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Criminal Procedure: Confessions, Searches, and Seizures

D. Kaylyn Betts

Michael E. Keasler

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*D. Kaylyn Betts**
*Michael E. Keasler***

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I. INTRODUCTION

THE most significant changes to established confession, search, and seizure jurisprudence were procedural in nature this year. Texas courts were especially concerned with proper preservation of jury instruction error and clarified the prerequisites for obtaining such instructions. Courts continued to refine and apply well-settled substantive law. In doing so, they typically analyzed issues under the United States Constitution with an occasional nod to Texas law, especially when statutory provisions were implicated. Generally, the courts refused to address a state constitutional claim if the defendant did not argue that the rights and protections under the state constitution differed from those under the Federal Constitution.¹ Although error may affect constitutional rights, a defendant must sufficiently object when the trial judge admits

* D. Kaylyn Betts is the law clerk for Judge Michael E. Keasler.

** Michael E. Keasler is a judge on the Court of Criminal Appeals in Austin, Texas.

1. *Segundo v. State*, 270 S.W.3d 79, 96 n.59 (Tex. Crim. App. 2008).

the evidence or the defendant risks forfeiting the error.²

II. CONFESSIONS

The Fifth Amendment to the United States Constitution guarantees an individual's privilege against self-incrimination.³ To protect that privilege from official coercion, courts and legislatures have developed procedural safeguards that must be followed.⁴ But even when these safeguards are not followed, any error in admitting the confession may be deemed harmless on appeal.⁵

A. VOLUNTARINESS

"A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion."⁶ An accused's statement may be involuntary under: (1) Texas's general voluntariness section in Article 38.22 of the Texas Code of Criminal Procedure,⁷ (2) *Miranda v. Arizona*⁸ as expanded in Article 38.22,⁹ or (3) the Federal Due Process Clause.¹⁰ Article 38.22 provides greater protection to the accused than the United States Constitution because Texas state law includes a broader definition of "involuntary" than federal law.¹¹ To make a claim under the Due Process Clause or the *Miranda* doctrine, a defendant must show that the confession or waiver resulted from police overreaching.¹² In contrast, to make a claim under Article 38.22 a defendant may show that the statement resulted from a defendant's subjective mental state, caused by such things as hallucinations, illness, or medications—independent of any police coercion.¹³

The appropriate jury instruction in a given case depends on which theory of involuntariness a defendant advances.¹⁴ There are three types of jury instructions in Texas addressing the taking of confessions: "(1) a 'general' Article 38.22, § 6 voluntariness instruction; (2) a 'general' Article 38.22, § 7 warnings instruction (involving warnings given under § 2 and § 3); and (3) a 'specific' Article 38.23(a) exclusionary-rule instruction."¹⁵ A state statutory claim of involuntariness, based on a defen-

2. Rothstein v. State, 267 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

3. U.S. CONST. amend. V.

4. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

5. E.g., *Williams v. State*, 257 S.W.3d 426, 436-37 (Tex. App.—Austin 2008, pet. ref'd).

6. TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2009).

7. *Id.* art. 38.22, § 6.

8. *Miranda*, 384 U.S. at 436.

9. Art. 38.22, §§ 2-3.

10. *Oursbourn v. State*, 259 S.W.3d 159, 169 (Tex. Crim. App. 2008).

11. *Id.* at 173.

12. *Id.* at 169-70.

13. *Id.* at 172.

14. *Id.* at 169.

15. *Id.* at 173.

dant's subjective mental state, warrants only a general Article 38.22 voluntariness instruction.¹⁶ But Due Process and *Miranda* claims based on police coercion may call for both general and specific voluntariness instructions.¹⁷

Both the Texas Court of Criminal Appeals and the Fifth Circuit recently clarified a trial judge's duty to instruct the jury, *sua sponte*, on the voluntariness of a defendant's statement.¹⁸ In *Oursbourn*, the Court of Criminal Appeals held that a trial judge must give a general voluntariness instruction anytime the evidence raises an issue of voluntariness.¹⁹ But if a defendant fails to request an appropriate instruction, any error committed by the trial judge in neglecting to include the instruction is reviewed under *Almanza's*²⁰ "egregious harm" standard.²¹ In contrast, the Fifth Circuit held that in federal prosecutions the evidence must not only raise an issue of voluntariness, but that the issue must be clearly raised before a trial judge has a duty to instruct the jury *sua sponte*.²² When the trial judge errs in failing to give the jury an unrequested instruction, federal courts review the error under the plain error standard.²³

B. CUSTODIAL INTERROGATION

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."²⁴ Texas courts continue to interpret the term "custodial interrogation" in Article 38.22 as consistent with its meaning under federal law.²⁵ The *Miranda* doctrine and Article 38.22 require that law enforcement officials give a suspect certain warnings before subjecting the suspect to custodial interrogation.²⁶

A person is "in custody" when a reasonable person, under the circumstances, would feel that "his freedom of movement was restrained to the degree associated with a formal arrest."²⁷ Merely questioning a suspect at a police station or placing handcuffs on the suspect's wrists does not mean that the suspect is "in custody" for purposes of *Miranda* and Article 38.22.²⁸ The Fourteenth Court of Appeals in Houston held that a suspect was not in custody, despite being handcuffed and taken to a police station

16. *Id.* at 174.

17. *Id.*

18. *Id.* at 165; *see also* United States v. Guanespen-Portillo, 514 F.3d 393, 405 (5th Cir. 2008).

19. *Oursbourn*, 259 S.W.3d at 165.

20. *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

21. *Oursbourn*, 259 S.W.3d at 182.

22. *Guanespen-Portillo*, 514 F.3d at 405.

23. *Id.*

24. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

25. *E.g.*, *Cedillos v. State*, 250 S.W.3d 145, 151 (Tex. App.—Eastland 2008, no pet. h.).

26. *See Miranda*, 384 U.S. at 467-73; TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a) (Vernon 2009).

27. *Turner v. State*, 252 S.W.3d 571, 576 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

28. *Id.* at 580; *Cedillos*, 250 S.W.3d at 152.

thirty miles away, because he voluntarily left with the officers, was told that he was being handcuffed only for their safety, and was told that he was not under arrest.²⁹

To invoke Fifth Amendment protections, a suspect must unambiguously assert the right to silence or counsel.³⁰ "Ambiguity exists when the suspect's statement is subject to more than one reasonable interpretation under the circumstances."³¹ If a suspect makes an ambiguous request, law enforcement officials may, but are not required to, clarify the suspect's desire.³² Merely referring to an attorney, for example, by stating "without a lawyer," does not require police to cease questioning the suspect because the statement is ambiguous.³³ The Austin Court of Appeals held that the defendant's seemingly clear statement that he "want[ed] to terminate everything right now" was ambiguous after considering the circumstances, which were that just moments before making the statement the suspect said "[y]ou guys need to talk to me, arrest me or whatever."³⁴ So it was reasonable for the officers to attempt to clarify whether the suspect wanted to invoke his right to silence.³⁵

After asserting a Fifth Amendment right, questioning can constitutionally resume if the suspect reinitiates communication with the police.³⁶ A suspect reinitiates communication by expressing a desire to "open up a more generalized discussion relating directly or indirectly to the investigation."³⁷ Reinitiation does not occur when a suspect simply responds to further police interrogation.³⁸ The San Antonio Court of Appeals held that a defendant reinitiated communication by saying, "So, I mean, Jay ordered this hit. I mean, what is . . .," because the statement reflected a desire to discuss the investigation.³⁹

A suspect's confession resulting from custodial interrogation is not admissible unless *Miranda* warnings were received and waived.⁴⁰ An unsettled issue is whether a defendant's silence, pre-arrest and pre-*Miranda* warnings are admissible at trial as substantive evidence if the defendant does not testify. Neither the Supreme Court of the United States nor the Texas Court of Criminal Appeals have decided this precise issue.⁴¹ And the federal circuits are split.⁴² The two Texas courts of appeals that were

29. *Turner*, 252 S.W.3d at 579-80.

30. *Martinez v. State*, 275 S.W.3d 29, 34 (Tex. App.—San Antonio 2008, pet. dism'd); see also *Williams v. State*, 257 S.W.3d 426, 442 (Tex. App.—Austin 2008, pet. ref'd).

31. *Williams*, 257 S.W.3d at 433.

32. *Id.* at 432-33.

33. *Martinez*, 275 S.W.3d at 35.

34. *Williams*, 257 S.W.3d at 434.

35. *Id.* at 433-34.

36. *Martinez*, 275 S.W.3d at 34.

37. *Id.* at 35 (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983)).

38. *Pecina v. State*, 268 S.W.3d 564, 567 (Tex. Crim. App. 2008).

39. *Martinez*, 275 S.W.3d at 35-36.

40. *United States v. Martinez-Larraga*, 517 F.3d 258, 266 (5th Cir. 2008).

41. *Hennessy v. State*, 268 S.W.3d 153, 160-61 (Tex. App.—Waco 2008, pet. ref'd).

42. *Id.* at 161 n.1 (citing *State v. Lee*, 15 S.W.3d 921, 925 n.5 (Tex. Crim. App. 2000)).

faced with the issue this year declined to decide it.⁴³ The Waco Court of Appeals disposed of its case by finding that any potential error was harmless.⁴⁴ And, in an unpublished opinion, the Dallas Court of Appeals disposed of its case by concluding that the trial court did not abuse its discretion in denying a motion for mistrial.⁴⁵

C. JUVENILES

A juvenile's statement may be inadmissible under Section 51.095 of the Texas Family Code because of noncompliance with those special requirements.⁴⁶ A suppression order takes a different route on appeal in juvenile cases than it does in adult cases. Unlike adult criminal matters, where the court of last resort is the Texas Court of Criminal Appeals,⁴⁷ the court of last resort for juvenile criminal matters is the Supreme Court of Texas.⁴⁸ In 2003, the Texas Legislature adopted a statute that allows the State, for the first time, to appeal an order suppressing evidence in the case of a violent or habitual juvenile offender if: "(A) jeopardy has not attached in the case; (B) the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay; and (C) the evidence, confession, or admission is of substantial importance in the case."⁴⁹ In *In re H.V.*, the Supreme Court of Texas interpreted that statute for the first time.⁵⁰ The court held that despite the new statute, it may review the suppression order only if it falls within one of its other general jurisdictional statutes.⁵¹ The court reasoned that its jurisdiction over interlocutory appeals is limited to those specifically granted by statute and the new statute does not expressly grant such jurisdiction to the Supreme Court of Texas.⁵²

Many of the same requirements in Article 38.22 of the Texas Code of Criminal Procedure apply to juveniles under Section 51.095 of the Texas Family Code. For example, the same warnings are read to both juveniles and adults.⁵³ Extra protection is required before questioning a juvenile because a magistrate must read the rights and the juvenile's statement must be signed in the presence of a magistrate outside the presence of police and prosecutors.⁵⁴ The statute does not require that a juvenile understand that it is a magistrate who is reading the warnings, as opposed to

43. *Id.* at 161; see also *Millson v. State*, No. 05-06-01378-CR, 2008 WL 82242, at * 7 (Tex. App.—Dallas Jan. 9, 2008, pet. ref'd) (not designated for publication).

44. *Hennessy*, 268 S.W.3d at 162.

45. *Millson*, 2008 WL 82242, at *7.

46. TEX. FAM. CODE ANN. § 51.095 (Vernon 2002 & Supp. 2008).

47. TEX. CONST. art. V, § 5(a).

48. TEX. FAM. CODE ANN. § 56.01(a) (Vernon 2001).

49. § 56.03(b)(5) (Vernon Supp. 2008); see also *In re H.V.*, 252 S.W.3d 319, 322 (Tex. 2008).

50. *In re H.V.*, 252 S.W.3d at 320.

51. *Id.*

52. *Id.* at 321-22.

53. CODE CRIM. PROC. ANN. art. 38.22(b) (Vernon 2001); see also TEX. FAM. CODE ANN. § 51.095(a)(1) (Vernon 2002 & Supp. 2009).

54. TEX. FAM. CODE ANN. § 51.095(a)(1)(A)(B)(i).

a police officer or anyone else; it only requires that the person reading the warnings is a magistrate.⁵⁵ A juvenile must knowingly, intelligently, and voluntarily waive the rights before a confession is admissible,⁵⁶ but there is no requirement that each right be waived individually.⁵⁷

A child's age is relevant to voluntariness,⁵⁸ custody,⁵⁹ and waiver.⁶⁰ But it is unclear if age is relevant to whether juveniles have invoked their rights.⁶¹ The Supreme Court of Texas did not decide this question in *In re H.V.* because it held that under either standard, a child's statement that he "wanted his mother to ask for an attorney" unambiguously invoked the right to counsel.⁶²

D. SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment right to counsel attaches when "adversary judicial criminal proceedings" begin.⁶³ Adversary judicial proceedings begin when a defendant makes an "initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction."⁶⁴ The Supreme Court of the United States recently applied this constitutional requirement specifically to Texas procedural law by holding that an Article 15.17 hearing marks the beginning of adversary judicial proceedings and, therefore, the protections of the Sixth Amendment.⁶⁵ This is so even if no prosecutor is aware of or involved in the hearing.⁶⁶ Article 15.17 requires that an arrestee be brought before a neutral and detached magistrate without unnecessary delay, but no later than forty-eight hours after being arrested.⁶⁷ At the hearing, the magistrate must inform the arrestee of the accusations, give statutory warnings, set bail, and appoint counsel if the magistrate is so authorized.⁶⁸ A suspect's Sixth Amendment right to counsel attaches at this time because "the State's relationship with the defendant has become solidly adversarial."⁶⁹

55. *In re J.L.*, No. 10-06-00246-CV, 2007 WL 3298920, at *3 (Tex. App.—Waco Nov. 7, 2007, no pet.) (mem. op., not designated for publication).

56. § 51.095(a)(1)(C).

57. *In re J.L.*, 2007 WL 3298920, at *5.

58. *Id.* at *2.

59. *In re J.A.B.*, 281 S.W.3d 62, 59-66 (Tex. App.—El Paso 2008, no pet.).

60. *In re H.V.*, 252 S.W.3d 319, 326 (Tex. 2008) (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

61. *Id.*

62. *Id.* at 326-27.

63. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)).

64. *Id.* at 2592.

65. *Id.* at 2583-84.

66. *Id.* at 2588.

67. TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon 2009).

68. *Id.*

69. *Rothgery*, 128 S. Ct. at 2586.

III. SEARCHES AND SEIZURES

The touchstone of the Fourth Amendment is reasonableness.⁷⁰ During this Survey period, courts continued to balance an individual's privacy interests against the government's law enforcement interests when analyzing search and seizure issues.⁷¹

A. DEFINITIONS

Both the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution prohibit "unreasonable searches and seizures."⁷² To invoke the protections of these provisions, an individual must make a threshold showing that the government conducted a search or seizure within the constitutional definition.⁷³ An intrusion rises to the level of a search or seizure only if an individual has a reasonable expectation of privacy in the place invaded.⁷⁴

More than ten years ago, in *State v. Hardy*,⁷⁵ the Texas Court of Criminal Appeals held that a patient does not have a reasonable expectation of privacy in the results of a blood-alcohol test taken by hospital personnel for medical purposes after a traffic accident.⁷⁶ So, the defendant's Fourth Amendment rights were not violated when the State later obtained the records through a grand jury subpoena.⁷⁷ Five years later, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA), which limits a healthcare provider's ability to disclose a patient's medical records to others.⁷⁸ Three Texas Courts of Appeal recently rejected the argument that HIPAA preempted the holding in *Hardy* by recognizing a reasonable privacy interest in medical records.⁷⁹ The Austin Court of Appeals concluded that the narrow holding in *Hardy* did not conflict with HIPAA because the court in *Hardy* addressed only the narrow issue of whether an individual had a reasonable expectation of privacy in blood-alcohol test results—not whether an individual had a reasonable expectation of privacy in medical records generally.⁸⁰ Additionally, HIPAA does not conflict with *Hardy* because HIPAA allows healthcare providers to disclose medical records when the grand jury issues a

70. *Segundo v. State*, 270 S.W.3d 79, 97 n.68 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977)).

71. *See, e.g., Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008); *see also Herring v. United States*, 129 S. Ct. 695, 700 (2009).

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

73. *See Kirsch v. State*, 276 S.W.3d 579, 587-89 (Tex. App.—Houston [1st Dist.] 2008, no pet. h.).

74. *Davidson v. State*, 249 S.W.3d 709, 725 (Tex. App.—Austin 2008, pet. ref'd).

75. 963 S.W.2d 516, 527 (Tex. Crim. App. 1997).

76. *See Kennemur v. State*, 280 S.W.3d 305, 311-12 (Tex. App.—Amarillo 2008, pet. ref'd).

77. *Hardy*, 963 S.W.2d at 527.

78. *Kirsch*, 276 S.W.3d at 586.

79. *Id.* at *7; *Kennemur*, 280 S.W.3d at 312; *Murray v. State*, 245 S.W.3d 37, 41-42 (Tex. App.—Austin 2007, pet. ref'd).

80. *Murray*, 245 S.W.3d at 41.

subpoena.⁸¹

B. WARRANTLESS ARRESTS, STOPS, OR INQUIRIES

It is well established that there are three types of interactions between citizens and law enforcement officials: (1) encounters, (2) investigative detentions, and (3) arrests. It is only the two latter categories that invoke constitutional scrutiny.⁸²

1. Encounters

A consensual encounter does not implicate the Fourth Amendment.⁸³ A police officer may approach citizens on the street, in their car, at their home door, or even at their motel door without having any level of suspicion.⁸⁴ An encounter with police may be inconvenient or embarrassing, but the interaction does not become an investigative detention unless "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."⁸⁵

Courts apply a totality of the circumstances approach, where no single factor is dispositive, in deciding where to draw the line between an encounter and a detention.⁸⁶ In *Garcia-Cantu*, the Texas Court of Criminal Appeals considered the following factors relevant:

- The officer's use of language, tone of voice, and demeanor;⁸⁷
- The location and time of day;⁸⁸
- The officer's use of a spotlight, flashlight, and emergency lights;⁸⁹
- The patrol car's position and whether it blocked the citizen's exit;⁹⁰ and
- The citizen's subjective feelings.⁹¹

After considering these factors, the court held that a reasonable person would not have "felt free to leave or terminate [the] encounter."⁹²

2. Detentions

Unlike a consensual encounter, which does not require the police to have any suspicion, an officer must have a reasonable and articulable suspicion that a person is involved in criminal activity to justify a deten-

81. *Id.*

82. See *State v. Garcia-Cantu*, 253 S.W.3d 236, 242 (Tex. Crim. App. 2008).

83. *Id.*

84. *Id.* at 243; *Bouyer v. State*, 264 S.W.3d 265, 270 (Tex. App.—San Antonio 2008, no pet. h.) (mem. op.).

85. *Garcia-Cantu*, 253 S.W.3d at 242-43 (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)).

86. See *id.*

87. *Id.* at 244-45, 248.

88. *Id.* at 244-45.

89. *Id.* at 245, 247-49.

90. *Id.* at 246, 249.

91. *Id.* at 249.

92. *Id.*

tion.⁹³ Although the State does not have to prove that a defendant actually violated the law,⁹⁴ the suspicion must be related to a violation of the law.⁹⁵ An officer's reasonable belief that a defendant is violating the law cannot be based on the officer's misunderstanding that a certain activity is against the law.⁹⁶ For example, an officer's mistaken belief that crossing a lane line was a violation of the traffic code did not justify stopping the driver when the law prohibits only crossings that are dangerous.⁹⁷ Additionally, an officer's suspicion must point to a particular person; the time of day and level of criminal activity in an area alone is not specific enough to establish reasonable suspicion that a certain individual is engaging in or about to engage in criminal activity.⁹⁸

A frequently litigated issue is whether an informant's tip in a given case creates reasonable suspicion. A completely anonymous tip, on its own, is not sufficient to establish reasonable suspicion; it must be corroborated.⁹⁹ On the other hand, a tip personally given to an officer by a witness who has no other involvement in the crime establishes reasonable suspicion without corroboration.¹⁰⁰ In between these two scenarios, the Fifth Circuit noted that the reliability of an otherwise anonymous tip increases if the police can trace the phone number to the informant because the informant is then exposed to liability for false complaints.¹⁰¹ The court rejected the defendant's argument that the reliability of a tip does not increase unless the informant is aware that the call can be traced.¹⁰² The court reasoned that regardless of whether the government proved that the informant actually knew his call could be traced, caller identification is so widespread that the informant must have known that he could be subject to liability for giving false information.¹⁰³ The Fort Worth Court of Appeals, however, found that the reliability of a tip did not increase when police may have learned only the name of the person registered to the phone number—not the name of the actual informant.¹⁰⁴ If the informant voluntarily gives his name and describes himself and the suspect, then the tip may also be reliable even if the informant does not meet with police face-to-face.¹⁰⁵

A detention justified at its inception may become invalid if its scope is

93. *Id.* at 238.

94. *Hicks v. State*, 255 S.W.3d 351, 354 (Tex. App.—Texarkana 2008, no pet. h.).

95. *State v. Griffey*, 241 S.W.3d 700, 705 n.4 (Tex. App.—Austin 2007, pet. ref'd).

96. *Fowler v. State*, 266 S.W.3d 498, 504 (Tex. App.—Fort Worth 2008, pet. dism'd).

97. *Id.* at 503-04.

98. *Hudson v. State*, 247 S.W.3d 780, 786-87 (Tex. App.—Amarillo 2008, no pet. h.).

99. *Swaffar v. State*, 258 S.W.3d 254, 259-60 (Tex. App.—Fort Worth 2008, pet. ref'd).

100. *Griffey*, 241 S.W.3d at 704-05; e.g. *Martinez v. State*, 261 S.W.3d 773, 776 (Tex. App.—Amarillo 2008, pet. ref'd).

101. *United States v. Casper*, 536 F.3d 409, 415 (5th Cir. 2008).

102. *Id.* at 415 n.5.

103. *Id.*

104. *Swaffar*, 258 S.W.3d at 259-60.

105. *United States v. Vickers*, 540 F.3d 356, 361 (5th Cir. 2008).

unreasonable.¹⁰⁶ The duration of a stop may make the detention unreasonable.¹⁰⁷ There are no rigid time limitations, and the reasonableness of the duration depends on whether the officers were diligently pursuing their suspicions.¹⁰⁸ The Texarkana Court of Appeals followed the Texas Court of Criminal Appeals's lead when holding that a traffic stop that lasted twenty minutes while officers waited for a drug dog to arrive was reasonable because the officers did not delay in attempting to secure a dog.¹⁰⁹ The Fort Worth Court of Appeals held that, while detaining a driver for twenty-seven minutes "approach[ed] the edge of reasonableness," it was nevertheless reasonable.¹¹⁰ In that case, the delay was caused by waiting for a more experienced officer, who could perform the investigation faster, to arrive.¹¹¹ During the wait, the officer at the scene called the more experienced officer four times to see when she would arrive.¹¹²

3. Arrests

Unlike a detention, which requires only reasonable suspicion, under Texas statutory law, a warrantless arrest requires both probable cause and the application of a statutory exception to the warrant requirement.¹¹³ One of the exceptions allows an officer to arrest an individual for an offense that was committed in the officer's presence.¹¹⁴ The Texas Court of Criminal Appeals held that a trial judge's implicit findings that the defendant committed the offense of driving while intoxicated in the officer's presence was supported by the record.¹¹⁵ The case has a complicated procedural history, including a trip back to the Beaumont Court of Appeals because that court initially erred in assuming that a videotape supported the trial judge's findings when the tape was not included in the appellate record.¹¹⁶ The Court of Criminal Appeals reversed the court of appeals a second time because the court erred in requiring direct evidence of the defendant's performance on the field sobriety test.¹¹⁷ The court stated that a trial judge, just "like any [other] factfinder, [could] make reasonable inferences from the evidence."¹¹⁸

Officers outside their jurisdiction may arrest an individual without a warrant only if the individual commits a felony or breach of the peace in

106. *United States v. Escareno Sanchez*, 507 F.3d 877, 881 (5th Cir. 2007), *vacated*, 128 S. Ct. 2428 (2008); *United States v. Estrada*, 459 F.3d 627, 631 (5th Cir. 2006).

107. *Love v. State*, 252 S.W.3d 684, 687 (Tex. App.—Texarkana 2008, pet. ref'd).

108. *Id.*

109. *Id.* at 688; *see also* *Madden v. State*, 242 S.W.3d 504, 517 (Tex. Crim. App. 2007) (finding a twenty-five minute wait for a drug dog appropriate).

110. *Belcher v. State*, 244 S.W.3d 531, 541-42 (Tex. App.—Fort Worth 2007, no pet.).

111. *Id.* at 541.

112. *Id.*

113. *See* CODE CRIM. PROC. ANN. arts. 14.01-.04 (Vernon 2005 & Supp. 2008).

114. Art. 14.01(b).

115. *Amador v. State*, 275 S.W.3d 872, 879-80 (Tex. Crim. App. 2009).

116. *See Amador v. State*, 221 S.W.3d 666, 668-69 (Tex. Crim. App. 2007).

117. *Amador*, 275 S.W.3d at 879-80.

118. *Id.* at 878-79.

the officer's presence.¹¹⁹ The Amarillo Court of Appeals held that an officer who was outside of his jurisdiction could arrest a driver for driving while intoxicated even though the officer witnessed only a minor traffic violation because the officer's observations corroborated an informant's tip that the driver was driving recklessly and was possibly intoxicated.¹²⁰

Under federal law, a warrantless arrest for a crime committed in an officer's presence is justified by probable cause alone.¹²¹ In *Virginia v. Moore*, the Supreme Court of the United States considered whether the police officers' warrantless arrest, based on probable cause but prohibited by Virginia state law, violated the Fourth Amendment.¹²² Two police officers arrested Moore for driving with a suspended license, which was not an arrestable offense under Virginia law on the facts of this case.¹²³ Moore moved to suppress cocaine found during a search incident to arrest under the Fourth Amendment.¹²⁴ The Supreme Court of Virginia held that Moore's federal constitutional rights were violated because state law allowed the officers to issue only a citation and there is no exception to the warrant requirement for a search incident to a citation.¹²⁵ While the Supreme Court of the United States recognized that states are free to offer their citizens more protection under state law, it held that the Fourth Amendment requires only probable cause to arrest an individual when an officer observes a crime; a state law prohibiting the arrest has no effect.¹²⁶ To hold otherwise, the Court said, would cause federal constitutional rights to vary from state to state and destroy a bright-line standard.¹²⁷

C. WARRANTLESS SEARCHES

As a general rule, law enforcement officials must obtain a warrant before conducting a search.¹²⁸ But courts have "carved out numerous exceptions to the warrant requirement."¹²⁹ Some of the exceptions discussed by the courts lately—such as search incident to a lawful arrest, emergency doctrine, and inventory searches—are well established. Others, such as a search pursuant to the DNA statute, are newly created.

The search incident to a lawful arrest exception allows police to search an arrestee and the area "within his immediate control" without a warrant.¹³⁰

The Fifth Circuit undertook another case this year in which an officer

119. Art. 14.03(d).

120. *Martinez v. State*, 261 S.W.3d 773, 777-78 (Tex. App.—Amarillo 2008, pet. ref'd).

121. See *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008).

122. *Id.* at 1601.

123. *Id.* at 1601-02.

124. *Id.* at 1602.

125. *Id.*

126. *Id.* at 1607-08.

127. *Id.* at 1607.

128. *Segundo v. State*, 270 S.W.3d 79, 97 n.68 (Tex. Crim. App. 2008).

129. *Id.*

130. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

searched a driver's cell phone after an arrest.¹³¹ The court rejected the government's argument that the search was incident to arrest because the officers did not have probable cause to arrest the defendant.¹³² It also rejected the argument that the officers did not need probable cause because searching a cell phone is equivalent to a license check and the defendant consented to the search.¹³³ The court found that it was not objectively reasonable to understand the defendant's consent to search of the car to extend to the cell phone because it was placed on the roof of the vehicle immediately after the stop.¹³⁴ Additionally, the search was not equivalent to running a license check because, unlike a driver's license, a person has a reasonable expectation of privacy in the information contained in a cell phone.¹³⁵

Another exception frequently discussed during this Survey period was the emergency doctrine. Under this doctrine, police officers may conduct a warrantless search "if they are acting on a reasonable belief that doing so is immediately necessary 'to protect or preserve life or avoid serious injury.'"¹³⁶ In deciding whether an officer's belief is objectively reasonable, courts consider the facts and circumstances that the officer knew at the time of the search.¹³⁷ An officer's training and experience in similar situations may be considered when assessing whether the officer's inferences are objectively reasonable.¹³⁸

In *Pitonyak v. State*, the Austin Court of Appeals extended the emergency doctrine to justify an entry by a private citizen.¹³⁹ The court held that the victim's stepfather lawfully entered the defendant's apartment under the emergency doctrine after no one responded to repeated knocks on the door.¹⁴⁰ The victim had been missing for two days, she was last seen with the defendant, her car was parked outside the apartment, and the defendant lied about the last time that he saw the victim.¹⁴¹ The court held that all of these facts would lead a reasonable officer to believe that the victim was seriously injured or threatened inside the apartment.¹⁴²

Both the Fifth Circuit and the Texas Court of Criminal Appeals considered whether it was reasonable for officers to enter a residence when the

131. *United States v. Zavala*, 541 F.3d 562, 571 (5th Cir. 2008).

132. *Id.* at 568.

133. *Id.*

134. *Id.* at 576.

135. *Id.* at 577.

136. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *Laney v. State*, 117 S.W.3d 854, 859 (Tex. Crim. App. 2008)).

137. *Id.*

138. *Id.*

139. 253 S.W.3d 834, 850 (Tex. App.—Austin 2008, pet. ref'd) (citing *Miles v. State*, 241 S.W.3d 28, 36 (Tex. Crim. App. 2007)).

140. *Id.* at 852.

141. *Id.*

142. *Id.*

occupants failed to answer the door.¹⁴³ In *Shepherd*, the Court of Criminal Appeals held that it was reasonable for the officers to believe that entering the house was necessary to protect or preserve life.¹⁴⁴ In that case, the defendant's neighbors called 911 to report that the defendant's front door was open even though it was routinely closed.¹⁴⁵ When the police came to the defendant's house and called for him, no one responded.¹⁴⁶ Based on their experience in similar situations, the officers were concerned that a burglary had taken place and that the homeowners were hurt inside.¹⁴⁷

In contrast, the Fifth Circuit held that border patrol agents did not have a reasonable belief that suspected aliens were in need of assistance simply because they failed to answer the door.¹⁴⁸ Unlike in *Shepherd*, where the officers believed a victim of a recent burglary was inside,¹⁴⁹ the agents in *Troop* believed that the suspected aliens were fatigued after a long journey.¹⁵⁰ The signs of physical distress did not rise to the level required for immediate entry.¹⁵¹ Although citing the Supreme Court of the United States's case from 2006 that held that "an officer's subjective motivation is irrelevant," the court still found it noteworthy that none of the agents believed the occupants needed assistance until after the entry.¹⁵² And without any objective evidence of medical distress beyond mere fatigue, the occupants' failure to answer the door was not enough for the agents to enter constitutionally without a warrant.¹⁵³

An inventory search is another exception to the warrant requirement. An inventory search is proper if (1) an inventory policy exists and (2) the police followed the policy.¹⁵⁴ Although some federal circuit court cases have reached the opposite conclusion,¹⁵⁵ the Eastland Court of Appeals distinguished those cases and held that the inventory search exception does not apply when an officer neglects to follow the procedure of filling out a written inventory list.¹⁵⁶

The Texas Court of Criminal Appeals recognized a new exception to the warrant requirement this year. The federal government and all states have statutes requiring that DNA be collected from individuals convicted

143. *Shepherd*, 273 S.W.3d at 682-83; *see also* United States v. Troop, 514 F.3d 405, 409 (5th Cir. 2008).

144. *Shepherd*, 273 S.W.3d at 684-85.

145. *Id.* at 682-83.

146. *Id.* at 683.

147. *Id.* at 682-83.

148. *Troop*, 514 F.3d at 411.

149. *Shepherd*, 273 S.W.3d at 683-84.

150. *Troop*, 514 F.3d at 410.

151. *Id.*

152. *Id.* at 411 (citing *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006)).

153. *Id.* at 410.

154. *State v. Stauder*, 264 S.W.3d 360, 364 (Tex. App.—Eastland 2008, pet. ref'd) (citing *Moberg v. State*, 810 S.W.2d 190, 195 (Tex. Crim. App. 1991)).

155. *Id.* at 363 (citing *United States v. Loaiza-Martin*, 832 F.2d 867 (5th Cir. 1987); *United States v. Mayfield*, 161 F.3d 1143 (8th Cir. 1998); *United States v. Trullo*, 790 F.2d 205 (1st Cir. 1986)).

156. *Id.* at 364.

of certain felonies and then stored in a databank to assist law enforcement in solving mainly sex-related crimes.¹⁵⁷ While the Supreme Court of the United States has not addressed the constitutionality of such statutes, most courts have upheld searches pursuant to them under either the “special needs” test or the “totality-of-the-circumstances” test.¹⁵⁸ Following the latter rationale, the Court of Criminal Appeals held that a warrantless search of a prisoner for blood taken pursuant to Texas’s mandatory DNA statute was reasonable.¹⁵⁹

D. WARRANT SEARCHES & SEIZURES

Before a magistrate may issue a search warrant, a police officer must first present a sworn affidavit setting forth sufficient facts to establish probable cause.¹⁶⁰ In special cases, additional requirements must also be met.¹⁶¹ Unlike warrants for persons, contraband, fruits, or instrumentalities—which may be issued by any magistrate—warrants for mere evidence that a crime has been committed may be issued only by “a judge of a municipal court of record or county court who is an attorney licensed by the State of Texas, statutory county court, district court, the Court of Criminal Appeals, or the [Texas] Supreme Court.”¹⁶² But an exception to that rule allows any magistrate to issue a mere evidence warrant when “the only judges serving the county who are licensed attorneys are two or more district judges each of whose district includes more than one county.”¹⁶³

In *Muniz v. State*, the First Court of Appeals in Houston interpreted this exception.¹⁶⁴ The court rejected the plain meaning of the statute because it would lead to the absurd result that any magistrate in Colorado County could not issue mere evidence warrants because the county has two nondistrict court judges who are licensed attorneys, even though those judges are otherwise prohibited from issuing mere evidence warrants.¹⁶⁵ So the court read the exception to mean that any magistrate can issue mere evidence warrants when the “only judges serving a county who are licensed attorneys *and who are authorized to issue article 18.02(10) search warrants* are district judges serving more than one county.”¹⁶⁶

Once a warrant of any kind has been issued, it “must be executed within three days from the time of its issuance.”¹⁶⁷ A warrant that is executed after this time is stale, and any search or seizure pursuant to the

157. See *Segundo v. State*, 270 S.W.3d 79, 97 (Tex. Crim. App. 2008).

158. See *id.* at 97-98.

159. *Id.* at 98-99.

160. CODE CRIM. PROC. ANN. art. 18.01(b) (Vernon Supp. 2007).

161. *E.g.*, art. 18.01(c).

162. *Id.*

163. *Id.* art. 18.01(i).

164. 264 S.W.3d 392, 396-98 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

165. *Id.* at 397.

166. *Id.* at 398.

167. CODE CRIM. PROC. ANN. art. 18.06(a) (Vernon 2005).

warrant is invalid absent an exception to the warrant requirement.¹⁶⁸ The time between when a warrant is issued and when it becomes stale is “three whole days, exclusive of the day of its issuance and of the day of its execution.”¹⁶⁹ The Amarillo Court of Appeals rejected the State’s interpretation of “days” to mean a twenty-four hour period, which would make a warrant valid for 120 hours after it was issued.¹⁷⁰ Rather, the court held that a warrant is stale if the State does not execute it before midnight on the fourth day after it was issued.¹⁷¹ Within this timeframe, the police may execute the warrant at any time.¹⁷² So it is within a police officer’s discretion to decide who will be present when a warrant is executed by delaying or expediting a search when certain individuals are at the location.¹⁷³

A properly issued warrant that is executed within the required timeframe may still be invalid if the State exceeds the scope of the warrant. A search of an automobile found at the premises to be searched is generally within the scope of a warrant authorizing a search of only the premises.¹⁷⁴ But it is better practice to include a description of the vehicle in the warrant whenever feasible.¹⁷⁵ In *Hedspeth*, the Austin Court of Appeals held that the police did not exceed the scope of a warrant by searching a car in a motel parking lot because information in the affidavit reduced the possibility that the wrong vehicle would be searched.¹⁷⁶

E. EXCLUSIONARY RULE

The exclusionary rule requires trial judges to suppress improperly obtained evidence under certain circumstances.¹⁷⁷ The purpose of the rule is to deter police misconduct.¹⁷⁸ So, under the good-faith exception, the exclusionary rule does not apply when police act in “objectively reasonable reliance” on an invalid warrant, unconstitutional statute, or mistaken information in a court database caused by judicial error.¹⁷⁹

The Supreme Court of the United States narrowed the scope of the exclusionary rule by holding that the rule is not triggered by negligent police error.¹⁸⁰ In *Herring*, a sheriff’s deputy arrested Herring for a warrant that computer records showed as current but had been unknowingly recalled.¹⁸¹ The Supreme Court held that evidence obtained incident to

168. *State v. Rico*, 241 S.W.3d 648, 649 (Tex. App.—Amarillo 2008, no pet. h.).

169. Art. 18.07.

170. *Rico*, 241 S.W.3d at 649.

171. *Id.* at 650.

172. *Allen v. State*, 249 S.W.3d 680, 697 (Tex. App.—Austin 2008, no pet. h.).

173. *Id.*

174. *Hedspeth v. State*, 249 S.W.3d 732, 738 (Tex. App.—Austin 2008, pet. ref’d).

175. *Id.* at 740 n.3.

176. *Id.* at 740.

177. *Weeks v. United States*, 232 U.S. 383, 398 (1914); CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005).

178. *Herring v. United States*, 129 S. Ct. 695, 701 (2009).

179. *Id.* at 703.

180. *Id.* at 704.

181. *Id.* at 698.

the arrest was not subject to exclusion because the deputy relied on the computer records in good-faith and, although law enforcement was responsible for the error, it was the result of mere negligence.¹⁸² The Supreme Court rejected a rigid application of the exclusionary rule, and instead balanced the deterrent effect on police misconduct against the social costs of letting a guilty defendant go free.¹⁸³ In the balance, the deterrent effect did not outweigh the social costs because "the error was the result of isolated negligence attenuated from the arrest."¹⁸⁴ To trigger the exclusionary rule, police misconduct must be sufficiently deliberate, reckless, or systemically negligent that suppressing the evidence will deter future conduct.¹⁸⁵

Under the fruit of the poisonous tree doctrine, evidence obtained indirectly from police misconduct is also suppressed under the exclusionary rule.¹⁸⁶ But evidence that would not have been discovered "but for" the misconduct is not automatically excluded.¹⁸⁷ Once the evidence becomes so attenuated from the misconduct that it is brought about by "means sufficiently distinguishable to be purged of the primary taint," it is no longer subject to the exclusionary rule.¹⁸⁸ The Texas Court of Criminal Appeals recently held that evidence of a criminal offense committed after an illegal entry should not have been suppressed.¹⁸⁹ In *Iduarte*, an officer testified that the defendant pointed a gun at him after the officer followed the defendant into his apartment.¹⁹⁰ The Court reasoned that, even assuming the officer's entry into the apartment was unlawful, the federal exclusionary rule and article 38.23 did not apply because evidence of the crime did not exist before the entry, and thus was not "causally connected" to any constitutional violation.¹⁹¹

In Texas, a defendant has two options to challenge the jury's ability to consider evidence obtained during an allegedly illegal search or seizure.¹⁹² A defendant can first challenge the admissibility of the evidence by either filing a pretrial motion to suppress or objecting when the evidence is offered at trial.¹⁹³ If unsuccessful, a defendant can challenge the jury's ability to consider the evidence by requesting an instruction to disregard the evidence if the jury finds that it was illegally obtained.¹⁹⁴ Texas's exclusionary rule, set out in article 38.23, states in part:

182. *Id.* at 700.

183. *Id.* at 704.

184. *Id.* at 698.

185. *Id.* at 702.

186. *State v. Iduarte*, 268 S.W.3d 544, 550 (Tex. Crim. App. 2008) (citing *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)).

187. *Id.*

188. *Id.* (quoting *Wong Sun*, 371 U.S. at 488).

189. *Id.* at 551.

190. *Id.* at 548.

191. *Id.* at 551.

192. *Holmes v. State*, 248 S.W.3d 194, 199 (Tex. Crim. App. 2008).

193. *Id.*

194. *Id.* at 199-200.

(a) 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.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.¹⁹⁵

Therefore, evidence may be suppressed if the trial judge finds that it was obtained in violation of the law, or the jury can be instructed to disregard the evidence if it finds a violation.

A defendant is entitled to a jury instruction as a matter of statutory right if: (1) the evidence raises a contested issue of material fact that a constitutional violation has occurred and (2) the trial court has admitted the evidence.¹⁹⁶ The Texas Court of Criminal Appeals issued two opinions that give further guidance on these prerequisites.¹⁹⁷

Addressing the first prerequisite, the court clarified what type of evidence is sufficient to raise a disputed issue of material fact.¹⁹⁸ Breaking the requirement down, a defendant must show evidence that (1) raises an issue of fact, (2) is affirmatively contested, and (3) is material to whether the conduct was lawful.¹⁹⁹ The court held that the defendant was not entitled to an instruction because the evidence failed to meet all three requirements.²⁰⁰ The instruction the defendant requested was “wholly incorrect” because it asked the jury to decide a question of law—not fact.²⁰¹

Addressing the second prerequisite, the court held that objecting to the admissibility of evidence is not required before obtaining a jury instruction.²⁰² Clarifying its own precedent and settling a dispute among the courts of appeals, the court held that a defendant is entitled to a jury instruction after making a request, despite stating “no objection” or failing to object when the State offers the contested evidence at trial.²⁰³ The court explained that it does not make sense to require a defendant to invalidly object to the admissibility of evidence simply to preserve the right to request a jury instruction later.²⁰⁴ The admissibility of evidence

195. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005).

196. *Holmes*, 248 S.W.3d at 199 (quoting *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000)).

197. *Id.* at 199-202; *see also* *Madden v. State*, 242 S.W.3d 504, 509-511 (Tex. Crim. App. 2007).

198. *Madden*, 242 S.W.3d at 509-10.

199. *Id.* at 510.

200. *Id.* at 518.

201. *Id.* at 510.

202. *Holmes*, 248 S.W.3d at 202.

203. *Id.*

204. *Id.* at 200.

and the jury's consideration of evidence are two separate issues.²⁰⁵ The defendant must raise a contested issue of fact concerning the legality of the search or seizure to be entitled to a jury instruction.²⁰⁶ But when the State offers the evidence at trial, the facts are typically not yet in dispute because the defense has not presented its case-in-chief.²⁰⁷ At that time, the defendant may well have "no objection" to the admissibility of the evidence, but that does not mean that the defendant waives the right to raise a disputed issue of fact later and request a jury instruction.²⁰⁸

The court's opinion did not disturb its holding in other cases that failing to object or expressly waiving an objection does forfeit the right to complain on appeal that the evidence was inadmissible.²⁰⁹ But at least two courts of appeal have found that a defendant preserved the right to complain that a trial judge erroneously admitted evidence even after declaring they had "no objection" when the evidence was offered.²¹⁰ In both cases, the trial judge expressly treated any error as preserved despite trial counsel's apparent waiver.²¹¹ For example, one trial judge held a suppression hearing after defense counsel said he had "no objection" to the evidence offered by the State.²¹² Another trial judge told defense counsel that the judge considered the issue preserved for appeal.²¹³

IV. CONCLUSION

A survey of confession, search, and seizure cases over the past year reveals that Texas state and federal courts have clarified some procedural requirements. Generally, however, the courts continued to apply well-established precedent.

205. *Id.* at 202.

206. *Id.* at 199.

207. *Id.* at 200.

208. *Id.*

209. *Id.* at 196.

210. *Bouyer v. State*, 264 S.W.3d 265, 268 (Tex. App.—San Antonio 2008, no pet.) (mem. op.); *Shedden v. State*, 268 S.W.3d 717, 730 (Tex. App.—Corpus Christi 2008, no pet.).

211. *Bouyer*, 264 S.W.3d at 268-69; *Shedden*, 268 S.W.3d at 730.

212. *Bouyer*, 264 S.W.3d at 268-69.

213. *Shedden*, 268 S.W.3d at 730.