Criminal Procedure: Confession, Search and Seizure

Thomas M. Melsheimer

David M. Finn

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This Article reviews significant cases during the Survey period on the subject of search and seizure as well as confessions from the Texas Court of Criminal Appeals, the Texas Courts of Appeals and the United States Court of Appeals for the Fifth Circuit. The Article is intended as a summary of decisions published during the Survey period. The Article is not intended as an in-depth treatment of the subject matter and will not discuss all aspects of each case cited.

* B.A., University of Notre Dame. J.D., University of Texas. Partner, Lynn Stodghill Melsheimer & Tillotson, L.L.P., Dallas, Texas. Adjunct Professor of Law, Southern Methodist University School of Law. Adjunct Professor of Law, University of Texas School of Law.

** B.A., University of Notre Dame. J.D., University of Texas.

The research assistance of Chad Johnson, second year law student at Southern Methodist University School of Law, is gratefully acknowledged.

I. TEXAS CASES

A. CONFESSIONS

1. Voluntary Nature of Confessions

During the Survey period, the Texas Court of Criminal Appeals addressed the legality of a confession taken from a misinformed defendant. In *Green v. State*,[1] the defendant argued that the trial court should have suppressed his confession to police. Green asserted on appeal that the confession was involuntary because the police intentionally misinformed him regarding the existence of an eyewitness.[2]

In *Green*, the police originally arrested the defendant on a charge of aggravated robbery. At the hearing before a magistrate, the defendant exercised his Sixth Amendment rights and requested an attorney to represent him on the robbery charge. Subsequently, police learned that the gun found in the defendant's car had fired the bullet taken from a murder scene. After learning of this evidence, the Houston Homicide Division questioned the defendant. At this interview, the defendant waived his Miranda rights to have an attorney present and confessed to being at the scene of the murder.

In addressing the voluntariness of a confession, a court views the totality of the circumstances present at the time of the confession. Citing the U.S. Supreme Court, the Court noted that "[a] confession is involuntary or coerced if the totality of the circumstance demonstrates that the confessor did not make the decision to confess of his own free will."[3] On appeal, Green argued that the officer's intentional misrepresentation about the existence of an eyewitness caused him to confess involuntarily. The Court agreed that misrepresentation is a factor to consider, but stated that without other coercive circumstances "it is insufficient to render an otherwise voluntary confession inadmissible."[4]

The Court adopted the Seventh Circuit's approach to analyzing this type of misrepresentation involving the accused's connection to the crime. Under that court's approach, the question becomes whether the deception "interject[ed] the type of extrinsic considerations that would overcome [the defendant's] will by distorting an otherwise rational choice of whether to confess or remain silent."[5] Based upon this rationale and its own analysis of the totality of the circumstances, the Court held that the defendant's confession was voluntary.[6] Specifically, the Court found that the defendant's prior experience with the police and "that he repeatedly received his Miranda warnings," weighed in favor of a voluntary confession.[7]

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1. 934 S.W.2d 92 (Tex. Crim. App. 1996).
2. *See id.* at 99-101.
3. *Id.* at 99 (citing Arizona v. Fulminante, 499 U.S. 279, 285-86 (1991)).
4. *Id.*
5. *Id.* at 100 (quoting Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992)).
6. *See id.* at 100-01.
7. *Id.* at 100.

2. Admissibility of an Unrecorded Statement

Ordinarily, state law requires officers to record a defendant's statements in order for the statement to be admissible at trial. However, courts recognize an exception to this rule. If a defendant's statement proves to be true and helps to establish guilt, it does not have to be recorded to be admitted at trial.[8]

In *Dansby v. State*,[9] the state charged and convicted the defendant of involuntary manslaughter. Dansby, while intoxicated, was involved in a one-vehicle accident which resulted in the death of one of the passengers. Several witnesses told police that Dansby was driving and that he smelled like he had been drinking. When the officer questioned the defendant at the hospital, Dansby admitted that he drove the car and that he was intoxicated. The trial court found that the confession satisfied the exception to the general rule and admitted it.

On appeal, Dansby contended that the trial court improperly admitted the confession because it did satisfy both requirements of the exception. The Court agreed with the defendant. The exception requires that the unrecorded statement be "found to be true."[10] In this case, the Court placed heavy emphasis on the importance of this qualifying phrase. The officer questioning the defendant already knew that the responses were true.[11] "Found to be true means facts about which the police were unaware at the time of the confession [which] are later, after the confession found to be true."[12] The Court found that this confession failed to satisfy the exception because the statement concerned only matters that the officer already knew.[13]

B. THE TEXAS EXCLUSIONARY RULE

During the Survey period, Texas courts, in three different cases, addressed the application of the Texas exclusionary rule to searches and seizures.[14] The Texas exclusionary rule is embodied in article 38.23(a) of the Texas Code of Criminal Procedure and reads as follows:

> No evidence obtained by an officer or other person in violation of any provision 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.[15]

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8. *See* Dansby v. State, 931 S.W.2d 297, 298 (Tex. Crim. App. 1996) (citing TEX. CODE CRIM. PROC. art. 38.22, § 3(c) (Vernon Supp. 1998)).
9. *See id.*
10. *Id.* at 298.
11. *See id.*
12. *Id.* at 298-99 (quoting Romero v. State, 800 S.W.2d 539, 544-45 (Tex. Crim. App. 1990)).
13. *See id.* at 299.
14. *See* Baker v. State, 956 S.W.2d 19 (Tex. Crim. App. 1997); State v. Johnson, 939 S.W.2d 586 (Tex. Crim. App. 1996); Crunk v. State, 934 S.W.2d 788 (Tex. App.—Houston [14th. Dist.] 1996, pet. ref'd).
15. TEX. CODE. CRIM. PROC. art. 38.23(a) (Vernon Supp. 1998).

Each case addressed involved the proper application of the exclusionary rule in different circumstances: violation of Miranda rights, evidence found by a roommate, and evidence given by a private citizen.

1. Admissibility of Evidence Obtained in Violation of Miranda Rights

Miranda warnings allow a defendant to avoid making a self-incriminating statement. So what happens if police, after the defendant invokes his right to remain silent, continue to question the defendant and learn of valuable evidence? During the Survey period, this issue presented itself to the Texas Court of Criminal Appeals.[16]

In *Baker*, the police arrested the defendant for murdering a store clerk after robbing the store and stealing the victim's truck. After the arrest, several officers arrived on the scene and Baker was advised of his Miranda rights several times. However, after Baker expressed a desire to remain silent officers continued to question him. The defendant responded to the officer's questions, despite his professed desire to remain silent, and later consented to a search of his apartment. On appeal, Baker asserted that the trial court erred in admitting evidence gained during the search. He argued that the police obtained the evidence as a direct result of the violation of his Miranda rights.

Baker's argument, commonly known as the "fruit of the poisonous tree doctrine,"[17] was developed by the Supreme Court to exclude evidence gained from illegal activity.[18] The Texas court noted that subsequent Supreme Court decisions have held that the doctrine does not apply to Miranda violations. "[W]hile the statement taken in violation of Miranda must be suppressed, other evidence subsequently obtained as a result of that statement . . . need not be suppressed."[19] These holdings, however, applied to situations where the police failed to advise a defendant of his Miranda rights. The *Baker* case involved a failure to honor those rights. The Texas Court of Criminal Appeals found the situation presented a distinction without a difference because merely continuing to question a defendant is not necessarily coercive. The Court held that "[i]n the absence of actual coercion, the fruits of a statement taken in violation of Miranda need not be suppressed under the 'fruits' doctrine."[20] The Court, rather than ending the analysis at this point, also evaluated the situation under Texas law.

The Court reasoned that the mere absence of a federal exclusion does not necessarily mean that no state basis exists for exclusion of the evidence.[21] Texas law also has a provision which prohibits the admission of evidence gathered in violation of the Constitution or laws of the United

16. Baker v. State, 956 S.W.2d 19 (Tex. Crim. App.1997).
17. *Id.* at 22.
18. *Id.* (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).
19. *See id.* (citing Michigan v. Tucker, 417 U.S. 433, 452 (1974); Oregon v. Elstad, 470 U.S. 298, 314 (1985)).
20. *Id.* at 23.
21. *See id.* at 24.

States or Texas.[22] Relying on U.S. Supreme Court precedent, the Court found that Miranda violations are not in themselves illegal.[23] "[T]he Miranda rule is simply a judicially imposed rule of evidence. . . ."[24] The questions themselves are not illegal, the answers are simply inadmissible. The Court therefore held that evidence gained as a result of violations of Miranda were not covered by the state exclusionary rule.[25]

2. Private Citizens and the Exclusionary Rule

The Fourth Amendment protects individuals from illegal search and seizure by the government or its agents. In some situations, private citizens may conduct a search which would be violative of the Fourth Amendment if conducted by a government official. Federal law does not require exclusion of this evidence because absent government involvement a violation of the Fourth Amendment cannot occur. In Texas, however, the protection of the exclusionary rule extends further than that of the Fourth Amendment.[26]

In *State v. Johnson*,[27] the Court addressed searches conducted by private citizens. The State accused Johnson of murdering his business partner and roommate. During the course of the investigation, the decedent's sons obtained evidence from the defendant's business and provided it to the police. Based in part on this evidence, the State charged the defendant with murder. The defendant filed a motion to suppress the evidence obtained by the victim's sons because the search violated Texas law. The trial court granted the motion based on the Texas exclusionary rule.[28]

The State argued on appeal that the legislature only intended article 38.23(a), to protect against illegal government action. The Court declined to adopt the State's interpretation.[29] The Court found no reason to divine legislative intent, because the plain meaning of the statute is clear on its face.[30] "[T]he plain language of art. 38.23 supports the conclusion that the unlawful or unconstitutional actions of *all* people, governmental and private alike, fall under the purview of Texas' exclusionary rule."[31] The decedent's sons took the evidence illegally and thus the trial court correctly suppressed it.

Additionally, the Court found that the consent given by Johnson's attorney, as to the receipt of the evidence by police, was irrelevant to the issue of the case.[32] This consent could not vitiate the illegality of the

22. *See id.*
23. *See id.* at 23-24 (citing Davis v. United States, 512 U.S. 452 (1994)).
24. *Id.* at 24.
25. *See id.*
26. *See* State v. Johnson, 939 S.W.2d 586, 588 (Tex. Crim. App. 1996).
27. *See id.*
28. *See id.* at 587.
29. *See id.*
30. *See id.*
31. *Id.* (emphasis in original).
32. *See id.* at 588.

sons' acts.

3. *The Exclusionary Rule and Roommates*

In *Crunk v. State*,[33] the Houston Court of Appeals, for the Fourteenth District, addressed the effectiveness of a roommate's consent to a search of a defendant's room. The State suspected, and later charged, Crunk of murder and attempted murder. During the investigation, officers went to the defendant's home. While Crunk shared the house with three roommates, none of the roommates shared his room. One of the roommates signed a consent form for the officers to search the defendant's room. While at the defendant's home, the officers obtained a list of names, including the victims, with notations regarding property and money. At trial, whether police obtained the list during their search or whether the roommate gave it to them when they arrived was never clearly resolved. The defendant argued that his roommate illegally acquired the list before giving it to the police.

On appeal, the defendant's asserted two theories of illegal activity: (1) the roommate either committed theft, or (2) criminal trespass by removing the list without defendant's permission.[34] Initially, the court stated that the Texas exclusionary rule provides greater protection than the Fourth Amendment.[35] In order to enjoy the protection of Article 38.23, the defendant bears the burden of proving an illegal act which entitles him to the suppression of the evidence.[36]

The court found no evidence to support a charge of theft. "A person commits theft 'if he unlawfully appropriates property with intent to deprive the owner of the property.'"[37] The court found no intent by the roommate to deprive the defendant of the list. The roommate gave the list to the police to facilitate the investigation of a crime, not to deprive the defendant of property.[38]

The court next addressed the issue of criminal trespass. Citing a number of cases, the court found no support for the principle that a roommate commits trespass by entering another roommate's unlocked room.[39] Based on the lack of support for the theories of theft or trespass, the court affirmed the trial court's decision to admit the evidence. Absent an illegal act, the Texas exclusionary rule does not require suppression of evidence.[40]

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33. Crunk v. State, 934 S.W.2d 788, 791 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

34. *See id.* at 792.

35. *See id.* at 793.

36. *See id.* (citing Carroll v. State, 911 S.W.2d 210, 219 (Tex. App.—Austin 1995, no pet.).

37. *Id.* (citing TEX. PEN. CODE. ANN. § 31.03 (Vernon Supp. 1998)).

38. *See id.*

39. *See id.* at 794 (citing People v. Gauze, 542 P.2d 1365 (Cal. 1975); Wesolic v. State, 837 P.2d 130 (Alaska App. 1992)).

40. *See id.*

C. Investigative Detentions

The Fourth Amendment also protects against unreasonable seizures.[41] The Texas Court of Criminal Appeals recently addressed whether police officers may detain a suspect without actually arresting him.

In *Rhodes*, the police began chasing the defendant's car after observing its involvement in suspicious conduct in a high crime area. When the defendant's car pulled over, the driver fled the scene. One officer gave chase, leaving the other officer alone with the defendant. The officer decided to handcuff the defendant for safety reasons–but not to arrest him–until he could evaluate the situation. On the way to the police car, the defendant dropped a bag containing crack cocaine. At that time, the officer arrested the defendant for possession of a controlled substance.

At trial, the defendant moved to suppress the bag of crack on the basis that the officer subjected him to an illegal arrest. The trial court denied the motion. The Texas Court of Criminal Appeals began its analysis by citing *Terry v. Ohio*.[42] In what has become known as a *Terry* stop, an officer "may stop and briefly detain persons reasonably suspected of criminal activity even if probable cause to arrest is not then present."[43]

The Court listed three reasons to allow reasonably necessary force during these types of stops. Reasonable force may be used for "investigation, maintenance of the status quo, or officer safety."[44] The reasonableness of the force must be evaluated from the perspective of a reasonable officer at the scene.[45] The Court viewed the conduct at issue as reasonable. The officer was alone with a suspect who had been involved in a high speed chase. Consequently, the officer's decision to handcuff the defendant to protect himself and safely evaluate the situation was imminently reasonable.[46]

Based upon this analysis of the conduct, the Court found that the detention, while not an arrest, was legal.[47] Therefore, the defendant's bag of crack cocaine was not obtained as a result of an illegal arrest and was properly admitted.

D. Administrative Searches

In certain circumstances, courts have allowed searches using metal detectors and X-ray machines as part of an administrative search. The Austin Court of Appeals recently addressed the extent of an officer's authority to conduct these types of searches.

In *Woods v. State*,[48] the defendant entered a courthouse carrying a gun.

41. *See* Rhodes v. State, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997).
42. 392 U.S. 1 (1968).
43. *Rhodes*, 945 S.W.2d at 117.
44. *Id.*
45. *See id.* at 118.
46. *See id.*
47. *See id.* at 116.
48. 933 S.W.2d 719, 723 (Tex. App.—Austin 1996), *rev'd*, 956 S.W.2d 33 (1997). On November 5, 1997, the Texas Court of Criminal Appeals reversed the decision of the Aus-

Upon her discovery of a metal detector and an X-ray machine at the door, she began to exit the building. One of the officers operating the metal detector noticed her reaction and, finding her behavior suspicious, asked if he could be of assistance. Upon learning that to reach her destination she would have to pass through the metal detector, she attempted to return to her car. The officer did not allow her to leave and forced her to put her bag through the X-ray machine. The officer arrested the defendant after the X-ray revealed the gun.

On appeal, the defendant raised two arguments: (1) the search exceeded the lawful scope of a security screening, and (2) there was no constitutional basis for detaining her.[49] The court addressed these arguments in order.

The court noted that an administrative search does not require a warrant and should be carefully limited.[50] The search should "be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it."[51] The purpose of the instant administrative search was to exclude firearms from the courthouse. Since the defendant attempted to leave the courthouse, the search in question exceeded that scope.

The trial court ruled that the search was a lawful stop and frisk.[52] The Austin appeals court recognized that "[a]n officer may detain a person for investigatory purposes (a '*Terry* stop') if, based on the totality of the circumstances, the officer has a particularized and objective basis for suspecting the person detained of criminal activity."[53] When circumstances equally indicate legal or illegal activity, however, "a detention based on those facts is unlawful."[54] The court found that the defendant's behavior did not appear any more illegal than legal and held that the detention was unconstitutional. The appeals court reversed the trial court's admission of the evidence because the officer exceeded the lawful purpose of the search and detained the defendant unconstitutionally.[55]

E. Exigent Circumstances and the Warrantless Search

During the survey period, the Corpus Christi Court of Appeals analyzed the parameters of probable cause and exigent circumstances necessary to conduct a permissible warrantless search.

In *Cerda v. State*,[56] the police observed the defendant's car following

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tin court. "[T]he 'as consistent with innocent activity as with criminal activity' construct is no longer a viable test for determining reasonable suspicion." 956 S.W.2d at 38 (citations omitted). Because the Survey period runs from October 1 to September 30, the Court of Criminal Appeals decision will be discussed in the 1999 Survey.

49. *See id.* at 723-24.
50. *See id.* at 723.
51. *Id.*
52. *See id.* at 724.
53. *Id.* (citing United States v. Cortez, 449 U.S. 411, 417-18 (1981)).
54. *Id.*
55. *See id.* at 726.
56. 951 S.W.2d 119, 121 (Tex. App.—Corpus Christi 1997, pet. granted).

too closely behind another car. When the officer began to follow the defendant, the other car began swerving. Believing the car to be a decoy for the defendant's, the officer stopped both cars. The defendant admitted that the two cars were traveling together. After this admission, and at the officer's request, the defendant consented to a general search of her vehicle. Discovering a strange box in the air conditioning system, the officer asked the defendant to follow him to a nearby garage. The defendant followed the officer to the garage where the officer proceeded to disassemble the box and found several pounds of marijuana.

On appeal, the defendant argued that not only was her consent involuntary, but also that the search exceeded the scope of the consent.[57] The court agreed with the defendant. Relying on its earlier holding in *State v. Guzman*, the court held that a warrantless search not only required probable cause, "but also exigent circumstances."[58] The court found that neither existed in this case. Probable cause developed only after the defendant followed the officer to the garage.[59] Additionally, since the car was already stopped, no urgency existed to prevent the officer from obtaining a warrant.[60] The lack of urgency or immediate necessity negated the claim of exigent circumstances. Based on these two findings, the appeals court determined that the trial court abused its discretion by admitting the evidence found in the search.[61]

II. FIFTH CIRCUIT CASES

A. Inventory Searches of Impounded Vehicles

Ordinarily, impounding a defendant's car will allow the police to perform an inventory search. These searches satisfy three purposes: (1) to protect the property of the owner, (2) to protect the police against claims of lost property, and (3) to protect the police from danger.[62] If conducted according to established procedures, evidence obtained during an inventory search may be used at trial. However, in the *Hope* case, an improper inventory search resulted in the reversal of a portion of the defendant's conviction.[63]

Hope, an escaped convict, committed several robberies–armed and unarmed–while a fugitive. After his arrest in Memphis, Tennessee, police properly impounded the car Hope left at the boarding house where he had been living. During the inventory search, the police found .25 caliber ammunition in the car.[64] The trial court denied a motion to suppress this

57. *See id.* at 120.
58. *Id.* at 121 (citing State v. Guzman, 942 S.W.2d 41, 45 (Tex. App.—Corpus Christi 1997), *rev'd*, 956 S.W.2d 631 (Tex. Crim. App. 1998)).
59. *See id.*
60. *See id.* at 121-22.
61. *See id.* at 122.
62. *See United States v. Hope*, 102 F.3d 114, 116 (5th Cir. 1996).
63. *See id.* at 118.
64. Hope was arrested while driving another vehicle which was also impounded and inventoried. Hope did not challenge the first inventory. *See id.* at 116.

evidence and the defendant was convicted for illegal possession of a firearm.

In the opinion, the Fifth Circuit relied on *South Dakota v. Opperman*,[65] which held that an inventory of an impounded vehicle does not violate the Fourth Amendment if done according to regulations consistent with the three purposes for the search. Applying that analysis, the court found that the inventory search by the Tennessee officers failed to satisfy those requirements.[66] The only evidence offered at the suppression hearing consisted of a Texas officer's testimony that "he believed an inventory search was performed."[67] Additionally, Judge Politz found that the Tennessee officer turning the evidence over to the Texas authorities did not properly "bag and tag [the evidence] as the search procedures prescribed."[68] While the panel did not opine as to the exact regulations necessary for a valid inventory search, the court found that the dearth of evidence relating to the very existence of any procedures and whether those procedures were followed sufficient to invalidate the search. Significantly, the court stated that its previous opinions have held that an "officer's unrebutted testimony that he followed standard procedures was sufficient to validate an inventory search."[69] The evidence recovered in the invalid search of the Honda represented the only physical evidence of Hope's use of a semiautomatic handgun. Consequently, the court reversed his conviction for illegal possession of a handgun based on that evidence.[70]

B. VOLUNTARY CONSENT TO SEARCH

The Fifth Circuit recognizes voluntary consent as an exception to the Fourth Amendment's requirement of a search warrant. During the Survey period, the Fifth Circuit analyzed the circumstances necessary for consent to be voluntary.[71]

The first situation addressed by the court in *United States v. Rivas*, involved the defendant's own consent.[72] While the police were confiscating stolen property from the yard, Rivas consented to the search of his home. At trial, he sought to suppress the evidence found in his home on the ground of involuntary consent.

The police approached the defendant's home to execute a valid warrant to search the premises for stolen property. Upon their arrival, the police caught the defendant leaving the house through the back door. Officers asked Rivas to sign a consent form to search the house.

65. 428 U.S. 364 (1976).
66. *See id.* at 116-17.
67. *Id.* at 116.
68. *Id.* at 117.
69. *Id.* at 116.
70. The court affirmed the defendant's other convictions. *See id.* at 118.
71. *See* United States v. Asibor, 109 F.3d 1023 (5th Cir. 1997); United States v. Brown, 102 F.3d 1390 (5th Cir. 1996); United States v. Rivas, 99 F.3d 170 (5th Cir. 1996).
72. *See Rivas*, 99 F.3d at 175.

Although he signed the form without reading it, Rivas stated that he believed the officers were already inside and qualified his signature with the word "reluctantly."[73] Despite the qualifications, Rivas gave further oral consent to search the house.[74]

Despite the arguably coercive context of the request, the Fifth Circuit found the consent voluntary. The court arrived at this conclusion by applying the six factors found in *United States v. Kelley*.[75] The factors include:

> (1) the defendant's custodial status; (2) the presence or absence of coercive police tactics; (3) the nature and extent of the defendant's cooperation with officers; (4) the defendant's knowledge of his ability to decline to give consent; (5) the defendant's intelligence and educational background; and (6) the defendant's belief that no incriminating evidence will be found.[76]

Viewed in the totality of the circumstances, the court found Rivas' consent voluntary. None of the *Kelley* factors are dispositive in the determination of voluntariness and they are applied on a case by case basis.[77] However, the *Rivas* panel seemed to emphasize that the defendant was not in custody at the time of the request.[78] Further, the court stated that the form revealed to Rivas that he did not have to consent.[79] Unfortunately, Rivas did not read the consent form and the court found his consent to be voluntary.[80]

The Fifth Circuit next addressed voluntary consent in *United States v. Brown*.[81] In *Brown*, the court evaluated the voluntariness of consent obtained at the conclusion of a traffic stop. The defendant argued that the officer's failure to inform him that the traffic stop detention was at an end rendered the consent involuntary.

The police stopped the van the defendant was in for the driver's failure to wear a seat belt and because the vehicle's inspection sticker had expired. After writing the driver a citation, the officer asked Brown, the van's owner, if there were any illegal items in the van. After Brown responded negatively, the officer asked if he could search the van–to which Brown replied "go ahead."[82] During the search, the officer discovered various drugs and weapons. At that time, the officer arrested all occupants of the van.

On appeal Brown argued three things: (1) that the stop was illegal, (2) even if legal, the officer had an obligation to inform them that the traffic

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73. *Id.*
74. *See id.*
75. *See id.* at 175-76 (citing United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir. 1993)).
76. *Id.*
77. *See id.* at 175.
78. *See id.* at 176.
79. *See id.*
80. *See id.*
81. 102 F.3d 1390 (5th Cir. 1996).
82. *Id.* at 1393.

stop was at an end, and (3) the consent was not voluntary.[83] As for the defendant's first argument, the court declined to adopt a test followed in other circuits requiring the legality of a traffic stop to be tested according to a reasonable officer standard.[84] In rejecting the second argument, the court relied upon a recent Supreme Court decision holding that officers have no duty to inform a motorist that the legal detention is at an end before engaging in consensual interrogation.[85] Finally, the panel found that the defendant's consent was voluntary.

The *Brown* panel also relied upon the six *Kelley* factors.[86] The fact that Brown cooperated with the officer, was not in custody, and "seemed to have the ability to understand," weighed in favor of a finding of voluntariness despite the vulnerable position of a traffic stop.[87] The court stated, "[a]lthough Tracy [Brown] probably did not know he had the right to refuse consent and likely knew of the incriminating evidence hidden in the van, based on the totality of the circumstances, Tracy's consent was voluntarily given."[88]

Lastly, in *United States v. Asibor*,[89] the Fifth Circuit addressed the question of spousal consent to search the home. In *Asibor*, the defendant claimed his wife's consent was coerced and involuntary.

DEA agents arrested Asibor on charges of drug trafficking. After the arrest, the agents went to the defendant's home and asked his wife for consent to search the house. The defendant's wife signed the consent form. During the search, the agents located the defendant's birth certificate and passport which were used to prove that the defendant was in the country illegally after his deportation for a felony conviction. On appeal, the defendant asked the court to find that his wife's consent was coerced.

The court analyzed the initial validity of the wife's consent under its previous holding in *United States v. Smith*.[90] In *Smith*, the court recognized that an individual with joint control of a premises–like a spouse–may validly consent to its search.[91] Accordingly, Mrs. Asibor could validly consent to a search of the house owned by her and her husband.

After that determination, the court evaluated the voluntary nature of her consent, focusing again on the six *Kelley* factors.[92] The court found that these factors, viewed in the totality of the circumstances, warranted a finding of voluntary consent. Specifically, the court focused on the fact that only after Mrs. Asibor read the consent form and signed it did she

83. *See id.* at 1394.
84. *See id.*
85. *See id.* at 1395 (citing Ohio v. Robinette, 117 S. Ct. 417 (1996).
86. *See id.* at 1396; *see supra* text accompanying note 76.
87. *See id.* at 1397.
88. *Id.*
89. 109 F.3d 1023, 1029 (5th Cir. 1997).
90. *Id.* at 1038 (citing United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991)).
91. *See id.*
92. *See id.* at 1039 n.14; *see supra* text accompanying note 76.

allow the search to proceed.[93] Asibor presented no evidence of threats by the DEA agents or evidence that his wife believed the agents would find any incriminating evidence. Accepting the trial court's factual findings regarding the voluntary nature of the search, the court affirmed the decision to admit the evidence.

C. "ALL RECORDS" SEARCH WARRANTS

In 1986, the Fifth Circuit recognized the validity of an "all records" search warrant for purely fraudulent businesses.[94] Additionally, the court held that "a warrant may satisfy the requirements of the Fourth Amendment even though it describes the objects to be seized only in generic terms."[95] During the Survey period, the Fifth Circuit extended the "all-records" search to businesses operated from a residence under certain circumstances.

The defendants in the *Humphrey* case operated a fraudulent loan brokerage service. The defendants represented that they would assist individuals in obtaining loans from legitimate lenders. The victims of the scam would submit applications to the defendants and would later receive a letter stating that they had been approved for financing. The victims were then informed that a small deposit, approximately $4,000, would be required to complete the loan process. Unfortunately, the financing never materialized and when the victims demanded a refund of the deposit, they were refused. The Humphreys ran this business out of their home and kept no known bank accounts. Based upon an affidavit from an FBI agent stating these facts along with others, the government secured a search warrant for the defendants' home. The warrant authorized the seizure of any and all records pertaining to financial transactions.

The defendants argued on appeal that the "warrant was overbroad and failed to describe sufficiently the property to be seized."[96] Judge Jolly, writing for the panel, cited with approval the First Circuit's holding that the "all-records" doctrine should be applied with caution when dealing with residences.[97] There must be proof that fraud consumes the defendant's entire life to seize all records found within the home.[98] The panel held that in this case sufficient proof existed to justify the warrant. The proof cited by the court included "the pervasive nature of the fraud, the considerable overlap of the [defendant's] business and personal lives, and the limitation of the warrant to records pertaining to financial transactions."[99] The court limited its holding regarding the validity of the war-

93. *See id.*
94. *See* Williams v. Kunze, 806 F.2d 594, 598 (5th Cir. 1986).
95. United States v. Humphrey, 104 F.3d 65, 69 (5th Cir. 1997) (citing *Kunze*, 806 F.2d at 598).
96. *Humphrey*, 104 F.3d at 68.
97. *See id.* at 69 (citing United States v. Falon, 959 F.2d 1143, 1148 (1st Cir. 1992)).
98. *See id.*
99. *Id.*

rant to the specific facts and evidence present in this case.[100]

D. Exigent Circumstances

The presence of exigent circumstances may excuse a warrantless search from violating the Fourth Amendment. "Exigent circumstances include those in which officers reasonably fear for their safety or where there is the risk of a suspect fleeing or the destruction of evidence."[101] The Fifth Circuit examines several factors to determine whether exigent circumstances existed at the time of the search. These factors include:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) whether there is a reasonable belief that contraband is about to be removed or a suspect may flee; (3) the possibility of danger to police officers guarding the target site while a search warrant is sought; (4) information indicating that the suspects are aware that the police are on their trail; and (5) the ready destructibility of any contraband present.[102]

The court reviewed two cases during the Survey period in which the police claimed exigent circumstances excused their warrantless searches.

In the first case, *United States v. Blount*,[103] the police obtained a search warrant for the defendant's home. The defendant claimed that the warrant was invalid because the police relied upon evidence from a warrantless search to obtain the warrant.

Police arrived at Blount's house after a suspect fled from a known "crack house." A neighbor informed the police that the suspect would "end up" at Blount's.[104] The police knocked on the defendant's door, but no one came to the door. At the same time, another officer went into the backyard where, through a crack in the window, he observed the defendant locking a closet door. After attempting to gain entry for over twenty minutes, the officers called for backup. Meanwhile, residents in the house had phoned 911 and reported a burglary in progress. The defendant, after observing the arrival of uniformed officers, finally answered the door. At that time, he was immediately seized and handcuffed. The officers also handcuffed two other residents of the home. A pat-down search was conducted on each resident. The officers then conducted a perimeter sweep of the house looking for the suspect.[105] During the sweep, an officer noticed some white residue which a field test revealed to be cocaine. Only after the field test did police call for a search warrant.

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100. *See id.* at 67.

101. United States v. Blount, 98 F.3d 1489, 1495 (5th Cir. 1996).

102. *Id.* at 1496.

103. 98 F.3d 1489 (5th Cir. 1996).

104. *Id.* at 1492.

105. The court found this perimeter sweep to be illegal because it must accompany a legal arrest. The court, for reasons outside the search and seizure context, found the defendant's arrest illegal, invalidating the perimeter sweep. *See id.* at 1498.

The defendants, on appeal, challenged the district court's findings that exigent circumstances excused the officers' warrantless search. As noted previously, the court must balance five factors to determine the presence of exigent circumstances.[106] Based upon these factors, the court decided that no exigent circumstances existed that would excuse the warrantless search.[107] The court relied upon the following facts. The police were not in "hot pursuit" of a suspect. Indeed, they waited over thirty minutes to secure the first house before initiating a chase. No evidence of contraband was present other than an uncorroborated statement by a neighbor, and certainly no evidence of contraband which was readily destructible or removable.[108] Additionally, the police were in no particularized danger, apart from the normal dangers which attend any narcotics investigation.[109]

In another exigent circumstances case during the survey period, the government appealed the district court's decision to suppress evidence. In *United States v. Rodea*,[110] the government claimed that exigent circumstances necessitated a warrantless search performed by the Drug Enforcement Agency.

The DEA had the defendants under surveillance for drug activity. A DEA agent, with the assistance of a confidential informant, arranged to purchase marijuana from one of the defendants. On the way to meet the DEA agent, one of the defendants, traveling with the informant, detected the surveillance. As a result, the DEA was forced to arrest him prior to schedule. Knowing that the other defendants expected their cohort to return shortly, the agents decided to execute a search in order to prevent the defendants from fleeing with the marijuana. As the agents approached the mobile home, one of the defendants ran out the front door. While one agent pursued the fleeing suspect, the others removed the remaining defendants from the mobile home. After the agents removed all defendants from the mobile home, they conducted a perimeter sweep and discovered over 400 pounds of marijuana. The trial court suppressed this evidence because of the warrantless search.

Applying the five factors set out above[111] to these facts, the Fifth Circuit expressed no reservation about finding exigent circumstances.[112] The limited amount of time after the agents were discovered created a great urgency to act. Evaluating the time it would have taken for the defendants to reload the marijuana and move it to a new location, the court held that the agents did not have the necessary three hours to obtain a warrant.[113] Further, with respect to the agents' expressed safety concerns,

106. *See supra* text accompanying note 102.
107. *See Blount*, 98 F.3d at 1496.
108. *See id.*
109. *See id.*
110. 102 F.3d 1401 (5th Cir. 1996).
111. *See supra* text accompanying note 102.
112. *See Rodea*, 102 F.3d at 1410.
113. *See id.* at 1406-08.

the court noted the obvious fact that firearms are tools of the trade for drug traffickers.[114] Viewing these facts as a reasonably prudent officer, the court found the existence of exigent circumstances. The court noted that police cannot create their own exigent circumstances. However, in the instant case, while further exigencies developed as the agents approached, the detection of the surveillance initially set events in motion and created those circumstances, not any act performed by the agents.[115]

114. *See id.* at 1408.
115. *See id.* at 1408-09.