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CRIMINAL PROCEDURE: CONFESSION, SEARCH AND SEIZURE

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THIS Article reviews the major cases in the areas of confession, search, and seizure from the Texas Court of Criminal Appeals, Texas courts of appeals and the United States Court of Appeals for the Fifth Circuit. The United States Supreme Court addressed no confession or search and seizure issues during its last term.

I. TEXAS CASES

A trend toward the use of independent state grounds as a basis for suppressing illegally obtained evidence, which began during the last survey period, has continued. Several cases discussed in this Article show the necessity of concentrating on Texas constitutional and statutory authority as a basis for challenging improper arrests and searches, regardless of contrary holdings from the United States Supreme Court.

A. THE STATE EXCLUSIONARY RULE

In *Nix v. Williams*¹ the United States Supreme Court held that unlawfully seized evidence is admissible in court if the evidence inevitably would have been discovered by lawful means.² In other words, the evidence is admissible if the prosecution can show that the outcome of the law enforcement investigation was not affected by the police illegality. The Supreme Court reasoned that in such a situation the deterrence rationale of the federal exclusionary rule has so little basis that the evidence should be received.³

In *Garcia v. State*⁴ the Texas Court of Criminal Appeals declined to carve out an "inevitable discovery" exception to the state statutory exclusionary rule.⁵ The court stated that because Texas law provides an independent ba-

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1. 467 U.S. 431 (1984).

2. *Id.* at 448.

3. *Id.* at 447.

4. 829 S.W.2d 796 (Tex. Crim. App. 1992).

5. *Id.* at 798. The Texas Code of Criminal Procedure, article 38.23(a) provides 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

sis for the exclusion of evidence, the federal inevitable discovery exception is irrelevant to state law.⁶ The Texas statute does not, on its face, contain an inevitable discovery exception.⁷ It therefore absolutely requires the exclusion of all unlawfully seized evidence.⁸ The court of criminal appeals refused to judicially create an exception to a statute that cannot fairly be read to include such an exception.⁹

The strict construction of the state statutory exclusionary rule and the deference to legislative intent that the court of criminal appeals displayed in *Garcia* was also exhibited by the court in *Fuller v. State*.¹⁰ There, Aaron Fuller was charged with capital murder. During the punishment phase of the capital murder trial, the State offered into evidence a sexually explicit audio tape recording made by Fuller. Fuller had given this tape to a female inmate in the county jail. Another inmate stole the tape and delivered it to the authorities. Fuller objected to the admission of the tape in evidence against him because it was stolen in violation of the law. The court of criminal appeals declined to interpret the language of article 38.23(a)¹¹ in such a way as to confer standing on Fuller to complain about the theft of the tape.¹² Although the court recognized that article 38.23(a) might be read to confer third party standing on a criminal defendant, the court declined "to work such a fundamental change in this State's elemental law of standing without a rather more explicit indication of legislative intent."¹³

In a case of first impression, the San Antonio court of appeals addressed the question of whether evidence obtained by the State in violation of the criminal trespass law¹⁴ is admissible at trial.¹⁵ That court strictly construed article 38.23(a) of the Code of Criminal Procedure to bar the introduction of such evidence.¹⁶

These cases can certainly be used to argue against any judicially created exceptions to the state exclusionary rule. Unless and until the legislature amends article 38.23, defendants should challenge the application of such

of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1993).

6. *Garcia*, 829 S.W.2d at 798.

7. The only exception to the state statutory exclusionary rule is in article 38.23(b) of the Texas Code of Criminal Procedure. It reads as follows: "[i]t is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon Supp. 1993).

8. *Garcia*, 829 S.W.2d at 798.

9. *Id.* at 799.

10. 829 S.W.2d 191 (Tex. Crim. App. 1992), *petition for cert. filed*, No. 92-5344 (Jul. 20, 1992).

11. *See supra* note 5.

12. *Fuller*, 829 S.W.2d at 202.

13. *Id.*; *cf.* *State v. Bassano*, 827 S.W.2d 557, 559 (Tex. App.—Corpus Christi 1992, *pet. ref'd*) (mere allegation by accused that he was a victim of illegal search or seizure, if not challenged by the State, is sufficient to establish standing).

14. TEX. PENAL CODE ANN. § 30.05 (Vernon 1989).

15. *State v. Hobbs*, 824 S.W.2d 317, 318 (Tex. App.—San Antonio 1992, *pet. ref'd*).

16. *Id.* at 319.

judicially created exceptions to the state exclusionary rule under the independent source doctrine. The simple fact that Supreme Court authority allows introduction of seized items as a matter of federal constitutional jurisprudence should never end the inquiry as to whether the items are admissible in a Texas state prosecution. Clearly, article 38.23 provides greater protection against admissibility of illegally obtained evidence than the United States Constitution.

B. THE PRETEXT ARREST DOCTRINE

The Texas Court of Criminal Appeals held in *Black v. State*¹⁷ that “[a]n arrest for one crime is not permitted to be used as a pretext to search for evidence of another.”¹⁸ According to the court in *Black*, if an arrest is used as a pretext, it is an illegal arrest and evidence discovered as a result of it may not be used at trial.¹⁹

The pretext arrest doctrine, as the rule in *Black* was known, came to an end in *Garcia v. State*.²⁰ There the court defined a “pretext arrest” as an objectively valid stop for an allegedly improper reason, i.e., to investigate the arrested person for an offense other than the offense for which he was arrested.²¹ After reviewing a number of federal decisions,²² the court concluded that “the validity of an arrest or stop should be determined solely by analyzing objectively the facts surrounding the event.”²³ The court stated that it made little sense to maintain the pretext arrest doctrine in order to deter the subjectively bad intentions of law enforcement personnel that do not result in any objectively ascertainable violations of the Fourth Amendment.²⁴ The court held that law enforcement officers are free to enforce the laws and detain a person for an actual violation of the law regardless of the usual practices or standards of the local law enforcement agency and regardless of the officer’s subjective reasons for the detention.²⁵

Garcia shifts the focus from a subjective analysis of the arresting officer’s intent to an objective analysis of the officer’s conduct in making an arrest. This does not mean, however, that evidence of an officer’s intent is irrelevant. It would certainly be proper to explore an officer’s intent in evaluating the officer’s credibility when he describes his actions in arresting the defendant.

In *Garcia* the court made clear that the decision was based strictly upon

17. 739 S.W.2d 240 (Tex. Crim. App. 1987).

18. *Id.* at 243 (citing *United States v. Lefkowitz*, 285 U.S. 452 (1932)).

19. *Id.* at 244.

20. 827 S.W.2d 937 (Tex. Crim. App. 1992); *accord*, *Hamilton v. State*, 831 S.W.2d 326 (Tex. Crim. App. 1992).

21. *Garcia*, 827 S.W.2d at 939-40.

22. The court particularly relied on the en banc decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc).

23. *Garcia*, 827 S.W.2d at 943.

24. *Id.* at 944.

25. *Id.*

the United States Constitution.²⁶ Specifically, the court recognized that *Heitman v. State*²⁷ would allow the state courts to interpret article I, section 9 of the Texas Constitution²⁸ differently than the interpretation given by the federal courts to the Fourth Amendment. Because, however, since the appellant in *Garcia* failed to raise a claim under the Texas Constitution, the court declined to address it.

C. ARREST VS. INVESTIGATORY DETENTION

In *Amores v. State*²⁹ the court of criminal appeals discussed the difference between an arrest and an investigative detention. According to the court, an arrest occurs when a person's liberty of movement is restricted or restrained.³⁰ An arrest must be supported by probable cause.³¹ An investigative detention, however, "may be founded upon a reasonable, articulable suspicion that the person detained is connected with criminal activity."³² This is because the purpose of an investigative detention is to allow the police to briefly question a suspicious person regarding his identity, his reason for being where he is, and to make similar reasonable inquiries which are truly investigatory.³³ An investigative detention is therefore a lesser intrusion upon a person's freedom. The distinction between an arrest and an investigative detention is important because the scope of a permissible search depends on whether the suspect is validly under arrest or whether he has merely been detained for purposes of investigation.

A police officer ordered Jorge Amores from his car at gunpoint, placed him face-down on the ground with his hands behind his back, and told him he would be shot if he did not obey. The State argued that Amores was merely investigatively detained. According to the State, the discovery of a handgun in Amores's vehicle, while Amores lay prone on the ground, provided probable cause to arrest Amores. The court rejected the State's argument and held that Amores was under arrest prior to the discovery of the handgun.³⁴ The discovery of the weapon after Amores was arrested could not be used to provide probable cause for the arrest.³⁵ Subsequently discovered facts "cannot retrospectively serve to bolster probable cause at the time

26. *Id.* at 943 n.8.

27. 815 S.W.2d 681 (Tex. Crim. App. 1991) (Court of Criminal Appeals, when analyzing and interpreting search and seizure provision of the Texas Constitution, will not be bound by U.S. Supreme Court decisions addressing the comparable Fourth Amendment issue).

28. Article I, section 9, of the Texas Constitution 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.

TEX. CONST., art. I, § 9.

29. 816 S.W.2d 407 (Tex. Crim. App. 1991).

30. *Id.* at 411.

31. *Id.*

32. *Id.*

33. *Id.* at 412.

34. *Id.*

35. *Id.* at 413.

of the arrest.”³⁶ If the court had found the detention of Amores to be an investigatory detention rather than an arrest, the discovery of the gun could have been considered in assessing the ultimate probable cause for the arrest.

The defendant in *Burkes v. State*³⁷ benefitted from the decision in *Amores* when he appealed his conviction for possession of cocaine. Burkes had the misfortune to run into a police officer while hurriedly leaving an area well-known as a place where drugs were illegally sold and used. The officer ordered Burkes to lie down on the ground, handcuffed Burkes, and then patted him down. The patdown revealed a plastic snuff can containing cocaine. The court of criminal appeals held that handcuffing Burkes and placing him on the ground constituted an arrest and not a mere investigatory detention.³⁸ The court was aided in reaching this conclusion by the fact that the officer did not question Burkes prior to handcuffing and searching him.³⁹ The court remanded *Burkes* to the court of appeals for a determination as to whether there was probable cause for the arrest.⁴⁰

D. PROBABLE CAUSE

In order to effect an arrest, it is necessary to have probable cause to believe that the arrested person has committed or is committing an offense.⁴¹ Whether probable cause exists is determined in Texas by applying the “totality of the circumstances” test.⁴² An officer has probable cause to make an arrest when “the facts and circumstances within the officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a particular person has committed or is committing an offense.”⁴³ This definition of probable cause sounds simple. The application of this definition is, however, often open to dispute.

A critical question in *Amores v. State*⁴⁴ was whether a police broadcast of a burglary in progress, at a particular apartment complex, involving a black male, provided probable cause for a police officer to arrest a black male in a vehicle in the parking lot of the complex. While an officer certainly has the right to act upon such a broadcast,⁴⁵ if there are no facts other than the broadcast known to the arresting officer that give rise to probable cause for an arrest, then the state must establish the facts known to the dispatcher in order to support a finding of probable cause.⁴⁶ In other words, some police official must have sufficient knowledge to possess probable cause. In *Amores* the State failed to prove the dispatcher knew the identity of the person call-

36. *Id.* at 415.

37. 830 S.W.2d 922 (Tex. Crim. App. 1991).

38. *Id.* at 925.

39. *Id.*

40. *Id.* at 925-26.

41. *Amores v. State*, 816 S.W.2d 407, 411 (Tex. Crim. App. 1991).

42. *Id.* at 413.

43. *Id.*

44. *Id.*

45. *Id.* at 416.

46. *Id.* at 414-16.

ing in the report of the burglary in progress.⁴⁷ The call was the equivalent of an anonymous tip which alone is insufficient to establish probable cause.⁴⁸ The arresting officer, who also did not know the identity of the caller, relied upon the broadcast from the dispatcher in arresting the appellant. Since neither the dispatcher nor the arresting officer possessed sufficient facts to establish probable cause, the warrantless arrest was found to be unauthorized because it did not meet the requirements of article 14.04 of the Code of Criminal Procedure.⁴⁹

In concluding that there was a lack of probable cause, the court in *Amores* made clear that "it is 'state law and not federal law that governs the legality of a state arrest so long as that law does not violate federal constitutional protections against unreasonable searches and seizures.'" ⁵⁰

Chapter Fourteen of the Texas Code of Criminal Procedure⁵¹ allows warrantless arrests in Texas only in limited circumstances.⁵² The court has previously held that Chapter Fourteen requires the legal equivalent of

47. *Id.* at 415.

48. *Id.* at 416.

49. *Id.* at 414-15. Article 14.04 of the Texas Code of Criminal Procedure states: Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977 and Supp. 1993).

50. *Amores*, 816 S.W.2d at 413 (quoting *Milton v. State*, 549 S.W.2d 190, 192 (Tex. Crim. App. 1977)).

51. Chapter 14, in pertinent part, states the following:

Article 14.01. Offense within view

(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Article 14.02. Within view of magistrate

A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

Article 14.03. Authority of peace officers

(a) Any peace officer may arrest, without warrant:

(1) persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws;

(2) persons who the peace officer has probable cause to believe have committed an assault resulting in bodily injury to another person and the peace officer has probable cause to believe that there is danger of further bodily injury to that person; . . .

Article 14.04. When felony has been committed

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

TEX. CODE CRIM. PROC. art. 14.01-.04 (Vernon 1977 and Supp. 1993).

52. *Amores*, 816 S.W.2d at 413.

constitutional probable cause,⁵³ a holding that was reaffirmed in *Amores*.⁵⁴

Amores also reaffirmed the court's previous rulings that the "totality of the circumstances" test applies in Texas for determining probable cause for a warrantless search and seizure.⁵⁵ Ultimately, the court found that the warrantless arrest in *Amores* was not authorized by Chapter Fourteen of the Code of Criminal Procedure and was in violation of the Fourth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Texas Constitution.⁵⁶

The Dallas court of appeals also addressed the interplay of Chapter Fourteen of the Texas Code of Criminal Procedure with the Fourth Amendment probable cause standard in an interesting driving while intoxicated case. In *Segura v. State*⁵⁷ the court found probable cause to arrest Segura under the Fourth Amendment based on what the officer saw and information given to him by civilian witnesses.⁵⁸ These witnesses said that Segura appeared intoxicated, and was driving a vehicle that was involved in an accident. The officer did not see Segura driving the vehicle, but the officer did determine that Segura was intoxicated when he spoke to him after the accident. The court found that the Fourth Amendment probable cause standard was met because the officer had facts and circumstances within his knowledge, based on a combination of what he observed about Segura and what others told him of the incident, that would warrant a person of reasonable caution to believe that appellant had committed the offense of driving while intoxicated.⁵⁹

The court in *Segura* found, however, that the more stringent standard of article 14.01 of the Texas Code of Criminal Procedure⁶⁰ was nevertheless violated by an arrest of Segura for driving while intoxicated because the officer did not personally observe Segura driving his pickup.⁶¹ While personal observation of the defendant driving was not required for federal probable cause, it was required under article 14.01.⁶² The opinion made clear that the establishment of probable cause under the United States Constitution does not necessarily allow a warrantless arrest under Texas statutory law. The court reiterated what had been previously stated in *Heitman v. State*:⁶³ the federal constitution provides a floor on constitutional rights and not a ceiling. States are free to grant citizens greater rights than that given by the United States Constitution. In Texas, Chapter Fourteen of the Code of Criminal Procedure does just this.

Ultimately, the court in *Segura* upheld the arrest based on a theory of

53. *Johnson v. State*, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986).

54. *Id.*

55. *Id.*

56. *Id.* at 417.

57. 826 S.W.2d 178 (Tex. App.—Dallas 1992, pet. ref'd).

58. *Id.* at 184.

59. *Id.*

60. *See supra* note 51.

61. *Segura*, 826 S.W.2d at 184.

62. *Id.*

63. 815 S.W.2d 681 (Tex. Crim. App. 1991).

public intoxication rather than driving while intoxicated.⁶⁴ Public intoxication does not require driving and the court found the officer had personally observed all of the facts necessary to make the public intoxication arrest.⁶⁵

In *Torres v. State*⁶⁶ police set up surveillance at a residence. They observed Torres drive up to the residence with another person. The other person exited the vehicle, went behind the residence, and was arrested for a drug offense. The police suspected that Torres was involved in the drug offense. They therefore ordered him out of the car, placed him face down on the ground, and handcuffed him. After reading him his rights, the officers discovered that Torres did not have a valid driver's license. They also found cocaine in the vehicle Torres was driving. The State claimed there was probable cause for the arrest because the officers observed Torres driving without a license. The court of criminal appeals rejected the State's position because the officers did not know until after they arrested Torres that he did not have a valid license.⁶⁷ *Torres* indicates that the court is still willing to look behind the facial justification offered for an arrest, even though this same term the court of criminal appeals abandoned the "pretext arrest" doctrine.

During the Survey period, the court of criminal appeals considered the sufficiency of an affidavit to establish probable cause in support of a warrant. In *Jones v. State*⁶⁸ the court reiterated the well settled rule that the sufficiency of an affidavit for an arrest or search warrant is limited to the "four corners" of the affidavit.⁶⁹ Thus, even if the affiant is aware of enough facts to constitute probable cause, if he fails to put those facts in the affidavit they cannot be considered in determining whether there was probable cause for a magistrate to issue an arrest or search warrant.⁷⁰ The affidavit in *Jones* was insufficient because the affiant, in a conclusory fashion, stated only that he believed that the suspect intentionally and knowingly caused the death of the victim and, during the course of that act, took property from the victim's residence. The failure to set forth the underlying facts for these conclusions invalidated the warrant.⁷¹

In *State v. Martin*⁷² the court of criminal appeals reviewed a complaint filed in municipal court, charging Martin with a traffic offense, to determine if the complaint contained sufficient information to support the issuance of an arrest warrant. A complaint filed in court as a charging instrument need not necessarily reflect the factual basis upon which the complaint is based.⁷³

64. *Segura*, 826 S.W.2d at 185.

65. *Id.*

66. 825 S.W.2d 124 (Tex. Crim. App. 1992).

67. *Id.* at 125.

68. 833 S.W.2d 118 (Tex. Crim. App. 1992), *cert. denied*, *Jones v. Texas*, No. 92-5568, 1992 WL 227399 (S. Ct. Feb. 22, 1993).

69. *Id.* at 123.

70. *Id.* at 124 n.10.

71. *Id.* at 124.

72. 833 S.W.2d 129 (Tex. Crim. App. 1992).

73. The Texas Code of Criminal Procedure, article 45.17 reads in pertinent part as follows:

"such complaint shall state: . . . 2. The offense with which he is charged, in plain and intelligible words; . . ." TEX. CODE CRIM. PROC. ANN. art. 45.17 (Vernon 1979).

A complaint in support of an arrest warrant, however, must contain probable cause to show that the accused committed a crime.⁷⁴ The complaint in *Martin* was sufficient because it alleged the place and day the traffic violation occurred, and it stated that the affiant received the information about the offense from a police officer who personally observed the offense.⁷⁵

The Dallas court of appeals addressed an interesting probable cause question in *State v. Toone*.⁷⁶ Toone sent several written requests to a United States Postal Inspector for illegal videotapes and publications. The postal inspector arranged a controlled delivery of the contraband to Toone's house. In anticipation of the delivery and to prevent possible destruction of the evidence, the postal inspector obtained a search warrant for Toone's house. During the execution of that warrant cocaine was discovered. Toone moved to suppress the evidence of cocaine on the theory that probable cause for the search did not exist when the warrant was issued because the contraband was not yet on the premises. The trial court agreed with Toone and granted the motion to suppress.⁷⁷ The court of appeals reversed, holding that the warrant was valid because there was probable cause to believe that the contraband would be in Toone's house when the warrant was executed.⁷⁸

E. REASONABLE SUSPICION

The court in *Viveros v. State*⁷⁹ stated that, in order for a stop or detention to be legal under the reasonable suspicion standard, the officer must possess articulable facts that create some reasonable inference of criminal conduct.⁸⁰ This means that "there must be a reasonable suspicion that there is something out of the ordinary occurring and some indication that the unusual activity is related to crime."⁸¹ The court found that passing a moving patrol car on an interstate highway at sixty-five miles per hour, and then slowing to forty-five miles per hour and maintaining that speed until stopped by the officers, is not suspicious activity which may be reasonably believed to be related to crime.⁸² The court then held that the marijuana the officers observed following the stop based on that conduct should have been suppressed.⁸³

74. Article 15.05 of the Texas Code of Criminal Procedure reads in pertinent part as follows:

[t]he complaint shall be sufficient, without regard to form, if it have these substantial requisites: . . . 2. It must show that the accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense

TEX. CODE CRIM. PROC. ANN. art. 15.05 (Vernon 1977).

75. *Martin*, 833 S.W.2d at 132.

76. 823 S.W.2d 744 (Tex. App.—Dallas 1992, pet. granted).

77. *Id.* at 745.

78. *Id.* at 747.

79. 828 S.W.2d 2 (Tex. Crim. App. 1992).

80. *Id.* at 4.

81. *Id.*

82. *Id.*

83. *Id.*

In *Davis v. State*⁸⁴ the court of criminal appeals held that a police officer had reasonable suspicion upon which to detain Davis under the following facts: he was one of three black males standing in front of a particular apartment where, according to the police dispatcher, three black males were reportedly selling drugs; the three men attempted to "flee" when they saw the officer's car; and the appellant was suspiciously wearing a trench coat although it was a warm day.⁸⁵ The court, however, disallowed the admission of evidence contained in a matchbox found during a patdown search⁸⁶ of the appellant because it was unreasonable for an officer to fear that a razor blade or other weapon might have been hidden in the matchbox.⁸⁷

The amount of suspicion necessary to detain members of the travelling public was considered at least twice by the Houston court of appeals for the First District. In *Walton v. State*⁸⁸ the court considered the detention of an airline passenger. A Houston police officer was working at the airport looking for potential drug couriers when he spotted Walton. The officer testified that Walton appeared nervous, which is a characteristic in a drug courier profile. Additionally, Walton walked to the metal detector, hesitated, and then walked away, and held his suitcase close to him. Walton later met a Latin American male and started to walk out of the airport with him. The officer approached Walton and asked to examine his ticket and driver's license. The names did not match. The officer asked Walton if he was carrying narcotics. Walton said he was not. Walton allowed the officer to look in his suitcase where a large amount of cash was found. He was then taken to the police office where a drug detection dog was brought in to examine the money and the suitcase. The dog "alerted" on both. The officer requested Walton's identification again, took the wallet, and discovered cocaine in it. The court held that Walton was detained at the point that the officer asked permission to examine his suitcase.⁸⁹ The court also held that there was no reasonable suspicion for this detention,⁹⁰ and the cocaine obtained from Walton's wallet was obtained as a direct result of the illegal detention and should have been suppressed.⁹¹

In *Mitchell v. State*⁹² the court considered the detention of a bus passenger. Similar to the circumstances in *Walton*, the police were monitoring activity in a bus station looking for narcotics couriers. Mitchell's actions were unusual as he entered the bus station and then boarded a bus. Three officers approached Mitchell on the bus, asked to talk to him, and asked to see his ticket. The officers then asked if they could look through Mitchell's bag. Mitchell asked if he had a right to privacy and the officers assured him that

84. 829 S.W.2d 218 (Tex. Crim. App. 1992).

85. *Id.* at 220.

86. During an investigatory stop a police officer who reasonably fears for his or her safety, or that of others, may conduct a limited search of the outer clothing for weapons. *Id.*

87. *Id.* at 221.

88. 827 S.W.2d 500 (Tex. App.—Houston [1st Dist.] 1992, no pet.).

89. *Id.* at 502.

90. *Id.* at 503.

91. *Id.* at 503-04.

92. 831 S.W.2d 829 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

he did. The officers told Mitchell that if he preferred they could have a dog check the bag instead. Mitchell then agreed to allow the officers to look in his bag. The officers found cocaine and marihuana in the bag. The court analyzed this situation by first noting that a seizure does not occur just because a police officer approaches someone and asks a few questions.⁹³ The proper inquiry was whether a reasonable person in Mitchell's situation would feel free to decline the officers' requests or otherwise terminate the encounter.⁹⁴ The court held that a reasonable person would not have believed that he was free to ignore the officers or terminate the encounter and without reasonable suspicion the detention was illegal.⁹⁵ Additionally, the court found that the consent Mitchell gave to the officers to search his bag was not voluntary, and the evidence of drugs should therefore have been suppressed.⁹⁶

Under *Heitman v. State*,⁹⁷ if properly raised,⁹⁸ the courts are required to address search and seizure issues under the Texas Constitution separately from their disposition under the federal constitution.⁹⁹ At least two Texas courts of appeals have decided that article I, section 9 of the Texas Constitution requires no greater restrictions on police activity regarding reasonable suspicion detentions and searches than that required by *Terry v. Ohio*¹⁰⁰ under the United States Constitution. In *Brown v. State*,¹⁰¹ the Dallas court of appeals stated that there was "no Texas statute or case requiring different or more stringent reasons than those articulated in *Terry* to justify a temporary detention in Texas under article I, section 9" of the Texas Constitution.¹⁰² In *Spillman v. State*,¹⁰³ the Austin court of appeals came to the same conclusion.¹⁰⁴

F. ATTENUATION OF THE TAIN

In *Brown v. Illinois*¹⁰⁵ the United States Supreme Court determined that a confession obtained by authorities after an illegal arrest might be admitted into evidence if the taint of the illegal arrest was attenuated before the police obtained the confession.¹⁰⁶ The Supreme Court identified four factors that should be considered in deciding whether a confession was obtained by ex-

93. *Id.* at 832.

94. *Id.* (citing *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991)).

95. *Id.* at 833.

96. *Id.* at 834.

97. 815 S.W.2d 681 (Tex. Crim. App. 1991).

98. "Attorneys, when briefing constitutional questions, should carefully separate federal and state issues into separate grounds and provide substantive analysis or argument on each separate ground. If sufficient distinction between state and federal constitutional grounds is not provided by counsel, this Court may overrule the ground as multifarious." *Id.* at 690-91 n.23.

99. *Id.* at 682-83.

100. 392 U.S. 1 (1968).

101. 830 S.W.2d 171 (Tex. App.—Dallas 1992, pet. ref'd).

102. *Id.* at 174.

103. 824 S.W.2d 806 (Tex. App.—Austin 1992, pet. ref'd).

104. *Id.* at 811.

105. 422 U.S. 590 (1975).

106. *Id.* at 602.

ploitation of the illegal arrest: 1) whether the suspect was given *Miranda* warnings; 2) the temporal proximity of the arrest and the confession; 3) the presence of intervening circumstances; and 4) the purpose and flagrancy of official misconduct.¹⁰⁷ The Texas Court of Criminal Appeals also applied those four factors in deciding *Jones v. State*.¹⁰⁸

Jones was arrested for capital murder pursuant to a warrant based on an affidavit that failed to set forth probable cause for the arrest. The court of criminal appeals said that, because the arrest was illegal, it must examine each piece of evidence obtained after the arrest in light of the factors identified in *Brown* in order to determine if the taint of the illegal arrest was sufficiently attenuated.¹⁰⁹ The court held that the taint of the illegal arrest was attenuated as to written confessions given by Jones and that those statements were properly admitted into evidence.¹¹⁰ The court based this decision on the fact that *Miranda* warnings were given prior to each confession, there was no official misconduct, and Jones was taken before a magistrate before confessing.¹¹¹ An oral statement given by Jones, however, was found to be tainted because it was made almost immediately after the arrest, without any intervening circumstances, and before Jones was taken before a magistrate.¹¹²

In *Arcilla v. State*¹¹³ the court of criminal appeals made clear that finding a consent to search to have been voluntary does not conclude the analysis of whether the search was tainted by an illegal arrest.¹¹⁴ The trial court should still consider the factors identified in *Brown* to determine if the taint of the illegal arrest was attenuated.¹¹⁵ In *Arcilla*, however, there was no need for an attenuation of the taint analysis since *Arcilla* challenged only the voluntariness of his consent in the appellate court.¹¹⁶

G. SCHOOL SEARCH

The court of criminal appeals explained the parameters of a search by public school authorities in *Coronado v. State*.¹¹⁷ Relying on United States Supreme Court authority,¹¹⁸ the court first noted that a warrant was not required before searching a student.¹¹⁹ A search of a student, however, must be reasonable.¹²⁰ In order to decide if a search is reasonable, a court must

107. *Id.* at 603.

108. 833 S.W.2d 118 (Tex. Crim. App. 1992), *cert. denied*, Jones v. Texas, No. 92-5568, 1992 WL 227399 (S. Ct. Feb. 22, 1993).

109. *Id.* at 125.

110. *Id.*

111. *Id.*

112. *Id.* at 126.

113. 834 S.W.2d 357 (Tex. Crim. App. 1992).

114. *Id.* at 359.

115. *Id.*

116. *Id.*

117. 835 S.W.2d 636 (Tex. Crim. App. 1992).

118. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

119. *Coronado*, 835 S.W.2d at 640.

120. *Id.*

determine if the search was justified at its inception.¹²¹ This means there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated, or is violating, either the law or the rules of the school."¹²² The court must also determine whether the search was conducted in a manner reasonably related in scope to the circumstances which justified the search in the first place.¹²³ Since the stated justification for the search of Coronado was that he was suspected of truancy, the application of the above principles invalidated the search of Coronado's car that was parked in the school parking lot.¹²⁴

H. ORAL CONFESSION

Oral confessions in Texas are admitted into evidence under very limited circumstances.¹²⁵ One circumstance authorizing the admission of an oral confession is where the confession "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused. . . ." ¹²⁶ The Court of Criminal Appeals made it clear in *Almanza v. State*¹²⁷ that "it is the combination of the oral statement and the subsequent discovery of previously unknown evidence independently verifying the statement which provides the reliability necessary" to render the statement admissible.¹²⁸ The oral statement by Almanza identifying material in his bedroom at the time of his arrest as his "personal stuff" was held inadmissible even though the "stuff" later turned out to be heroin.¹²⁹ The court held that Almanza's statement did not lead to the discovery of evidence that later verified it, and was nothing more than a mere assertion of guilt.¹³⁰

I. INVENTORY SEARCH

Inventory searches are a well-established exception to the general prohibition on warrantless searches. An inventory search of a vehicle is permissible under both the Fourth Amendment to the United States Constitution, and article I, section 9 of the Texas Constitution, if conducted pursuant to a lawful impoundment of the vehicle by the police.¹³¹ In other words, if the police have the right to seize the vehicle they have the right to conduct an

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 641.

125. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3 (Vernon Supp. 1993).

126. *Id.* § 3(c).

127. 839 S.W.2d 817 (Tex. Crim. App. 1992).

128. *Id.* at 821.

129. *Id.* at 820-21. The ruling in *Almanza* appears to substantially overrule *Port v. State*, 791 S.W.2d 103 (Tex. Crim. App. 1990). *Port* had reinterpreted Article 38.22(3)(c) to allow admission of an oral statement that was shown to be true through other evidence even if the statement did not lead the police to find other evidence.

130. *Id.* at 821.

131. *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Benavides v. State*, 600 S.W.2d 809 (Tex. Crim. App. 1980).

inventory search. The Supreme Court in *Colorado v. Bertine*¹³² stated that this search is to protect the car owner's property and the police from claims of lost or stolen property or from potentially dangerous objects in the vehicle.¹³³

In *Bertine*, the defendant was arrested for driving under the influence of alcohol. After his arrest and prior to the impoundment of his vehicle, Bertine's van was inventoried. Inside a backpack in the vehicle, the officers found cocaine and a large amount of cash. The Supreme Court of Colorado held the search to be unreasonable, in part, because Bertine himself was not offered the opportunity to make other arrangements for the safekeeping of the property. The United States Supreme Court reversed, holding that "the reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."¹³⁴

In *Gords v. State*¹³⁵ the Dallas court of appeals was faced with a similar question. The officers arrested Gords for assault. They then impounded his vehicle and conducted an inventory search. During the inventory search the police found cash, a semi-automatic rifle, and cocaine.

The *Gords* court defined the issue as being whether the inventory search was reasonable under article I, section 9 of the Texas Constitution.¹³⁶ While conceding that under *Bertine* the search may have been permissible under the United States Constitution, nevertheless, based on *Heitman v. State*,¹³⁷ an independent analysis under the Texas Constitution was required.¹³⁸ *Gords* found that "Texas courts have consistently held that impoundment is lawful only when no other reasonable alternative is available to insure the protection of the vehicle."¹³⁹ This finding was contrary to the Supreme Court ruling in *Bertine*. Since the State in *Gords* failed to prove that there were no other reasonable alternatives available, the inventory search was held impermissible under the Texas Constitution and the case was reversed.¹⁴⁰

Gords may be the most important Texas court of appeals case during the Survey period. *Heitman* decided that the Texas courts were allowed to interpret the state constitution to provide more protection on search issues than the federal constitution. However, *Heitman* itself provided little guidance as to what situations would be appropriate for this application of independent state grounds. Understandably the courts of appeals have been reluctant to take the first step in finding independent state grounds to disallow searches when Supreme Court authority would allow such searches. In *Gords*, the court of appeals broke ranks with this pattern and found the

132. 479 U.S. 367 (1987).

133. *Id.* at 373.

134. *Id.* at 374 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)).

135. 824 S.W.2d 785 (Tex. App.—Dallas 1992, pet. ref'd).

136. *Id.* at 787.

137. 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

138. *Gords*, 824 S.W.2d at 787.

139. *Id.*

140. *Id.* at 788.

Texas Constitution to give greater protection than the federal constitution on this issue.

It should be noted that other courts of appeals may not follow the lead of the Dallas court on this issue. In *Autran v. State*¹⁴¹ the Beaumont court of appeals dealt with a different inventory search issue and cited *Bertine* with approval.¹⁴² *Autran* did not address the issue of whether other arrangements could be made for the safekeeping of the vehicle. Rather, the issue in *Autran* was the permissible scope of the inventory search itself.¹⁴³

II. FEDERAL CASES

A. CONSENT SEARCHES

A common point of contention regarding consent searches is whether the officers exceeded the scope of the consent. *United States v. Ibarra*¹⁴⁴ is a good demonstration of the varying approaches to the resolution of this question. The issue in *Ibarra* was whether officers exceeded the consent to search a house given to the police by a guest, when the officers forcibly broke into a sealed attic space.¹⁴⁵

The officers approached the house in question and knocked on the door. Robert Chambers answered the door and allowed the officers to enter the house. After explaining that they were conducting a narcotics investigation, the officers asked for Chambers's permission to search the house. Chambers's reply was, "That would be all right." Chambers, however, refused to sign a written consent to search form, explaining that the house wasn't his, but he was staying there as a guest for a few days.

The officers began their search which led to the house's attic. They discovered that access to the attic was through the ceiling of the bedroom closet, however, the entrance to the attic was sealed off with boards. The officers used a sledgehammer to knock out the boards in the ceiling. Once inside the attic, the officers found nearly one million dollars in cash, ledgers and a money counting machine.

The district court found that Chambers "freely and voluntarily consented" to the search of the house and garage, but that such consent could not have been reasonably interpreted to include a structural dismantling of the secured ceiling-attic floor using a sledgehammer.¹⁴⁶ Based on this finding, the items found in the attic were held to be inadmissible at trial.¹⁴⁷

The government appealed and a panel of the court of appeals reversed the district court's suppression order.¹⁴⁸ The court of appeals then agreed to

141. 830 S.W.2d 807 (Tex. App.—Beaumont 1992, pet. granted).

142. *Id.* at 812. "The reasonableness of any police or governmental activity does not necessarily or invariably rest on the existence of alternative 'less intrusive means.'" *Id.*

143. *Id.* at 814-16.

144. 965 F.2d 1354 (5th Cir. 1992) (en banc).

145. *Id.* at 1356.

146. *Id.* at 1355.

147. *Id.*

148. *Id.* at 1356.

hear the case en banc. The en banc court was equally divided, therefore the district court's suppression order was affirmed.¹⁴⁹

The judges voting to affirm the suppression order, in an opinion by Judge Jolly, relied on *Florida v. Jimeno*¹⁵⁰ in framing the issue on appeal as what a typical reasonable person would believe was encompassed within the consent given by Chambers to the officers.¹⁵¹ Relying on the district court's factual findings regarding the degree of force used and the extent of damage caused when the officers broke into the attic, these judges concluded that the officers exceeded the scope of the consent.¹⁵² They concluded that a general statement of consent is not limitless, "[r]ather, it is constrained by the bounds of reasonableness"¹⁵³

In an opinion by Judge Duhe, the remainder of the court concluded that the officers' conduct was not a structural dismantling of the attic entrance and was therefore not a Fourth Amendment violation.¹⁵⁴ Additionally, these judges concluded that Chambers's consent to search extended to the attic.¹⁵⁵

The differing viewpoints expressed by the court demonstrate the different philosophies underlying consent searches. The first faction of judges narrowly construed the consent and found that anything other than normal searching is outside the bounds of a general consent. The second group of judges took the opposite view in finding that a general consent is broadly construed and is not normally limited except in extraordinary circumstances.

B. REASONABLENESS OF SEARCH

In *United States v. Pierre*¹⁵⁶ the court concluded that it was reasonable for a border patrol agent to put his head inside a vehicle to address a passenger during a routine stop at a fixed checkpoint.¹⁵⁷ The court further held that, when the agent smelled freshly burned marijuana inside the vehicle, he had probable cause and was justified in searching the vehicle and its contents.¹⁵⁸

The defendants in this case were stopped at the fixed immigration checkpoint at Sierra Blanca, Texas. The agent spoke to the persons in the front seat concerning their citizenship and then thought he saw someone in the back seat. He stuck his head into the window to get a clear view of the backseat and to talk to the person there. As he did, he smelled freshly burned marijuana in the vehicle. The agent instructed the people to exit the

149. *Id.* at 1354.

150. 111 S.Ct. 1801 (1991).

151. *Ibarra*, 965 F.2d at 1356.

152. *Id.* at 1356-59.

153. *Id.* at 1358.

154. *Id.* at 1360.

155. *Id.* at 1361.

156. 958 F.2d 1304 (5th Cir. 1992), *cert. denied*, — U.S. —, 113 S. Ct. 280 (1992).

157. *Id.* at 1309.

158. *Id.* at 1310.

vehicle and subsequently obtained their permission to search it. In the course of the search, 13.8 pounds of cocaine were found.

The district court denied the motion to suppress and, after their conviction, the defendants appealed. A panel of the court of appeals concluded that the agent had conducted a search when he stuck his head into the vehicle and that the search was unreasonable.¹⁵⁹ The panel further concluded that the consent to search was not sufficiently attenuated from the illegal search to cure the taint and that the district court erred in not suppressing the evidence.¹⁶⁰

The court of appeals granted en banc rehearing on its own motion in order to address this issue.¹⁶¹ Upon rehearing, the court initially noted that "agents at fixed checkpoints may stop and briefly question the occupants of any vehicle without violating their Fourth Amendment rights."¹⁶² However, if agents wish to search vehicles or their occupants, probable cause or consent is required.¹⁶³

While not specifically deciding if the agent's conduct in placing his head inside the vehicle was a search, the court nevertheless concluded that he acted reasonably in doing so.¹⁶⁴ The court stated that, since agents have the right to question persons at fixed checkpoints concerning their citizenship, they have the right to conduct their questioning in an effective manner.¹⁶⁵ This effective questioning right includes the right of the officer to have eye contact with the person during the exchange.¹⁶⁶ The court found that this gave the agent the right to place his head in the vehicle to see the person he was questioning.¹⁶⁷ The court additionally concluded that the agent's actions were no more intrusive than necessary to accomplish his objective and therefore he had a right to be where he was when he smelled the marijuana.¹⁶⁸ Under the court's ruling, there was no illegality tainting the search and the order of the district court denying the motion to suppress was affirmed.¹⁶⁹

C. PATDOWN SEARCHES

In *United States v. Rideau*¹⁷⁰ the Fifth Circuit, in a sharply divided en banc opinion, upheld a patdown search that a previous panel opinion¹⁷¹ had found improper.¹⁷² The facts in *Rideau* are relatively simple. An officer,

159. *United States v. Pierre*, 932 F.2d 377, 383, 385 (5th Cir. 1991).

160. *Id.* at 390-91.

161. *United States v. Pierre*, 943 F.2d 6 (5th Cir. 1991).

162. *Pierre*, 958 F.2d at 1308 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

163. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 567).

164. *Id.* at 1309.

165. *Id.*

166. *Id.*

167. *Id.* at 1309-10.

168. *Id.* at 1310.

169. *Id.*

170. 969 F.2d 1572 (5th Cir. 1992).

171. 949 F.2d 718 (5th Cir. 1991).

172. *Rideau*, 969 F.2d at 1576.

driving through a high crime area, saw Rideau standing in the road at about 10:30 at night. The officer then observed Rideau stumble as he stepped from the road. As the officer got out of his car he asked Rideau to identify himself. Rideau began to back away. The officer then reached out and patted down Rideau's outer clothing and felt a gun. Rideau was charged with possession of a firearm by a felon.¹⁷³

In *Terry v. Ohio*¹⁷⁴ the United States Supreme Court held that an officer may conduct an investigatory detention and protective patdown when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous"¹⁷⁵ *Terry* requires that the officer be justified in initially detaining the individual.¹⁷⁶ Additionally, the officer must be able to point to specific and articulable facts suggesting that the individual presented a risk of harm to the officer or others to be justified in conducting a patdown.¹⁷⁷ A brief detention is lawful when supported by specific and articulable facts that reasonably warrant the intrusion.¹⁷⁸ In *Maryland v. Buie*¹⁷⁹ the court reaffirmed *Terry*, stating that *Terry* authorizes "a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on 'specific and articulable facts', and not on a mere 'inchoate and unparticularized suspicion or hunch', 'that he is dealing with an armed and dangerous individual.'" ¹⁸⁰

The panel opinion of the Fifth Circuit concluded that the initial detention of *Rideau* was justified based on his intoxicated appearance.¹⁸¹ The court found that the patdown was improper, however, based on the lack of articulable facts which would support an inference that Rideau was armed and dangerous.¹⁸²

In reversing the panel decision, the en banc court found that the officer acted properly in conducting the patdown of Rideau.¹⁸³ The court concluded that it was not unreasonable for the officer to have feared that when Rideau was backing away he was doing so in order to give himself time and space to draw a weapon.¹⁸⁴ Based on this conclusion, it was not unreasonable for the officer to touch Rideau's pocket to determine whether he had a gun.¹⁸⁵

The court found that because this encounter took place at night, in a high

173. *Id.* at 1573.

174. 392 U.S. 1 (1968).

175. *Id.* at 30.

176. *Id.* at 21.

177. *Id.*

178. *Id.*

179. 494 U.S. 325 (1990).

180. *Id.* at 332.

181. *Rideau*, 949 F.2d at 720.

182. *Id.*

183. *Rideau*, 969 F.2d at 1576.

184. *Id.* at 1575.

185. *Id.*

crime area where the carrying of guns was common, articulable facts existed which legitimately justified the officer's actions.¹⁸⁶ The court majority, however, also stated that the fact that an individual is in a high crime neighborhood at night is not in and of itself enough to support an officer's decision to stop and frisk him.¹⁸⁷

In dissent, Judge Smith, joined by four additional judges, sharply contested the majority's conclusion.¹⁸⁸ The dissent read the majority's opinion as allowing the patdown of virtually anybody in a high crime area.¹⁸⁹ This result would be violative of the requirement in *Terry* and *Buie* that the officer have a particularized and articulable suspicion before conducting the patdown.¹⁹⁰ According to Judge Smith, virtually any activity by Rideau after his detention would be construed by the officer as suspicious and by the majority as sufficient justification for a patdown search.¹⁹¹ The dissent concluded that the real thrust of the majority opinion was to allow almost unlimited patdown searches in high crime areas.¹⁹²

The sharply worded decisions in *Rideau* show a deep division in the Fifth Circuit over the proper scope of a *Terry* patdown search. For now, those judges inclined to grant officers greater leeway in conducting patdown searches have the upper hand. Under this opinion, a minimal amount of suspicious activity in a high crime area may justify a patdown search, while the same conduct in a different location may not. This opinion may ultimately prompt the Texas courts to adopt a narrower interpretation of an officer's right under the Texas Constitution to conduct a patdown search than that given to the federal constitution by the federal courts.

D. CONFESSIONS AND STATEMENTS

In *Fleming v. Collins*¹⁹³ the Fifth Circuit explored the reach of the "public safety exception" to the rules under *Miranda v. Arizona*¹⁹⁴ requiring advising arrested persons of their Fifth Amendment rights.¹⁹⁵ The court found the facts under *Fleming* to fit within the public safety exception to *Miranda*.¹⁹⁶ The court substantially relied on the holding in *New York v. Quarles*.¹⁹⁷ Fleming and two other men entered a Dallas bank armed with pistols, and attempted a robbery. A security guard knocked a gun out of the hands of

186. *Id.*

187. *Id.*

188. *Id.* at 1576.

189. *Id.* at 1580-81.

190. *Id.* at 1582.

191. *Id.* at 1581-82.

192. *Id.* at 1584.

193. 954 F.2d 1109 (5th Cir. 1992).

194. 384 U.S. 436 (1966) (requiring warnings to a suspect, before officers engage in custodial interrogation, concerning his right to remain silent, to have an attorney assist him, and the fact that any incriminating statements may be used against him).

195. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

196. *Fleming*, 954 F.2d at 1112-14.

197. 467 U.S. 649 (1984) (recognized "public safety" exception to requirement of giving *Miranda* warnings).

one of the robbers and shots were exchanged. As the robbers were fleeing, the security guard shot Fleming, but he continued to run toward a used car dealership one block away. Don Adams, who was working at the dealership, heard a gunshot and saw Fleming running. Adams chased Fleming into a nearby field and held a pistol on him until police arrived.

Two Dallas police officers were heading toward the bank when they saw Adams and Fleming. They approached Adams and Fleming and ordered Adams to drop his gun. They then determined that Fleming was one of the bank robbers. In response to questions from the officers, Fleming stated that the man at the bank had shot him. The officer asked him who was with him, his name, and where the gun was. Fleming responded that he had dropped the gun and did not get any money. He additionally said he did not shoot the security guard, but he acknowledged that he had been involved in the bank robbery. At the time of the questioning, Fleming had not received any *Miranda* warnings, although the officer stated that Fleming was not free to leave from the time the officer arrived.

The *Fleming* court explained that *Miranda* warnings were designed to protect an individual's Fifth Amendment rights during custodial interrogation.¹⁹⁸ It was acknowledged that Fleming was in custody and that at least some of the officers's questions were interrogation, therefore, a question existed as to whether *Miranda* warnings were required.¹⁹⁹ The determinative factor in *Fleming* was whether the public safety exception to *Miranda*, recognized in *New York v. Quarles*,²⁰⁰ applied to this situation. The court found that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."²⁰¹

The questions as to the location of Fleming's gun were asked in order to determine where a loaded gun had been discarded. According to the court, to require that *Miranda* warnings be given before making this inquiry was improper and, with slightly different facts, could have deterred Fleming from answering questions that were necessary to protect the officers or bystanders.²⁰² The court concluded that because the "public safety" exception to *Miranda* applied, Fleming's statements were admissible despite the failure of the officer to give him his *Miranda* warnings.²⁰³

In dissent, Judge Williams, joined by Judge Brown, agreed that the public safety exception was applicable to the earlier stages of the officer's confrontation and questioning of Fleming.²⁰⁴ The initial questions concerned the location of the gun. Judge Williams had no problem with the finding that the public safety exception to *Miranda* excused the failure of the officer to advise

198. *Fleming*, 954 F.2d at 1112.

199. *Id.*

200. 467 U.S. 649 (1984).

201. *Fleming*, 954 F.2d at 1112.

202. *Id.* at 1113.

203. *Id.* at 1113-14.

204. *Id.* at 1114. (Williams & Brown, J.J., dissenting).

Fleming of his *Miranda* warnings at that time.²⁰⁵ However, the officer later asked Fleming specifically if he had been involved in the bank robbery and he replied that he had. The dissent found this question and answer not to be covered by the public safety exception and therefore inadmissible at trial.²⁰⁶

In reaching this conclusion, the dissent found that any threat to public safety passed when the officer had Fleming in custody and determined that he no longer had a weapon.²⁰⁷ The dissent emphasized the narrow strictures of the *Quarles* exception, pointing out that a case where it applies is so rare that the Fifth Circuit had never applied it before.²⁰⁸

E. RIGHT TO COUNSEL

The confusing area of when a defendant has a right to counsel received some attention from the Fifth Circuit during this Survey period. In *United States v. Cooper*²⁰⁹ and *United States v. Carpenter*,²¹⁰ the court tackled the difficult question of the difference between the Sixth Amendment²¹¹ right to counsel and Fifth Amendment²¹² right to counsel.

In *Cooper* the defendant was in custody on a state aggravated robbery charge. The state court appointed an attorney to represent Cooper on this charge. Six days after appointment of counsel, a federal agent visited Cooper in jail without informing his attorney. The purpose of the visit was to ask Cooper about a shotgun found in the trunk of his car that was unrelated to the robbery for which he was in custody. The agent advised Cooper of his Fifth Amendment rights, including the right to have counsel present during custodial interrogation. Cooper waived his right to counsel and told the agent he had received the gun from a friend in order to have the stock fixed. Cooper was subsequently charged in federal court with possession of the shotgun. The district court denied his motion to suppress his statement to the federal agent concerning the gun.²¹³ He was convicted and appealed this ruling.

In *Carpenter* the defendant was arrested on a state burglary charge. After taking Carpenter to the county jail, the police found a firearm and crack pipe on the back seat floorboard of the police car. Carpenter was subsequently appointed a lawyer to represent him on the state burglary charge, however, his court-appointed attorney did not speak with him until weeks later. In the interim, an agent of the Bureau of Alcohol Tobacco and Firearms visited Carpenter twice. The agent advised Carpenter of his *Miranda* rights and

205. *Id.*

206. *Id.* at 1115.

207. *Id.*

208. *Id.*

209. 949 F.2d 737 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2945 (1992).

210. 963 F.2d 736 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 355 (1992).

211. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

212. There is no specifically delineated right to counsel under the Fifth Amendment to the United States Constitution. See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (right to counsel indispensable to protection of Fifth Amendment privilege).

213. *Cooper*, 949 F.2d at 741.

informed him that she was there to discuss the firearm discovered in the police car. He waived his rights and then confessed that the gun and crack pipe were his. Carpenter was charged in federal court with possession of a firearm by a convicted felon. His motion to suppress his confession to the agent was denied by the district court. Following his conviction, he appealed.

The question presented in both *Cooper* and *Carpenter* was whether the appointment of counsel under the Sixth Amendment in connection with the state charges constituted an invocation of the defendant's Fifth Amendment right to have counsel present during custodial interrogation about a different offense. In both cases the court concluded that it did not.²¹⁴

The courts placed primary reliance on *McNeil v. Wisconsin*.²¹⁵ In *McNeil* the Court held that the Sixth Amendment right to counsel attaches only after the initiation of adversary judicial criminal proceedings.²¹⁶ *Cooper* and *Carpenter* had court-appointed attorneys on their state cases pursuant to their Sixth Amendment rights. However, in *McNeil* the Court held that the Sixth Amendment right only applies to the specific offense with which the suspect has been charged.²¹⁷ This right to counsel invalidates subsequent waivers during any police-initiated interviews with the defendant only as to the specific offense.²¹⁸

According to *McNeil*, the Sixth Amendment does not prohibit police-initiated contact with defendants as to uncharged conduct.²¹⁹ This is equally true of those defendants situated like *Cooper* and *Carpenter* who have counsel representing them on other unrelated charges.²²⁰

The right to counsel during interrogation concerning uncharged conduct is found in the Fifth Amendment and is much more limited. The Fifth Amendment right to counsel is based on *Miranda v. Arizona*²²¹ and is designed to assist a defendant in asserting his right against self-incrimination under the Fifth Amendment. These Fifth Amendment rights apply to interrogation by law enforcement agents about any offense, but a suspect must expressly invoke the Fifth Amendment.²²²

In both *Cooper* and *Carpenter* the courts held that a request for appointed counsel in state court was not sufficient to invoke the Fifth Amendment right to counsel in unrelated future custodial interrogations.²²³ *Carpenter* left open the possibility that if the appointed counsel had demanded that *Carpenter* not be interrogated in the absence of counsel, such a demand might constitute an invocation of *Carpenter's* Fifth Amendment rights.²²⁴

214. *Carpenter*, 963 F.2d at 739; *Cooper*, 949 F.2d at 742.

215. 111 S. Ct. 2204 (1991).

216. *Id.* at 2207.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 2209.

221. 384 U.S. 436 (1966).

222. *Carpenter*, 963 F.2d at 739.

223. *Id.* at 739; *Cooper*, 949 F.2d at 742.

224. *Carpenter*, 963 F.2d at 740 n.3.

However, since that specific fact was not present in either *Carpenter* or *Cooper*, the courts have thus far declined to address it.

Both cases discuss a remaining avenue of challenge to interrogation when a defendant has invoked his Sixth Amendment right to counsel regarding a charged offense, but has not expressly invoked his Fifth Amendment right to have counsel present during custodial interrogation.²²⁵ "If the charged and uncharged offenses are 'so inextricably intertwined' or 'extremely closely related' then the Sixth Amendment (not the Fifth Amendment) prohibits interrogation about the uncharged offense."²²⁶ However, in both *Cooper* and *Carpenter*, the charged and uncharged offenses were not found to be "inextricably intertwined" or "extremely closely related," and this challenge was therefore unavailable.²²⁷

225. *Id.* at 740; *Cooper*, 949 F.2d at 743-44.

226. *Carpenter*, 963 F.2d at 740.

227. *Id.* at 740-41; *Cooper*, 949 F.2d at 743;

