period present significant developments in the law of confessions, searches, and seizures. The Texas Court of Criminal Appeals analyzes these issues mostly under federal constitutional law, except in cases where state law provides differently. Therefore, with the exception of *Corley*, the recent decisions of the United States Supreme Court will have a significant impact on Texas law.

238. *Id.* at 702.
239. *Id.* at 704.
240. *Id.* at 703.
241. *Id.* at 708 (Ginsburg, J., dissenting).
242. *Id.* at 708-09.
243. *Id.* at 708.
244. *Id.*
245. *Id.* at 709.
246. *See id.* at 702 (majority opinion).