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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*April A. Strahan**
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I. INTRODUCTION

THE state of established jurisprudence related to confessions, searches, and seizures suffered no significant changes in the past year. Harmless-error analysis is still routinely applied, and both state and federal appellate courts give deference to trial court fact-findings unless clearly erroneous.

Cases involving confessions, searches, and seizures traditionally arrive at appellate courts via a trial judge's ruling on a motion to suppress evidence such as a confession or evidence seized during a warrantless search.[1] When reviewing rulings on motions to suppress, Texas courts use a bifurcated standard of review in both juvenile and adult cases: appellate courts give "almost total deference to the trial court's ruling on (1) questions of historical fact and (2) application-of-law-to-fact questions that

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1. *See, e.g.*, Fineron v. State, 201 S.W.3d 361, 365 (Tex. App.—El Paso 2006, no pet.); Morris v. State, 195 S.W.3d 740, 744 (Tex. App.—Amarillo 2006, no pet.).

turn on an evaluation of credibility and demeanor."[2] But appellate courts conduct a de novo review of rulings on mixed questions of law and fact that do not turn on witness credibility or demeanor[3] as well as pure questions of law.[4] And if the trial court denies a motion to suppress, but does not file findings of fact, appellate courts "review the evidence in a light most favorable to the trial court's ruling."[5] An appellate court will affirm a trial court's ruling if it is correct under any theory of law.[6]

The Texas Court of Criminal Appeals recently examined a case in which the trial court refused to enter findings of fact over the State's objection.[7] By declining to make findings of fact, the trial judge deprived the intermediate court of appeals of "meaningful review of the decision to grant the motion to suppress."[8] The trial judge's refusal left the court of appeals "in the undesirable position of having to make assumptions about the reasons for the trial court's decision."[9] The Court of Criminal Appeals decided that "[e]ffective from the date of this opinion, the requirement is: upon the request of the losing party on a motion to suppress evidence, the trial court shall state its essential findings."[10] The Court of Criminal Appeals noted that it did "not intend to create additional work for the trial courts," but was "simply asking the trial courts to inform us of the findings of fact upon which their conclusion is based."[11] Moreover, the Court of Criminal Appeals explained that its holding applied only if a party requests findings of fact and conclusions of law and the trial judge fails to enter them; if a party fails to make such a request and the trial judge fails to enter findings and conclusions, an appellate court will review a trial judge's decision under the standard set forth in *State v. Ross*.[12]

II. CONFESSIONS

The Fifth Amendment to the United States Constitution protects an individual's privilege against self-incrimination.[13] Courts combat the improper use of evidence obtained in violation of that privilege by enforcing the rules, both judicially and legislatively created, that govern the admission of confessions. But that privilege is not absolute. Although the error may be constitutional, Texas courts still routinely require a defendant

2. Pair v. State, 184 S.W.3d 329, 333 (Tex. App.—Fort Worth 2006, no pet.); *see also In re* L.J., No. 03-04-00807-CV, 2005 Tex. App. LEXIS 10221, at *5 (Tex. App.—Austin Dec. 9, 2005, no pet.).
3. *Pair*, 184 S.W.3d at 333.
4. Brown v. State, Nos. 01-05-00074-CR, 01-05-00075-CR, 2006 Tex. App. LEXIS 10672, at *34 (Tex. App.—Houston [1st Dist.] Dec. 14, 2006, no pet.).
5. Cole v. State, 200 S.W.3d 762, 763 (Tex. App.—Texarkana 2006, no pet.).
6. *Pair*, 184 S.W.3d at 334.
7. State v. Cullen, 195 S.W.3d 696, 696 (Tex. Crim. App. 2006).
8. *Id.* at 698.
9. *Id.*
10. *Id.* at 699.
11. *Id.*
12. *Id.* (citing State v. Ross, 32 S.W.3d 853, 858 (Tex. Crim. App. 2000)).
13. Rodriguez v. State, 191 S.W.3d 428, 447 (Tex. App.—Corpus Christi 2006, pet. ref'd); *see also* U.S. CONST. amend. V.

to clearly object to the improper admission of a confession or risk waiving the error.[14]

A. VOLUNTARINESS

To be admissible as evidence against an accused, the statement must be "freely and voluntarily made without compulsion or persuasion."[15] "A statement is involuntary if the record reflects 'official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.'"[16] But "[a] confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice."[17] At a hearing on the admissibility of a confession, the burden of proof lies with the prosecution to prove by a preponderance of the evidence that the statement was voluntarily given.[18]

In *Houston v. State*,[19] the Austin Court of Appeals upheld the trial judge's denial of the defendant's motion to suppress his confession because he voluntarily went to the police station to speak to detectives about an unrelated matter; he was explicitly told that he was not under arrest; and the detectives' questioning implied that the defendant was free to leave. The detectives read the defendant his *Miranda* rights, searched his sport coat without his consent, and emphasized the State's case against him.[20] But, the court held that the detectives' explicit statements to the defendant that he was not under arrest, coupled with other statements implying that the defendant was not under arrest and was free to go, would have led a reasonable person to believe that his freedom of movement was not restrained to the degree associated with a formal arrest.[21] The court concluded that the defendant was not "in custody," and, thus, his confession was admissible.[22]

The Fifth Circuit addressed a related voluntariness issue in *United States v. Allard*.[23] In that case, the defendant argued that the district judge admitted evidence relating to a polygraph examination in violation of Federal Rule of Evidence 403 because the probative value of the evidence was "'substantially outweighed by the danger of unfair prejudice.'"[24] The Fifth Circuit considered cases from other circuits and

14. Jones v. State, 184 S.W.3d 915, 925 (Tex. App.—Austin 2006, no pet.).
15. TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2005).
16. Fineron v. State, 201 S.W.3d 361, 365 (Tex. App.—El Paso 2006, no pet.) (quoting Alvarado v. State, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995)).
17. United States v. Eff, 444 F. Supp. 2d 731, 739 (E.D. Tex. 2006); *see also Fineron*, 201 S.W.3d at 365.
18. Oursbourn v. State, No. 01-05-00141-CR, 2006 Tex. App. LEXIS 8407, at *7 (Tex. App.—Houston [14th Dist.] Sept. 28, 2006, pet. granted) (citing *Alvarado*, 912 S.W.2d at 211).
19. 185 S.W.3d 917, 920–21 (Tex. App.—Austin 2006, pet. ref'd).
20. *Id.* at 921.
21. *Id.*
22. *Id.*
23. 464 F.3d 529, 535 (5th Cir. 2006).
24. *Id.* at 534 (quoting FED. R. EVID. 403).

was "persuaded . . . that testimony concerning a polygraph examination is admissible where it is not offered to prove the truth of the polygraph result, but instead is offered for a limited purpose such as rebutting a defendant's assertion that his confession was coerced."[25] The court reasoned that if a defendant contests voluntariness before the jury, "it is only fair to permit the government, in response, to set the scene of that confession."[26] Moreover, the court found it "significant" that "the district court specifically instructed the jury that testimony relating to the polygraph was not scientific, that its results were irrelevant to the ultimate issue of truthfulness, and that the evidence was only to be considered in determining whether [the defendant's] confession was voluntary."[27] The court held that, under the circumstances, the defendant failed to show an abuse of discretion in admitting the polygraph testimony.[28]

B. Custodial Interrogation

In 1966, the United States Supreme Court decided *Miranda v. Arizona*,[29] the seminal case establishing the "*Miranda* warnings" that must be given to a suspect before custodial interrogation. *Miranda* has become an established part of our jurisprudence over the past forty years, even surviving a congressional attempt to overrule it.[30] Texas codified these warnings in Article 38.22 of the Texas Code of Criminal Procedure, which requires that a suspect be advised that:

> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
> (2) any statement he makes may be used as evidence against him in court;
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
> (5) he has the right to terminate the interview at any time[.][31]

Miranda requires only the first four warnings.[32] The fifth warning under Article 38.22 is an addition by the Texas legislature.[33]

It is well settled that interrogation must cease as soon as a suspect adequately invokes the right to remain silent.[34] And if the accused invokes

25. *Allard*, 464 F.3d at 534.
26. *Id.* at 535.
27. *Id.*
28. *Id.*
29. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).
30. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000).
31. Tex. Code Crim. Proc. Ann. art. 38.22, § 2(a) (Vernon 2005).
32. *Miranda*, 384 U.S. at 467–73.
33. Gonzales v. State, 190 S.W.3d 125, 130 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).
34. Houston v. State, 185 S.W.3d 917, 920 (Tex. App.—Austin 2006, pet. ref'd).

his right to counsel, the interrogation cannot continue until the suspect is provided with an attorney, "unless the accused himself initiates further communication, exchanges, or conversations with the police."[35]

Because the underlying purpose is "to protect an individual from the 'inherently compelling pressures' of custodial interrogation,"[36] *Miranda* and Article 38.22 only become relevant when a suspect is subjected to custodial interrogation; if a suspect freely and voluntarily gives a statement, neither *Miranda* nor Article 38.22 requires its suppression.[37] Moreover, a suspect cannot "anticipatorily" invoke his *Miranda* rights, although some courts have held that the window of opportunity for invoking those rights may extend to the moments before interrogation has commenced, but is "imminent."[38]

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of her freedom of action in any significant way."[39] "A person is in custody only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with formal arrest."[40] Thus, an investigative detention is not "custody" for purposes of *Miranda* and Article 38.22.[41] The ultimate question in discerning whether a person was in custody is "whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," and that inquiry involves a review of the objective facts and circumstances.[42] But *Miranda* also applies to interrogations that include "words or actions that, given the officers' knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to 'have . . . the force of a question on the accused,' and therefore are reasonably likely to elicit incriminating responses."[43]

Miranda warnings are not generally required during routine traffic stops because the detention and questioning of a person in such situations does not usually render that person "in custody."[44] Warnings are not required unless "the officer has objectively created a custodial environment and has communicated to the accused his intention to effectuate custody

35. Russell v. State, No. 10-04-00190-CR, 2007 Tex. App. LEXIS 558, at *5 (Tex. App.—Waco Jan. 24, 2007, pet. ref'd) (quoting Edwards v. Arizona, 451 U.S. 477, 484–85 (1981)).

36. *Houston*, 185 S.W.3d at 920 (quoting Arizona v. Robertson, 486 U.S. 675, 681 (1988)).

37. Arthur v. State, No. 2-06-030-CR, 2007 Tex. App. LEXIS 454, at *13 (Tex. App.—Fort Worth Jan. 25, 2007, no pet.).

38. *Russell*, 2007 Tex. App. LEXIS 558, at *11.

39. *Arthur*, 2007 Tex. App. LEXIS 454, at *13.

40. *Id.*

41. *Id.*

42. Rodriguez v. State, 191 S.W.3d 428, 440 (Tex. App.—Corpus Christi 2006, pet. ref'd).

43. *Id.* at 447.

44. *Id.* at 440.

to the accused himself."[45]

> The court of criminal appeals has outlined some general situations that may constitute custody, including the following: (1) when the suspect is physically deprived of his or her freedom of action in any significant way, (2) when a law enforcement officer tells the suspect he or she cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe his or her freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect he or she is free to leave.[46]

The first three situations require a restriction of movement that rises to the degree typically associated with an arrest, not just an investigative detention.[47] Texas courts have held that, by themselves, the following acts do not always convert an investigative detention into an arrest:

- a defendant's submission to and failing of a polygraph test administered by law enforcement officers;[48]
- questioning a suspect at a police station;[49]
- handcuffing a suspect;[50]
- ordering a suspect to the ground;[51]
- and an officer's drawing of his weapon on a suspect.[52]

The fourth situation requires that the officer's probable cause be communicated to the suspect.[53]

C. Statutory Requirements

Texas Code of Criminal Procedure Article 38.22 governs the admission of oral and written confessions in Texas.[54] The propriety of admitting oral confessions is a commonly litigated issue and was addressed in *Gonzales v. State*.[55] In that case, the Houston Court of Appeals acknowledged that Article 38.22 provides for the admissibility of a statement made in another state as long as the statement was validly obtained in accordance with either that state or Texas's confession laws.[56] Gonzales, the defendant, was arrested and given *Miranda* warnings, and then gave a

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45. *Id.* (quoting Abernathy v. State, 963 S.W.2d 822, 824 (Tex. App.—San Antonio 1998, pet. ref'd)).

46. *Rodriguez*, 191 S.W.3d at 441.

47. *Id.*

48. Resendez v. State, No. 14-05-00098, 2006 Tex. App. LEXIS 10138, at *20 (Tex. App.—Houston [14th Dist.] Nov. 28, 2006, no pet.).

49. Houston v. State, 185 S.W.3d 917, 920 (Tex. App.—Austin 2006, pet. ref'd).

50. *Rodriguez*, 191 S.W.3d at 441; Swain v. State, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005).

51. Morris v. State, 195 S.W.3d 740, 745 (Tex. App.—Amarillo 2006, no pet.).

52. *Id.*

53. *Rodriguez*, 191 S.W.3d at 441.

54. Tex. Code Crim. Proc. Ann. art. 38.22 (Vernon 2005).

55. Gonzales v. State, 190 S.W.3d 125 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

56. *Id.* at 130; *see also* Tex. Code Crim. Proc. Ann. art. 38.22 § 8.

confession in California regarding an offense in Texas.[57] On appeal from his conviction for capital murder in Harris County, the defendant argued that his confession was improperly admitted in violation of Article 38.22 because he did not receive the fifth warning required by Section 3.[58] The appellate court disagreed, noting that Section 8 of Article 38.22 precluded the defendant's argument because the warnings he received in California were valid under that state's laws and conformed to the *Miranda* requirements.[59]

Section 3(a) of Article 38.22 demands a special showing when the State offers an oral confession:

> No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:
> (1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;
> (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;
> (3) the recording device was capable of making an accurate recording, the operator was competent, the recording is accurate and has not been altered;
> (4) all voices on the recording are identified; and
> (5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.[60]

Although *Miranda* warnings are generally necessary for a confession to be admissible, Section 3(c) of Article 38.22 provides an exception to the above requirements for "any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed."[61] Article 38.22 also includes exceptions for an accused's statement in open court, during a grand jury hearing, or at an examining trial; statements that are "res gestae of the arrest or of the offense"; statements that do not stem from custodial interrogation; and otherwise voluntary statements, whether the result of custodial interrogation or not, that bear on the credibility of the accused as a witness.[62]

In *Wilkerson v. State*,[63] the Court of Criminal Appeals considered the extent to which "the statutory requirements that a [Child Protective Ser-

57. *Gonzales*, 190 S.W.3d at 129.
58. *Id.* at 130.
59. *Id.*
60. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a).
61. *Id.* § 3(c); *see also* Amador v. Quarterman, 458 F.3d 397, 403 (5th Cir. 2006).
62. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 5.
63. 173 S.W.3d 521, 526 (Tex. Crim. App. 2005).

vices ("CPS")] worker report her independent investigation results to police make her a police surrogate for purposes of *Miranda* warnings when the person she interviews is in custody[.]" The Court of Criminal Appeals noted that *Miranda* "specifically defined 'custodial interrogation' as '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.'"[64] Therefore, according to the Court of Criminal Appeals, the Supreme Court acknowledged the "unique danger of coercion in the police-arrestee relationship" in *Miranda*.[65] Because *Miranda* also applies to "agents of the State," the Court of Criminal Appeals then evaluated whether a CPS worker should be considered an agent of the State for purposes of *Miranda*.[66]

Noting that the *Miranda* Court was concerned with the particular imbalance of power between law enforcement and arrestees, the Court of Criminal Appeals asserted that CPS workers have "a very different set of goals and responsibilities" than those of law enforcement, including "protect[ing] the welfare and safety of children in the community."[67] CPS workers are statutorily required to report suspected child abuse to law enforcement authorities, but so are all Texas citizens.[68] CPS workers and law enforcement authorities work along "separate parallel paths," each gathering information for different goals—arrest and prosecution for the police and housing and protection from abuse for CPS workers.[69] The Court of Criminal Appeals concluded that "[w]hen a state agency employee is working on a path parallel to, yet separate from, the police, *Miranda* warnings are not required."[70] But if those paths merge and "police and state agent are investigating a criminal offense in tandem, *Miranda* warnings and compliance with Article 38.22 may be necessary."[71] In their inquiries, courts should "examine the entire record" and consider (1) "the relationship between the police and the potential police agent;"[72] (2) "the interviewer's actions and perceptions" and "the interviewer's primary reason for questioning the person;"[73] and (3) "the defendant's perceptions of the encounter."[74] Reducing its rule to a single question, the Court of Criminal Appeals explained, "At bottom, the inquiry is: Was this custodial interview conducted (explicitly or implicitly) on behalf of the police for the primary purpose of gathering evidence or statements to be used in a later criminal proceeding against the interviewee?"[75]

64. *Id.* (emphasis in original) (quoting Miranda v. Arizona, 384 U.S. at 444).
65. *Wilkerson*, 173 S.W.3d at 527.
66. *Id.* at 527–28.
67. *Id.* at 528.
68. *Id.* at 528–29 (citing TEX. FAM. CODE ANN. § 261.101).
69. *Wilkerson*, 173 S.W.3d at 529.
70. *Id.*
71. *Id.*
72. *Id.* at 530.
73. *Id.*
74. *Id.*
75. *Id.* at 531.

D. JUVENILES

Section 51.095 of the Texas Family Code governs the admission of statements given by juveniles and contains special requirements that do not apply in cases involving adult suspects.[76] For example, juveniles receive the same warnings as adult suspects, but a juvenile must receive them from a magistrate outside the presence of the police and prosecutor.[77] Moreover, the magistrate must sign a statement confirming that the magistrate was "fully convinced" that the juvenile understood the warnings and voluntarily signed the statement.[78]

Just as with adult suspects, a juvenile must be in "custody" for constitutional protections to apply.[79] "In determining whether a minor was in custody at the time of questioning, courts consider the age of the defendant and all the circumstances surrounding the interrogation to decide whether there was a formal arrest or a restraint of movement to the degree associated with formal arrest."[80] In making its determination, a court may consider "whether there was probable cause to arrest, the focus of the investigation, the officer's subjective intent, and the child's subjective beliefs."[81]

The Dallas Court of Appeals held that a juvenile was not in "custody" if:

- two uniformed, armed police officers located and questioned the juvenile at a football game with the officers standing on either side of the juvenile;
- neither officer told the juvenile that he was not free to leave;
- neither officer accused the juvenile of an offense;
- the officers did not have probable cause to arrest the juvenile;
- the juvenile was not restrained in any way;
- the juvenile never asked to go home or speak to an attorney or relative; and
- the juvenile freely answered the officers' questions.[82]

Viewing the totality of the circumstances, the court of appeals determined that a reasonable juvenile of the same age would have felt free to end the questioning; therefore, the juvenile was not in "custody," and the trial judge properly admitted the juvenile's statements under Section 51.095.[83]

III. SEARCH AND SEIZURE

The Supreme Court of the United States recognized over one hundred years ago that "No right is held more sacred, or is more carefully

76. TEX. FAM. CODE ANN. § 51.095 (Vernon 2002 & Supp. 2006).
77. *Id.* § 51.095(a)(1).
78. *Id.* § 51.095(a)(1)(B)(ii).
79. *In re* J.W., 198 S.W.3d 327, 331 (Tex. App.—Dallas 2006, no pet.).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[84] It is this sacred right that the law governing search and seizure defends.

A. In General

Article I, section 9 of the Texas Constitution regulates searches and seizures in Texas and states:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.[85]

Texas courts, however, typically analyze search and seizure cases in light of the Fourth Amendment which similarly provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[86]

The Fourth Amendment does not preclude all searches and seizures. Constitutional protections apply only if a governmental entity[87] conducts an unreasonable search or seizure and the complainant has a reasonable expectation of privacy.[88]

The United States Supreme Court and the Texas Court of Criminal Appeals have both adopted a test to determine whether a private citizen should be considered an "agent of the state" for purposes of the Fourth Amendment: "'In light of all the circumstances, the private citizen must be regarded as acting as an instrument or agent of the state.'"[89] The First and Sixth District Courts of Appeals recently evaluated cases in which private actors, rather than governmental officials, retrieved evidence that was later used in prosecutions.[90] Both cases involved Article 38.23 of the Texas Code of Criminal Procedure, which states in pertinent part: "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

84. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

85. Tex. Const. art. I, § 9.

86. U.S. Const. amend. IV.

87. *See* Bessey v. State, 199 S.W.3d 546, 550 (Tex. App.—Texarkana 2006, pet. granted).

88. Parker v. State, 182 S.W.3d 923, 925 (Tex. Crim. App. 2006).

89. *Bessey*, 199 S.W.3d at 550 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)); *see also* State v. Comeaux, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991).

90. Hansen v. State, No. 01-05-01014-CR, 2006 Tex. App. LEXIS 6931, at *4 (Tex. App.—Houston [1st Dist.] Aug. 3, 2006, pet. ref'd); *Bessey*, 199 S.W.3d at 550.

evidence against the accused on the trial of any criminal case."[91]

In *Bessey v. State*,[92] the defendant's estranged wife discovered videotapes in their home of the defendant molesting several children and turned them over to the police. Although the defendant's wife was not living in the home when she discovered the videotapes, the Texarkana Court of Appeals noted that she was still the defendant's legal wife, had a key with unrestricted access to the home, had been periodically feeding the animals at the home, shared the home's bills and expenses with the defendant, and had the defendant's permission to be in the home.[93] The court distinguished these facts from those in *McCuller v. State*,[94] in which a private party violated section 30.05 of the Texas Penal Code by gathering evidence from a home for which he did not have legal or constructive authority to enter; therefore, the court of appeals determined that Article 38.23 applied and rendered the evidence inadmissible.[95] In *Bessey*, given the circumstances and lack of any evidence that the defendant's wife had a preexisting agreement with "any State official to act as an agent of the State," the court of appeals held that "the Fourth Amendment's prohibition against warrantless searches does not serve to exclude the videotapes at issue."[96]

In *Hansen v. State*,[97] the First District Court of Appeals considered a similar case. In that case, the defendant was living and working at the Morrisons' equestrian center. After several suspicious incidents, Mrs. Morrison went into her guest house where the defendant lived and took some poems he had written, presumably about the Morrisons' eldest daughter.[98] The defendant challenged the admission of the poems in a motion to suppress, which the trial judge denied.[99] After determining that the defendant had adequately preserved his point of error,[100] the court explained that Article 38.23 "may not be triggered and the evidence may not have to be excluded" if a private party "takes property that is evidence of a crime without the consent of the owner and with the intent to turn the evidence over to the police . . . ."[101] In making that inquiry, a court should ask whether "this non-governmental actor [took] the evidence with the intent to turn it over to law enforcement authorities."[102] Because Mrs. Morrison testified that she contacted the police after discussing the contents of the poems with her husband and did, in fact, turn the evidence over to the police, the court of appeals determined that "[a]

91. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005).
92. 199 S.W.3d at 549.
93. *Id.* at 550–51.
94. 999 S.W.2d 801 (Tex. App.—Tyler 1999, pet. ref'd).
95. *Bessey*, 199 S.W.3d at 550 (citing *id.* at 802-03).
96. *Id.* at 551.
97. Hansen v. State, No. 01-05-01014-CR, 2006 Tex. App. LEXIS 6931, at *4 (Tex. App.—Houston [1st Dist.] Aug. 3, 2006, pet. ref'd).
98. *Id.* at *2.
99. *Id.* at *4.
100. *Id.* at *10–11.
101. *Id.* at *12.
102. *Id.*

rational trier of fact could have concluded that she took the evidence with the intent of turning it over to the police and, therefore, did not commit a burglary."[103] Thus, the court of appeals held that the trial judge did not abuse his discretion in admitting the poems.[104]

The Court of Criminal Appeals reaffirmed the requirement that a defendant assert a "legally protected right to the expectation of privacy" in *Parker v. State*.[105] Specifically, the court addressed "whether someone driving a rental car with permission only from the person who rented the car has an expectation of privacy that society is prepared to recognize as reasonable."[106] The Court of Criminal Appeals noted that case law among Texas courts of appeals and the Fifth Circuit conflicted and that almost every court had focused on what the rental contract stated in evaluating the privacy interest involved.[107] Disagreeing with a bright-line rule that would afford an expectation of privacy to only those listed in the rental agreement, the court "return[ed] to a *Smith v. Maryland*[108] analysis of whether the defendant's expectation of privacy is one that society recognizes as reasonable or justifiable under the circumstances."[109] In determining whether a person has a reasonable expectation of privacy in a rental car, a court should consider "the circumstances surrounding the use of the vehicle, as well as the nature of the relationship between the driver and the lessee . . . ."[110] A person's use of a car may breach the contract between the lessee and the rental agency, but that does not "automatically abolish [a driver's] standing to contest a violation of his constitutional rights."[111]

A person may prove a reasonable expectation of privacy by "'establishing that he had a subjective expectation of privacy in the place invaded that society is prepared to recognize as reasonable.'"[112] In evaluating an assertion of privacy, a court reviews the totality of the circumstances and considers several factors such as:

- whether the accused had a property or possessory interest in the place invaded;
- whether he was legitimately in the place invaded;
- whether he had complete dominion or control and the right to exclude others;
- whether, prior to the intrusion, he took normal precautions customarily taken by those seeking privacy;
- whether he put the place to some private use; and

103. *Id.* at *13.
104. *Id.*
105. 182 S.W.3d 923, 925 (Tex. Crim. App. 2006).
106. *Id.* at 926.
107. *Id.* at 926–27.
108. 442 U.S. 735 (1979).
109. *Parker*, 182 S.W.3d at 927 (citing *Smith*, 442 U.S. at 735).
110. *Parker*, 182 S.W.3d at 927.
111. *Id.*
112. Smith v. State, 176 S.W.3d 907, 913 (Tex. App.—Dallas 2005, pet. ref'd) (quoting Granados v. State, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002)).

- whether his claim of privacy is consistent with historical notions of privacy.[113]

Without a reasonable expectation of privacy, a defendant does not have standing to challenge the search or seizure.[114] In *Holden v. State*,[115] the Waco Court of Appeals held that evidence found inside a bag in a home was admissible because the defendant lacked standing to contest its warrantless seizure.[116] A police officer responded to a domestic disturbance call and observed the defendant and Greenwood having a "verbal disagreement."[117] The officer allowed the defendant to continue packing his belongings while the officer spoke with Greenwood. When the officer scanned the room looking for weapons or signs of violence, he noticed a bag near the front door, of which Greenwood denied ownership. The officer inspected the bag, felt "potential drug paraphernalia," and opened it, discovering "two syringes containing brown liquid and a spoon with a white substance encrusted on it."[118] The officer then questioned the defendant, who had retrieved the bag and placed it in his truck. At the officer's request, the defendant brought the bag back from his truck and opened it but denied knowledge of its contents. The defendant filed a motion to suppress the bag and its contents, which the trial judge denied.[119] The court of appeals affirmed the denial and held that the defendant did not have standing to contest the search and seizure of the bag based on principles of voluntary abandonment.[120]

A defendant who has voluntarily abandoned property does not have a reasonable expectation of privacy in that property and, therefore, cannot contest its search.[121] "The proper inquiry is whether the defendant 'voluntarily discarded, left behind, or otherwise relinquished his interest in the property' such that he no longer possesses a 'reasonable expectation of privacy' in the property 'at the time of the search.'"[122] The court of appeals stated that the defendant was "a third-party homeowner/co-occupant who abandoned the property before the search," and that Greenwood had authority to consent to a warrantless search as a homeowner, but even if she was just a co-occupant, had authority to consent to a warrantless search unless the defendant was present and refused to consent.[123] The court asserted that "if Greenwood's *consent* binds [the defendant], so would her *abandonment*."[124] The court justified its conclusion on two grounds: (1) "having left the bag inside Greenwood's home

113. *Smith*, 176 S.W.3d at 913 (quoting *Granados*, 85 S.W.3d at 223).
114. Holden v. State, 205 S.W.3d 587, 589 (Tex. App.—Waco 2006, no pet.).
115. *Id.*
116. *Id.* at 590.
117. *Id.* at 588.
118. *Id.*
119. *Id.*
120. *Id.* at 590.
121. *Id.* at 589.
122. *Id.* (quoting McDuff v. State, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997)).
123. *Holden*, 205 S.W.3d at 589–90.
124. *Id.* at 590 (emphasis in original).

and walked away, [the defendant] relinquished possession of the bag, assuming the risk that Greenwood might, even inadvertently, either allow or cause someone to view its contents"; and (2) the defendant's "conduct reflects an intent to abandon."[125] Thus, the court of appeals held that the defendant lacked standing to contest the search and seizure because "the trial court could have reasonably concluded that [the defendant] abandoned the bag, which resulted in [the defendant]'s loss of a reasonable expectation of privacy in the bag at the time of the search."[126]

B. Arrest, Stop, or Inquiry without Warrant

Both the United States Supreme Court and the Texas Court of Criminal Appeals have recognized three types of police-citizen interaction, each of which demands a different level of constitutional protection: "(1) arrests, which must be supported by probable cause; (2) brief investigatory stops, which must be supported by reasonable suspicion; and (3) brief encounters between police and citizens, which require no objective justification."[127]

1. Encounters

"Unlike investigative detentions and arrests, which are seizures for Fourth Amendment purposes, an encounter is a consensual interaction, which the citizen is free to terminate at any time."[128] To determine whether the police-citizen interaction is an encounter, a court must consider "whether the totality of the circumstances shows that the police conduct at issue would have caused a reasonable person to believe that he was free to decline the officer's requests or otherwise terminate the encounter."[129]

In December 2006, the Fifth Circuit reiterated the principle that once the original purpose of a valid traffic stop has been completed, the situation becomes a consensual encounter, and a police officer may then ask for consent to search a vehicle without unconstitutionally prolonging the stop.[130] In *United States v. Ricardo*,[131] a police officer pulled the defendant over for speeding. The officer checked the defendant and passengers' licenses for outstanding tickets or warrants and determined that

125. *Id.*
126. *Id.*
127. *In re* R.S.W., No. 03-04-00570-CV, 2006 Tex. App. LEXIS 1925, at *9 (Tex. App.—Austin Mar. 9, 2006, no pet.) (internal citations omitted); *see also* Saldivar v. State, 209 S.W.3d 275, 281 (Tex. App.—Fort Worth 2006, no pet.) (citing State v. Perez, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002)).
128. *Saldivar*, 209 S.W.3d at 281.
129. *Id.* (citing Florida v. Bostick, 501 U.S. 429, 439–40 (1991); State v. Velasquez, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999); Johnson v. State, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995)).
130. United States v. Ricardo, 472 F.3d 277, 284 (5th Cir. 2006); *see also Saldivar*, 209 S.W.3d at 282 ("The *Fourth Amendment* does not require that a lawfully seized defendant must be advised that he is 'free to go' before his consent to a search will be recognized as voluntary.") (citing Ohio v. Robinette, 519 U.S. 33, 35 (1996)).
131. *Ricardo*, 472 F.3d at 281.

none existed.[132] The officer then gave the defendant a warning, told him that "they were 'clear,'" and asked if the defendant had any questions.[133] The defendant then thanked the officer and assured him that he would not speed again. At that point, the officer requested and received the defendant's permission to search his vehicle, which lead to the discovery of illegal substances. The Fifth Circuit held that these facts supported a finding that the initial stop for speeding (an investigative detention) had ended, and that, at the time the officer requested the defendant's consent, the situation had become a consensual encounter, and the defendant's constitutional rights were not violated by the officer's request.[134]

2. *Investigative Detentions (Terry Stops)*

Investigative detentions, often called "*Terry* stops" after the United States Supreme Court decision recognizing them, represent an intermediate step between a consensual encounter and an arrest.[135] Investigative detentions and arrests are both seizures for constitutional purposes and distinguishing them can be challenging.[136] In deciding whether a seizure qualifies as an investigative detention or an arrest, courts evaluate the "reasonableness of the intrusion under all of the facts."[137] In making its determination, a court may consider factors such as the nature of the crime, the individual's behavior, the degree of the officer's suspicion, the time and location of the stop, the officer's own testimony regarding whether the defendant was free to leave the scene, the degree of force used in the seizure, and whether an investigation was actually undertaken.[138]

Almost forty years ago, in *Terry v. Ohio*,[139] the United States Supreme Court outlined a two-part test to determine whether a search or seizure is unreasonable under the Fourth Amendment: (1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[140] The *Terry* analysis is also used in evaluating reasonable suspicion for an investigative detention in offenses involving juveniles.[141]

Under *Terry*, to meet the first requirement and justify an investigative detention, the totality of the circumstances must show that the detaining officer had "specific, articulable facts which, taken together with rational

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132. *Id.*
133. *Id.*
134. *Id.* at 284.
135. *In re* O.G.J., No. 03-05-00806-CV, 2006 Tex. App. LEXIS 11000, at *9 (Tex. App.—Austin Dec. 20, 2006, no pet.).
136. Akins v. State, 202 S.W.3d 879, 885 (Tex. App.—Fort Worth 2006, pet. ref'd).
137. *Id.*
138. *Id.* at 885–86.
139. 392 U.S. 1 (1968).
140. *Id.* at 19–20.
141. *See, e.g.*, *In re J.D.B.*, Nos. 14-05-00659-CV, 14-05-00660-CV, 2006 Tex. App. LEXIS 9601, at *3–4 (Tex. App.—Houston [14th Dist.] Nov. 7, 2006, no pet.).

inferences from those facts, lead him to conclude that the person detained is, has been, or soon will be engaged in criminal activity."[142] Those facts must have created a "reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detainee with the unusual activity, and some indication that the unusual activity is related to crime."[143] But the facts must constitute "more than a mere hunch or suspicion," and cannot be the officer's "mere subjective opinion."[144] Moreover, the possibility that the behavior that an officer observes could just as easily be considered innocent as criminal does not preclude reasonable suspicion.[145]

Under *Terry*, the second requirement demands that the detention associated with the stop last no longer than the time required to accomplish the purpose of the original stop.[146] The Fifth Circuit recently reiterated its interpretation of "scope" in the context of *Terry*'s second part: "'We reject any notion that a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation . . . . Detention, not questioning, is the evil at which *Terry*'s second prong is aimed.'"[147] But if an officer develops new reasonable suspicion before the purpose of the original stop is fulfilled, then the officer may continue the detention until that reasonable suspicion is dispelled or confirmed.[148] Many courts have warned that "[o]nce the reason for the stop has been satisfied, the stop may not be used as a 'fishing expedition for unrelated criminal activity.'"[149]

The *Terry* inquiry is commonly used in the context of traffic stops.[150] The Fort Worth Court of Appeals determined that new reasonable suspicion arose during the traffic stop at issue in *Tucker v. State*.[151] In *Tucker*, an officer stopped a vehicle that was suspected of carrying a felony offender for a legitimate traffic offense. The officer ran background checks on the driver and passengers and discovered that two of the occupants had outstanding warrants. As the officer instructed one of the passengers to exit the vehicle, the officer noticed another passenger stuffing something into the back seat. The officer asked that the passenger get out of the vehicle and, after searching the back seat, discovered cocaine in a

142. Myers v. State, 203 S.W.3d 873, 882 (Tex. App.—Eastland 2006, pet. ref'd).

143. *Id.*

144. Cronin v. State, No. 03-04-00266-CR, 2005 Tex. App. LEXIS 10450, at *8, *10 (Tex. App.—Austin Dec. 16, 2005, op. on reh'g).

145. Dixon v. State, 187 S.W.3d 767, 769 (Tex. App.—Amarillo 2006, no pet.) (citing Woods v. State, 956 S.W.2d 33, 38–39 (Tex. Crim. App. 1997)).

146. United States v. Jenson, 462 F.3d 399, 404 (5th Cir. 2006).

147. *Id.* (quoting United States v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993)); *see also* United States v. Estrada, 459 F.3d 627, 630 (5th Cir. 2006).

148. *Jenson*, 462 F.3d at 404.

149. Goudeau v. State, Nos. 14-05-00946-CR, 14-05-00947-CR, 2006 Tex. App. LEXIS 9813, at *14 (Tex. App.—Houston [1st Dist.] Nov. 9, 2006, no pet.) (quoting Ohio v. Robinette, 519 U.S. 33, 41 (1996) (Ginsberg, J., concurring); Davis v. State, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997)).

150. *See, e.g.*, *Estrada*, 459 F.3d at 630–31.

151. 183 S.W.3d 501, 509 (Tex. App.—Fort Worth 2005, no pet.).

plastic baggie. The court determined that the officer's actions were reasonable because the passenger's furtive movements constituted new reasonable suspicion for the officer to justify prolonging the original stop.[152]

3. Warrantless Searches and Arrests

A warrantless search is per se unreasonable under the Texas and Federal Constitutions unless it falls under one of a few specific well-established exceptions.[153] These exceptions include exigent circumstances,[154] searches incident to arrest,[155] protective sweeps,[156] the automobile exception,[157] frisks,[158] and the community-caretaking function.[159] The plain-view doctrine is also related to the warrant requirement exceptions, but because it does not involve an invasion of privacy, it is not a true exception.[160]

Exigent circumstances is a frequently litigated exception to the warrant requirement and includes, "(1) rendering aid or assistance to persons whom officers reasonably believe are in need of assistance; (2) preventing the destruction of evidence or contraband; and (3) protecting officers from persons whom they reasonably believe to be present, armed and dangerous."[161] Although the presence of exigent circumstances is typically a fact-specific inquiry, and courts have no definitive formula for deciding whether a warrantless entry is justified,[162] the Court of Criminal Appeals has demanded that the State "leap two hurdles" in cases involving the warrantless search of a personal residence: (1) probable cause "that points like a beacon toward the location (but not necessarily any particular person)," and (2) exigent circumstances.[163]

The United States Supreme Court recently addressed the emergency doctrine of the exigent-circumstances exception in *Brigham City v. Stuart*,[164] for which it had granted certiorari "in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth

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152. *Id.* at 509.
153. United States v. Charles, 469 F.3d 402, 405 (5th Cir. 2006); Graham v. State, 201 S.W.3d 323, 329 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).
154. Brigham City v. Stuart, 126 S. Ct. 1943, 1947 (2006).
155. United States v. Virgil, 444 F.3d 447, 451 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 365 (2006).
156. *Charles*, 469 F.2d at 405.
157. United States v. Fields, 456 F.3d 519, 523 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 614 (2006).
158. Griffin v. State, No. PD-1036-05, 2006 Tex. Crim. App. LEXIS 2449, at *1 (Tex. Crim. App. 2006).
159. Salinas v. State, No. 04-06-00427-CR, 2007 Tex. App. LEXIS 1605, at *4 (Tex. App.—San Antonio Feb. 28, 2007, pet. ref'd).
160. Keehn v. State, No. 2-06-047-CR, 2007 Tex. App. LEXIS 310, at *8–9 (Tex. App.—Fort Worth Jan. 18, 2007, reh'g denied, no pet.); Lopez v. State, No. 07-05-0243-CR, 2006 Tex. App. LEXIS 1203, at *16–17 (Tex. App.—Amarillo Feb. 14, 2006, no pet.).
161. Stone v. State, No. 07-05-0393-CR, 2006 Tex. App. LEXIS 11046, at *4–5 (Tex. App.—Amarillo Dec. 21, 2006, pet. ref'd).
162. United States v. Newman, 472 F.3d 233, 237 (5th Cir. 2006).
163. Parker v. State, 206 S.W.3d 593, 597 (Tex. Crim. App. 2006).
164. 126 S. Ct. 1943 (2006).

Amendment standard governing warrantless entry by law enforcement in an emergency situation."[165] In *Brigham City*, officers responded to a call regarding a loud noise at a home and entered the home after witnessing through a screen door an altercation among several adults and a juvenile taking place in the kitchen. The defendants argued that the exigent-circumstances exception should not have applied because "the officers were more interested in making arrests than quelling violence" and that "their conduct was not serious enough to justify the officers' intrusion into the home."[166]

The Supreme Court disagreed with both contentions.[167] As to the first police-motive argument, the Court noted that its cases "repeatedly rejected" that argument because an "officer's subjective motivation is irrelevant."[168] Rather, the circumstances surrounding the officer's action must be "viewed *objectively*."[169] As to the second severity-of-the-circumstances argument, the Court noted, "Nothing in the *Fourth Amendment* required [the officers] to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering."[170] The Court explained that a peace officer's role includes "preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."[171] Finally, the Court evaluated the reasonableness of the officers' entry in light of the "knock-and-announce rule"—an ancient common-law principle that, subject to several exceptions, requires "law enforcement officers [to] announce their presence and provide residents an opportunity to open the door[.]"[172] The Court found that the officers satisfied the "knock-and-announce" rule by opening the screen door and calling out the word "police."[173] After that announcement, "the officers were free to enter" because "it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence."[174]

The Fourteenth District Court of Appeals also considered the "knock-and-announce" rule in *State v. Callaghan*.[175] The court of appeals applied *Hudson v. Michigan*[176] and held that

> Whether that preliminary misstep occurred or not, the police would have executed the warrant they had obtained, and would have dis-

165. *Id.* at 1947.
166. *Id.* at 1948.
167. *Id.* at 1948–49.
168. *Id.* at 1948.
169. *Id.* (emphasis in original).
170. *Id.* at 1949.
171. *Id.*
172. Hudson v. Michigan, 126 S. Ct. 2159, 2162 (2006).
173. *Brigham City*, 126 S. Ct. at 1949.
174. *Id.*
175. Nos. 14-06-00460-CR, 14-06-00461-CR, 2007 Tex. App. LEXIS 1981, at *1 (Tex. App.—Houston [14th Dist.] Mar. 15, 2007, pet. ref'd).
176. 126 S. Ct. 2159, 2160 (2006).

> covered the items named in the search warrant inside the motel room. Therefore, if there was a knock-and-announce violation, it was not the but for cause that the evidence was seized. Following the court's rationale in *Hudson*, we hold that the knock-and-announce violation, if any, did not warrant suppression of the evidence because it was not the unattenuated but for cause of obtaining the evidence.[177]

The court of appeals also rejected Callaghan's argument that "*Hudson* applies an 'inevitable discovery doctrine' reasoning and does not impact the Texas exclusionary rule because the Court of Criminal Appeals has held that Texas does not recognize the inevitable discovery doctrine as an exception to the exclusionary rule."[178] Explaining that the Supreme Court relied on causation in *Hudson*, not the inevitable discovery doctrine, the court of appeals found that *Hudson* was not inconsistent with the Texas exclusionary rule.[179]

Notably, there is no "general security check exception to the warrant requirement."[180] But appellate courts routinely affirm warrantless searches based on the established exception to the warrant requirement, commonly known as a "protective sweep."[181] In *Maldonado*, the Fifth Circuit evaluated the reasonableness of a protective sweep on the basis of exigent circumstances when agents arrested a man in a car parked outside his trailer home and then performed a protective sweep of the trailer after one agent observed someone open the trailer door as the other agents were making the arrest.[182] A "protective sweep" is just a "'quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others,'" and is "'narrowly confined to a cursory visual inspection of those places in which a person might be hiding.'"[183] The Fifth Circuit upheld the validity of the sweep in *Maldonado*, determining that exigent circumstances were present and that the agents did not illegally manufacture the exigency to excuse the warrantless search.[184]

The Amarillo Court of Appeals considered a case involving a search incident to arrest, the automobile exception, and the plain-view doctrine.[185] In *Lopez*, an officer stopped the defendant for a traffic violation, and while issuing the citation, the officer questioned the passenger. After the passenger admitted to giving the officer a false name, the officer arrested the passenger and placed him in his patrol car and then asked the defendant and a child that was in the back seat to get out of the

177. *Id.* at *11–12.
178. *Id.* at *13.
179. *Id.* at *16.
180. United States v. Maldonado, 472 F.3d 388, 394 (5th Cir. 2006).
181. *See, e.g., id.*
182. *Id.* at 392.
183. *Id.* at 393 (quoting Maryland v. Buie, 494 U.S. 325, 327 (1990)).
184. *Id.* at 397.
185. Lopez v. State, No. 07-05-0243-CR, 2006 Tex. App. LEXIS 1203, at *5, *7, *15 (Tex. App.—Amarillo Feb. 14, 2006, no pet.).

car so the officer could conduct a search incident to the passenger's arrest. After searching the driver's side, the officer began moving toward the back of the automobile to search the passenger side and noticed "a 'tiny bit' of a plastic baggie in the crease around the gas cap compartment located on the rear driver's side."[186] The defendant challenged the search of the gas cap as constitutionally invalid.

The court of appeals first determined that the search-incident-to-arrest exception did not validate the search of the gas cap because the officer noticed the plastic bag after his search of the car's interior in which he did not find any incriminating evidence.[187] The court then considered the automobile exception, which provides that "given probable cause to believe the presence of contraband or evidence, officers may search an automobile and the containers within it without a warrant."[188] Because the officer testified that he "stopped [the defendant] in a high crime area for narcotics and that in his experience a car's gas cap compartment is an area for concealing them, he had probable cause to believe an offense was being committed."[189] The court then determined that the search was valid under the plain-view doctrine.[190] Because plain view alone is not enough to support a warrantless seizure, two additional requirements must be met: "(1) the officer must have a prior justification or otherwise properly be in a position from which he can view the area, and (2) it must be immediately apparent to the officer that the item may be evidence of a crime, contraband, or otherwise subject to seizure."[191] The court of appeals held that the two plain-view requirements were met because the valid traffic stop and search incident to arrest served as prior justification, and that, under the circumstances surrounding the stop, the officer reasonably believed that "the plastic baggie presented evidence of a crime sufficient to satisfy the immediately apparent prong."[192]

The Court of Criminal Appeals evaluated the propriety of a "stop and frisk," "plain-feel" case in *Griffin v. State*.[193] The Court of Criminal Appeals noted that it had previously "recognized that it is reasonable for a police officer to believe that persons involved in the drug business are armed and dangerous."[194] The court expressly refused to hold that if an officer "testifies that he was not subjectively afraid of the suspect" and had not known the suspect to carry weapons in the officer's past dealings with him, it would be "objectively unreasonable for a reasonably prudent officer to protect himself by frisking a possibly violent drug-dealer for

186. *Id.* at *2.
187. *Id.* at *6.
188. *Id.* at *12–13.
189. *Id.* at *15.
190. *Id.*
191. *Id.* at *16.
192. *Id.* at *21–23.
193. Griffin v. State, No. PD-1036-05, 2006 Tex. Crim. App. LEXIS 2449, at *1 (Tex. Crim. App. Dec. 20, 2006).
194. *Id.* at *14.

weapons . . . ."[195]

"As part of his duty to 'serve and protect,' a police officer may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help."[196] In *Salinas v. State*,[197] the San Antonio Court of Appeals explained the analysis involved when the "community caretaking function" exception is at issue. In evaluating "the propriety of a stop pursuant to the community caretaking function[,]" an appellate court must make two determinations: (1) "whether the police officer was motivated by a community caretaking purpose"; and (2) "whether the police officer's belief that the individual needed help was reasonable."[198] In making the second determination, a court considers four factors: "'(1) the nature and level of distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance other than that offered by the officer; and (4) to what extent the individual, if not assisted, presented a danger to himself or others.'"[199]

In *Torres v. State*,[200] the Court of Criminal Appeals considered a case involving Article 14.01 of the Texas Code of Criminal Procedure, which allows an officer to make a warrantless arrest "for any offense committed in his presence or within his view."[201] The Court of Criminal Appeals noted that its prior cases had held that a warrantless arrest is permissible under Article 14.01(b) "if officers [1] possess personal knowledge and [2] if they have information from reasonably trustworthy sources that an offense was or is being committed."[202] The Court of Criminal Appeals' decision in *Castillo v. State*,[203] however, appeared to require both.[204] But "a probable-cause standard which requires an officer to have both personal knowledge *and* facts or circumstances about which the officer has trustworthy information is unreasonable."[205] Therefore, the Court of Criminal Appeals, therefore, overruled *Castillo* "only to the extent that it requires both kinds of information to support probable cause."[206]

C. Arrest or Search with Warrants

Texas Code of Criminal Procedure article 18.01 governs the issuance of search warrants in the State of Texas and requires a supporting affidavit

195. *Id.* at *14–15.
196. Wright v. State, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999).
197. No. 04-06-00427-CR, 2007 Tex. App. LEXIS 1605, at *4 (Tex. App.—San Antonio Feb. 28, 2007, pet. ref'd).
198. *Id.*
199. *Id.* (quoting *Wright*, 7 S.W.3d at 152).
200. 182 S.W.3d 899 (Tex. Crim. App. 2005)
201. *Id.* at 901–02 (quoting Tex. Code Crim. Proc. Ann. art. 14.01(b)).
202. *Torres*, 182 S.W.3d at 901–02.
203. 818 S.W.2d 803 (Tex. Crim. App. 1991).
204. *Torres*, 182 S.W.3d at 902.
205. *Id.* at 901 (emphasis in original).
206. *Id.* at 902.

"in every instance in which a search warrant is requested."[207] A trial court "examines the totality of the circumstances and gives great deference to the magistrate's decision to issue the warrant" in evaluating whether a probable-cause affidavit supports a search warrant.[208] The test for probable cause is "whether the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing."[209] To support the issuance of a search warrant, Texas Code of Criminal Procedure article 18.01(c) requires that an affidavit contain sufficient facts to establish probable cause:

> (1) that a specific offense has been committed,
> (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and
> (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.[210]

In determining whether probable cause exists, an appellate court considers only the four corners of the affidavit but also allows for reasonable inferences drawn from the affidavit and must interpret the affidavit "in a common sense and realistic manner."[211]

The Court of Criminal Appeals evaluated the sufficiency of a combination search and arrest warrant affidavit in *Davis v. State*.[212] The State conceded that the background information contained in the affidavit was insufficient for a probable-cause finding, but the State argued that the decisive piece of information in the affidavit was the affiant officer's assertion that "he 'could smell a strong chemical odor he has associated with the manufacture of methamphetamine[.]'"[213] The intermediate court of appeals held that the affidavit was insufficient, primarily because it did not detail the officer's expertise or experience in recognizing the odor related to the manufacture of methamphetamine.[214] The Court of Criminal Appeals, however, focused on "the only relevant inquiry": whether "the officer was 'qualified to recognize the odor.'"[215] The Court of Criminal Appeals determined that the magistrate could reasonably have inferred that: (1) the affiant officer was "a trained, commissioned police officer,"[216] and (2) "when a person identifies a smell by associa-

207. TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (Vernon 2005).
208. Pair v. State, 184 S.W.3d 329, 337 (Tex. App.—Fort Worth 2006, no pet.).
209. McKissick v. State, 209 S.W.3d 205, 211 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).
210. TEX. CODE CRIM. PROC. ANN. art. 18.01(c) (Vernon 2005).
211. *McKissick*, 209 S.W.3d at 212.
212. 202 S.W.3d 149, 150–51 (Tex. Crim. App. 2006); *see also* TEX. CODE CRIM. PROC. ANN. art. 18.03 (Vernon 2005) (allowing a search warrant under article 18.02 to also authorize an arrest).
213. *Davis*, 202 S.W.3d at 153–54 (quoting Davis v. State, 165 S.W.3d 393, 397 (Tex. App.—Fort Worth, 2005), *rev'd*, 202 S.W.3d 149 (Tex. Crim. App. 2006)).
214. *Id.* at 153.
215. *Id.* at 156.
216. *Id.*

tion, he has encountered that odor-causing agent before."[217] Thus, the Court of Criminal Appeals held that these inferences, taken with the other information in the affidavit and the proper deference to the magistrate's determination, rendered the affidavit sufficient.[218] The Court of Criminal Appeals, however, warned that the affidavit "was far from exemplary" and that "[a] magistrate should not have to resort so much to inferences and 'common sense' conclusions that skirt the boundaries of what constitutes a substantial basis . . . ."[219]

In *Smith v. State*,[220] the Court of Criminal Appeals considered "whether a search warrant [was] facially defective if the affiant swore before the magistrate that the facts within the affidavit were true, but he failed to sign the affidavit."[221] The Court of Criminal Appeals outlined two different purposes for an affidavit and its signature. The affidavit itself "memorialize[s] the affiant's recitation of the facts, conclusions, and legal basis for the issuance of the search warrant."[222] But the affiant's signature "memorializes the fact that he took the oath; it is not an oath itself."[223] Based on this premise, the Court of Criminal Appeals explained that it was the "act of swearing, not the signature itself, that is essential."[224] Because "the law [should] retain some flexibility in the face of technological advances,"[225] the Court of Criminal Appeals concluded that "an affiant's failure to sign his affidavit is not necessarily fatal if it can be proved by other means that he did swear to the facts contained within that affidavit before the magistrate."[226] The Court of Criminal Appeals was careful, however, to admonish that its holding should not be construed to "condone carelessness or sloppiness in either police procedure or judicial oversight."[227]

The United States Supreme Court recently considered the constitutionality of anticipatory search warrants.[228] "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specific place.'"[229] Anticipatory warrants are typically subject "to some condition precedent other than the mere passage of time—a so-called 'triggering condition.'"[230] In *Grubbs*, the Court evaluated an anticipa-

217. *Id.* at 157.
218. *Id.*
219. *Id.*
220. 207 S.W.3d 787 (Tex. Crim. App. 2006).
221. *Id.* at 788; *see also* Cole v. State, 200 S.W.3d 762, 765–66 (Tex. App.—Texarkana 2006, reh'g denied, no pet.) (considering a case involving a problem with an affidavit and upholding the trial judge's ruling under the good-faith exception).
222. *Smith*, 207 S.W.3d at 790.
223. *Id.* at 790–91.
224. *Id.* at 792.
225. *Id.*
226. *Id.* at 793.
227. *Id.*
228. United States v. Grubbs, 126 S. Ct. 1494, 1498 (2006).
229. *Id.* (quoting 2 Wayne R. LaFave, SEARCH AND SEIZURE 398 (4th ed. 2004)).
230. *Id.*

tory warrant whose execution was contingent on the delivery and receipt of a package containing child pornography and its subsequent physical entry into a residence. Because "the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued," Grubbs argued that anticipatory search warrants "contravene the *Fourth Amendment*'s provision that 'no Warrants shall issue, but upon probable cause.'"[231] The Court disagreed "[b]ecause the probable-cause requirement looks to whether the evidence will be found *when the search is conducted*"; therefore, "all warrants are, in a sense, 'anticipatory.'"[232] The Court also noted, however, that "the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur."[233] Therefore, an anticipatory warrant must satisfy two probability requirements: (1) "*if* the triggering condition occurs, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place'";[234] and (2) "there is probable cause to believe the triggering condition *will occur*."[235] Also, the affidavit must contain sufficient information regarding both requirements for a magistrate to make a probable-cause determination.[236]

If evidence is seized under a search warrant that is subsequently found to have been invalid, the evidence may not be subject to the exclusionary rule if the good-faith exception applies. As the Fifth Circuit explained in *United States v. Sibley*,[237] evidence that is seized under a search warrant that is founded on incorrect information will not be excluded if "'the officer's reliance upon the information's truth was objectively reasonable.'"[238] But the good-faith exception has its limits and does not apply when:

> (1) the magistrate issuing the warrant was misled by information in an affidavit that the affiant knew or should have known was false;
> (2) the issuing magistrate abandoned the judicial role;
> (3) the warrant was based on an affidavit so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable; or
> (4) the warrant was so facially deficient that the executing officers could not have reasonably presumed it to be valid.[239]

Moreover, "[t]o justify a magistrate's finding that an affidavit is sufficient to establish probable cause to issue a search warrant, the facts set out in the affidavit must not have become stale when the magistrate is-

231. *Id.* at 1499 (emphasis in original).
232. *Id.* (emphasis in original).
233. *Id.* at 1500.
234. *Id.* (emphasis in original) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).
235. *Id.* (emphasis in original).
236. *Id.*
237. 448 F.3d 754 (5th Cir. 2006).
238. *Id.* at 757 (quoting United States v. Cavazos, 288 F.3d 706, 709 (5th Cir. 2002)).
239. *Sibley*, 448 F.3d at 757.

sues the search warrant."[240]

D. Consent

"[C]onstitutional prohibitions against warrantless searches and seizures do not come into play when a person gives free and voluntary consent to a search."[241] But consent to search "may also be given by a third party who possesses common authority over or other sufficient relationship to the premises or effects to be searched."[242] Moreover, if a "person of reasonable caution" would believe that the third party "*apparently*" had authority to consent, the search may nevertheless be reasonable.[243]

Under the Texas Constitution, if the State attempts to justify a search with consent, then the State must prove, by clear and convincing evidence, that consent was "freely and voluntarily given" by showing that consent was "positive and unequivocal, and there was no duress or coercion."[244] The State does not satisfy this standard by showing only "acquiescence to a claim of lawful authority."[245] On the other hand, the federal constitution only requires the prosecution to prove voluntariness of consent by a preponderance of the evidence.[246]

Because it determined that "acquiesce" and "consent" are synonymous terms, the Court of Criminal Appeals recently decided that "an express or implied finding of 'mere acquiescence' to [an emergency-room technician's] blood draw also constitutes a finding of consent to the blood draw."[247]

The scope of a defendant's consent to search is a frequently litigated issue. The Fifth Circuit affirmed the district court's denial of a motion to suppress evidence seized during a search of the defendant's home.[248] In *Mendez*, an Immigration and Customs Enforcement ("ICE") plain-clothed agent knocked on the defendant's screen door to investigate reports that the defendant was harboring illegal immigrants while several other ICE agents and uniformed Dallas police officers surrounded the defendant's house. After the defendant stepped outside, the ICE agent explained that he was investigating reports that the defendant had illegal immigrants in his home, and the defendant gave the agent permission to "go[ ] inside and tak[e] a look."[249] The ICE agent entered the home,

240. McKissick v. State, 209 S.W.3d 205, 214 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).
241. Hernandez v. State, 190 S.W.3d 856, 862 (Tex. App.—Corpus Christi 2006, no pet.).
242. Miller v. State, 208 S.W.3d 554, 559 (Tex. App.—Austin 2006, pet. ref'd) (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).
243. *Id.* at 559-60 (emphasis in original).
244. Brown v. State, Nos. 01-05-00074-CR, 01-05-00075-CR, 2006 Tex. App. LEXIS 10672, at *41 (Tex. App.—Houston [1st Dist.] Dec. 14, 2006, op. on reh'g).
245. *Id.*
246. Graham v. State, 201 S.W.3d 323, 330 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).
247. State v. Kelly, 204 S.W.3d 808, 821 (Tex. Crim. App. 2006).
248. United States v. Mendez, 431 F.3d 420, 424 (5th Cir. 2005).
249. *Id.*

discovered several people in the living room whom he believed to be illegal immigrants, and radioed the other officers and ICE agents, who then entered the defendant's home.

In arguing that the search violated his constitutional rights, the defendant claimed that his consent extended only to the agent to whom he gave permission to enter his house. The Fifth Circuit disagreed, noting that the ICE agent had "explained his objective—a search for illegal aliens—before entering the house."[250] The court recognized that a reasonable person would conclude that the defendant consented to a "search of his house for people who might be illegal aliens, and that is exactly what transpired."[251] Although the agents and officers characterized the search as a "protective sweep," the court declared that the actions taken, not the terminology used, is "constitutionally determinative."[252] Because the "agents' actions were consistent with the scope of consent that [the defendant] gave," and the defendant did not limit his consent, the court held that under the "totality of the circumstances," the search was reasonable.[253]

E. Miscellaneous Cases

The Fifth Circuit reiterated that border searches that have the "primary purpose of identifying illegal immigrants" do not violate the Fourth Amendment, absent prolonged detention, although "'checkpoint searches are constitutional only if justified by consent or probable cause to search and '[a]ny further detention . . . must be based on consent or probable cause.'"[254] In *Jaime*, the Fifth Circuit considered whether a woman was illegally detained "because virtually immediately before" the border patrol agent asked for and received consent to search, the agent had satisfied himself as to her citizenship.[255] The court determined that its prior decision in *United States v. Machuca-Barrera*[256] governed the result in *Jaime* and recalled the two legal principles involved in both cases:

> (1) if "the primary programmatic purpose of the checkpoint was the detection of illegal immigrants, the permissible duration of a suspicionless detention there [is] determined by objective factors, not by the subjective motivation or state of mind of the specific individual officers conducting the stop and related examination or questioning on the particular occasion at issue";[257] and (2) "the permissible duration of a suspicionless stop at a fixed immigration checkpoint *includes* the time necessary to 'request consent to extend the

250. *Id.* at 426.
251. *Id.*
252. *Id.*
253. *Id.* at 426–28.
254. United States v. Jaime, No. 04-41700, 2006 U.S. App. LEXIS 31023, at *8 (5th Cir. Dec. 15, 2006) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976)).
255. *Id.* at *12.
256. 261 F.3d 425 (5th Cir. 2001).
257. *Jaime*, 2006 U.S. App. LEXIS 31023, at *15.

detention.'"[258]

Also in the specific context of border searches, the Fifth Circuit specifically held that "immigration checkpoint agents are entitled to sweep the restrooms and exterior luggage compartments of commercial buses so long as (1) during the time frame those checks are conducted, the primary purpose remains interdiction of illegal immigrants, and (2) the checks do not unreasonably prolong the duration of the stop."[259]

Over the past year, various Texas federal and state courts have also asserted the following principles:

- "The Fourth Amendment does not prohibit the seizure of property which has been voluntarily abandoned."[260]
- In *United States v. Cordero*, the Fifth Circuit reiterated, "'[t]he exclusionary rule was created to discourage violations of the *Fourth Amendment*, not violations of state law.'"[261] Thus, the Fifth Circuit explained that if "'evidence secured by state officials is to be used as evidence against a defendant accused of a federal offense,'"[262] a federal court must ask "'whether the actions of the state officials in securing the evidence violated the *Fourth Amendment to the United States Constitution*.'"[263]
- Article 38.23 of the Texas Code of Criminal Procedure does not require suppression of evidence gathered during a wrecker driver's citizen's arrest of a defendant for driving while intoxicated because the wrecker driver violated traffic laws during his pursuit of the defendant.[264]
- A Dallas Area Rapid Transit ("DART") officer was a "peace officer" for purposes of Texas Code of Criminal Procedure Article 14.01(b); therefore, a DART officer is not limited to making arrests for violations committed on DART property, but may also make a warrantless arrest for offenses committed within the officer's "presence or within his view."[265]
- The Court of Criminal Appeals explained that "probable cause does not depend upon the accumulation of only those facts which show overtly *criminal* conduct. Instead, probable cause is the accumulation of facts which, when viewed in their totality, would lead a reasonable police officer to conclude, with a fair probability, that a crime has been committed or is being committed by someone."[266] Thus, the Court of Criminal Appeals concluded that the facts of a case should not be categorized as either "probable cause" or "exi-

258. *Id.* at *16 (quoting *Machuca-Barrera*, 261 F.3d at 433) (emphasis in original).
259. United States v. Ventura, 447 F.3d 375, 381 (5th Cir. 2006).
260. Hudson v. State, 205 S.W.3d 600, 604 (Tex. App.—Waco 2006, no pet.).
261. United States v. Cordero, 465 F.3d 626, 630 (5th Cir. 2006) (quoting United States v. Walker, 960 F.2d 409, 415 (5th Cir. 1992)) (emphasis in original).
262. *Cordero*, 465 F.3d at 630 (quoting *Walker*, 960 F.2d at 415).
263. *Id.* (quoting *Walker*, 960 F.2d at 415) (emphasis in original).
264. Miles v. State, 194 S.W.3d 523, 527–28 (Tex. App.—Houston [1st Dist.] 2006, pet. granted).
265. Howard v. State, No. 05-05-00728-CR, 2006 Tex. App. LEXIS 7913, at *12–15 (Tex. App.—Dallas Sept. 5, 2006, pet. ref'd).
266. Parker v. State, 206 S.W.3d 593, 599 (Tex. Crim. App. 2006) (emphasis in original).

gent circumstances"; rather, all facts should be reviewed "as part of the totality of information, as it relates to both the probable cause and the exigent circumstances determinations."[267]

IV. CONCLUSION

Texas state and federal courts refined a few key points relating to confessions, searches, and seizures this past year, but well-established precedent remains largely the same. Courts continue to employ relatively uniform standards in both state and federal cases in these areas.

267. *Id.* at 600–01.