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Criminal Procedure: Confession, Search and Seizure

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CRIMINAL PROCEDURE: CONFESSION, SEARCH AND SEIZURE

*Thomas M. Melsheimer**
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THIS Article reviews significant cases during the Survey period on the subjects of confession, search and seizure from the Texas Court of Criminal Appeals, the Texas courts of appeals, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.

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TEXAS CASES

A. STATE CONSTITUTIONAL CHALLENGES

In *Heitman v. State*¹ the Court of Criminal Appeals held that Texas courts, in interpreting article I, section 9 of the Texas Constitution, may provide broader protections than afforded under the Fourth Amendment of the United States Constitution. Although *Heitman* was hailed by the defense bar for its potential scope, the Texas courts have since generally held the Texas and federal constitutions to be coextensive.²

An important exception to this general rule developed during the Survey period. In *Richardson v. State*³ the Court of Criminal Appeals considered the issue of whether the use of a pen register — a device used to catalogue the phone numbers dialed from a particular phone number — constitutes a search under the Texas Constitution. Section 11.21 of the Texas Code of Criminal Procedure authorized the use of such a device without a showing of probable cause.

The threshold issue before the court in *Richardson* was the same one facing any court interpreting the Texas constitutional provision prohibiting unreasonable searches and seizures: was the pen register a search for constitutional purposes? More specifically, did Richardson have a reasonable expectation of privacy in the number dialed from the telephone?

The court concluded that an individual may have a reasonable expectation of privacy in the numbers dialed from his telephone.⁴ In so holding, the *Richardson* court rejected the United States Supreme Court's holding in *Smith v. Maryland*.⁵ The *Richardson* court observed:

The mere fact that a telephone caller has disclosed the number called to the telephone company for the limited purpose of obtaining the services does not invariably lead to the conclusion that the caller has relinquished his expectation of privacy such that the telephone company is free to turn the information over to anyone, especially the police, absent legal process.⁶

Because the court found that a telephone caller may have a reasonable expectation of privacy in the numbers he dials from his telephone, the use of pen register may constitute a search under the Texas Constitution. The court remanded the case to the court of appeals for a determination of whether, under the facts of *Richardson*, the use of a pen register constituted a search and, if so, whether the use of a pen register without a showing of probable cause is unreasonable under the Texas Constitution.⁷

1. 815 S.W.2d 681 (Tex. Crim. App. 1991).

2. See, e.g., *Muniz v. State*, 865 S.W.2d 513 (Tex. App.—San Antonio 1993, pet. ref'd).

3. 865 S.W.2d 944 (Tex. Crim. App. 1993).

4. 865 S.W.2d at 953.

5. 442 U.S. 735 (1979).

6. 865 S.W.2d at 951.

7. *Id.*

The *Richardson* holding is peculiar, as Justice Miller points out in a concurring note, because after a lengthy exposition of the privacy interests that an individual has in the numbers dialed from his telephone, the court did not squarely hold that a pen register always constitutes a search. The question remains open as to what circumstances will make the use of a pen register a search and what circumstances will not.

B. ATTENUATION DOCTRINE

Article 38.23 of the Texas Code of Criminal Procedure provides for the exclusion at trial of illegally obtained evidence. The only exception to the rule of exclusion is evidence obtained by a law enforcement officer in good faith reliance on a warrant.⁸

Though straightforward, the provisions of article 38.23 have nonetheless created some confusion in the courts. In *Garcia v. State*,⁹ the Court of Criminal Appeals declined to find an inevitable discovery exception in article 38.23. The Texarkana Court of Appeals in *Johnson* concluded that, even if the inevitable discovery exception did not apply to article 38.23, the attenuation doctrine applied since, if the evidence obtained is sufficiently attenuated from any illegality, it is not, by definition, illegally obtained.¹⁰

The Texarkana Court of Appeals ended any remaining confusion by its holding in *Johnson*.¹¹ It held that the attenuation doctrine exists under Texas law and it has not been limited or modified in any way by *Garcia*.¹² Evidence attenuated from the taint of illegality has not been illegally obtained within the meaning of article 38.23.¹³

C. FEDERAL SEARCH WARRANTS IN STATE PROSECUTIONS

The reach of article 38.23 was also an issue in *State v. Toone*.¹⁴ Toone challenged the admissibility of certain evidence obtained through a federal search warrant. The court held that although the warrant was not obtained in a procedure permissible under Texas law, Texas law did not apply to a federal search warrant and thus the evidence was properly admitted in Toone's state court trial.¹⁵

Because of its holding regarding the reach of article 18.01, the *Toone* court did not address the "reverse silver platter doctrine," a principle that allows federal officers to turn over evidence for state prosecution that

8. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1994).

9. 829 S.W.2d 796 (Tex. Crim. App. 1992).

10. 843 S.W.2d 252 (Tex. App.—Texarkana 1992, pet. granted).

11. *Id.* at 258.

12. *Id.*

13. *Id.*

14. 872 S.W.2d 750 (Tex. Crim. App. 1994).

15. *Id.* at 752.

would be considered illegally obtained if gathered by state law enforcement officials in the first instance.¹⁶

D. HEARSAY EVIDENCE IN SUPPRESSION HEARINGS

In federal court, hearsay evidence is freely admissible in hearings or motions to suppress. The Court of Criminal Appeals, in *McVickers v. State*,¹⁷ considered the admissibility of hearsay in suppression hearings in Texas courts. At issue was whether the Rule 1101(d)(4) of the Texas Rules of Criminal Evidence, which requires the rules of evidence to be observed in suppression hearings, was somehow modified by Rule 104(c), which states that preliminary questions of admissibility can be determined by the court without regard to the rules of evidence.

The Court of Criminal Appeals held that Rule 1101(d)(4) means what it says and the rules of evidence apply to suppression hearings. According to the court, Rule 104(c) "is a general rule of evidence to which Rule 1101(d)(4) provides specific application for hearings on motions to suppress."¹⁸ Consequently, hearsay is as inadmissible at a suppression hearing as it would be at trial.

Although *McVickers* mandates a change in traditional state practice, the impact of the holding will be limited. Police officers will still be able to report what others told them as support for a conclusion of probable cause. Statements of the third parties are not hearsay because they are not being offered for the truth of the matter asserted, but as a basis for the officers' conclusions.¹⁹

E. VOLUNTARY CONFESSION

When a suspect makes an incriminating statement after receiving a promise or inducement from a law enforcement officer, the issue of the voluntariness of the statement arises. The Court of Criminal Appeals considered this sort of scenario in *Arnold v. State*.²⁰

Arnold wrote a letter to the Corpus Christi district attorney claiming knowledge of an unsolved murder/robbery of a jewelry store. At the time he wrote the letter, Arnold was imprisoned in California. In response to the letter, local law enforcement officers met with Arnold in California. Arnold refused to talk to the officers unless he received a "reward" payment of \$500. The officers informed him that the reward would be paid and arranged for an initial \$200 to be wired to California.

Once he understood the reward money to be in place, Arnold, who had received *Miranda* warnings, confessed to the crime. At his trial, the court

16. 823 S.W.2d 744, 748 (Tex. App.—Dallas 1992), *aff'd*, 872 S.W.2d 750 (Tex. Crim. App. 1994).

17. 874 S.W.2d 662 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 103 (1994).

18. *Id.* at 664.

19. *Id.* at 666.

20. 873 S.W.2d 27 (Tex. Crim. App. 1993).

denied his motion to suppress the confession as an involuntary statement.²¹

The *Arnold* court applied a four-prong test to determine the voluntariness of the confession. In order to render a confession involuntary, the promise or inducement must be "(1) of some benefit to the defendant, (2) positive, (3) made or sanctioned by a person in authority, and (4) of such a character as would be likely to influence the defendant to speak untruthfully."²²

The court concluded that Arnold failed to meet the final prong of the test because he had initiated the request for the reward money, and he was the one who requested the meeting that resulted in his confession.²³ Consequently, his confession was not involuntary.

F. REASONABLE SUSPICION

The circumstances that will support an investigatory detention, or "*Terry* stop,"²⁴ are a frequent subject of dispute, and this Survey period was no exception. In *Gurrola v. State*²⁵ the Court of Criminal Appeals placed some limits on the type of circumstances that will justify a brief detention.

In *Gurrola*, an officer arrived at the scene of a reported disturbance to find four individuals engaged in an argument. As the officer approached to inquire, the individuals dispersed. The officer ordered them to return and he conducted a pat-down search. The search revealed that Gurrola possessed a handgun and a white powder later determined to be cocaine. Gurrola was charged with possession of a controlled substance. He moved to suppress the gun and the cocaine; the trial court denied the motion.

It is axiomatic that a police officer can briefly stop an individual where the circumstances indicate that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity and some indication that the activity is related to crime."²⁶ The court of appeals concluded that the totality of the circumstances — the apparent altercation and the immediate dispersal of the participants — created reasonable suspicion sufficient to justify the initial detention.

The Court of Criminal Appeals disagreed, holding that the detention was not justified by reasonable suspicion. According to the court, the lower courts had placed too much emphasis on Gurrola walking away from the police officer. The court observed:

21. *Id.* at 33-34.

22. *Id.* at 34.

23. *Id.*

24. *Terry v. Ohio*, 392 U.S. 1 (1968).

25. 877 S.W. 300 (Tex. Crim. App. 1994).

26. *Id.* at 302.

Mere flight alone does not justify an investigative detention . . . [and] unless the officer has reasonable suspicion of criminal activity . . . walking away cannot be characterized as flight . . . If such action gives rise to reasonable suspicion, then the right of American citizens to refuse to answer questions by police officers who have no reasonable suspicion . . . is a hollow right.²⁷

The court distinguished a series of cases relied upon by the state as ones involving far more suspicious activity — the actual report of a crime in progress from another police officer, a noticeable bulge in the pocket of an individual who was reported to be carrying a gun, or an extended period of time in which suspicious behavior was observed. The court characterized Gurrolo's situation as simply standing in a parking lot with other persons in a conversation and dispersing upon arrival of a police officer. According to the court, those circumstances were far too slim to create any sort of suspicion, let alone a reasonable one.²⁸

G. WRITTEN CONFESSIONS

Article 38.22 of the Texas Code of Criminal Procedure provides that a written confession is not admissible against a defendant unless certain warnings are provided concerning the right to remain silent, the right to counsel, and other related rights. At issue in *Williams v. State*²⁹ was whether substantial compliance with article 38.22 is sufficient.

Williams challenged the admissibility of his confession because his statement did not contain, on its face, the warning that the evidence may be used against him at his trial or in court. Rather, the statement simply reflected that Williams understood that the statement may be used against him without mentioning how or where.

The *Williams* court held that the statement substantially complied with article 38.22 and was thus admissible.³⁰ The court also held that Williams had waived his complaint that the statement failed to reflect the proper waiver of the rights provided in article 38.22; specifically, the requirement that such waiver be "on the face of the document" containing the incriminating statement.³¹ As the dissent pointed out, however, the *Williams* majority essentially reads this requirement out of article 38.22 because Williams's statement clearly lacked the appropriate waiver language "on the face of the document."³² Absent waiver by the defendant, this loose construction of a specific statutory requirement seems unlikely to prevail in the courts.

27. *Id.* at 303.

28. *Id.*

29. 883 S.W.2d 317 (Tex. App.—Dallas 1994, writ ref'd).

30. *Id.* at 320.

31. *Id.*

32. *Id.* at 320-22 (Maloney, J. dissenting).

H. CONSTITUTIONALITY OF DWI ROADBLOCKS

In *Holt v. State*³³ the Court of Criminal Appeals considered the constitutionality of sobriety checkpoints under federal and state constitutional law. The court concluded that such roadblocks are per se unconstitutional under the Fourth Amendment of the Constitution “unless and until a politically accountable governing body sees fit to enact constitutional guidelines regarding such roadblocks.”³⁴ Thus, under *Holt*, any DWI or sobriety roadblock will fail to pass constitutional muster in the absence of some legislative guidelines governing the use of such roadblocks. The upcoming legislative session will likely see the introduction of one or more bills to correct the deficiency perceived by the court.

II. FEDERAL CASES

A. UNITED STATES SUPREME COURT CASES

1. *The Question Of Whether Someone Is “In Custody”*

During the Survey period, the Supreme Court decided *Stansbury v. California*,³⁵ a case which addressed the issue of when a person being questioned by law-enforcement personnel is deemed to be “in custody” and therefore entitled to *Miranda*³⁶ warnings. In a per curiam opinion, the Court held that “an officer’s subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is ‘in custody.’”³⁷

Stansbury was a potential witness in the rape-murder of a ten-year old girl. After *Stansbury* agreed to the request of officers to accompany them to the police station for questioning, *Stansbury* quickly came under the suspicion of the officers questioning him.³⁸ Upon further questioning, and without any *Miranda* warnings³⁹ being given to him, *Stansbury* admitted to the officers that he had been convicted in the past for rape, kidnapping and child molestation. At this point, the interview was terminated, *Stansbury* was given his *Miranda* warnings, and *Stansbury* was then arrested and charged with first-degree murder and other crimes. *Stansbury*’s pre-trial motion to suppress was denied, he was convicted at the trial court of first-degree murder and other crimes, and the California Supreme Court affirmed his conviction.

33. 887 S.W.2d 16 (Tex. Crim. App. 1994).

34. *Id.*

35. 114 S. Ct. 1526 (1994).

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

37. *Stansbury*, 114 S. Ct. at 1527.

38. *Id.* at 1527-28.

39. “[A] person questioned by law-enforcement officers after being ‘taken into custody or otherwise deprived of his freedom of action in any significant way’ must first ‘be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.’” *Id.* at 1528 (citing *Miranda*, 384 U.S. at 444).

The Supreme Court began its analysis of the case by observing that *Miranda* warnings must only be given when "there has been such a restriction on a person's freedom as to render him 'in custody.'"⁴⁰ The determination of whether someone is in custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."⁴¹ However, this is not to say that an officer's beliefs have no bearing at all on the custody issue, but any such beliefs "are relevant only to the extent they would effect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'"⁴² But even if an officer makes a clear statement to a person being questioned that that person is a prime suspect, the Court tells us that such a statement "is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest."⁴³

2. *Equivocal References To Counsel*

Although *Edwards v. Arizona*⁴⁴ held that law-enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation, it is not always clear if a suspect has asserted this right. Therefore, another important case handed down by the Court during the Survey period was *Davis v. United States*.⁴⁵ *Davis* sets out "how law-enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning."

Davis, a sailor in the United States Navy, was suspected of the murder of another sailor. *Davis* was interviewed by agents of the Naval Investigative Service. After being advised of the rights required by military law,⁴⁶ *Davis* waived the right to remain silent, and he further waived his right to counsel. However, about an hour and a half into the interview, *Davis* made the following statement: "Maybe I should talk to a lawyer."⁴⁷ It is this type of equivocal reference to counsel, and the subsequent action which should be taken by law-enforcement personnel, which the Court wanted to address in *Davis*.

After having his motion to suppress his statements denied by the military trial judge and subsequently being convicted of un-premeditated murder, the United States Court of Military Appeals affirmed the convic-

40. *Id.* at 1528 (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

41. *Stansbury*, 114 S. Ct. at 1529.

42. *Id.* at 1530 (citing *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)).

43. *Stansbury*, 114 S. Ct. at 1530.

44. 451 U.S. 477 (1981).

45. 114 S. Ct. 2350 (1994).

46. *Davis* was advised by the agents "that he was a suspect in the killing, that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning." *Davis*, 114 S. Ct. at 2353.

47. *Id.*

tion. The Court of Military Appeals made note of the fact that there are three different approaches that have been developed by the state and federal courts regarding "a suspect's ambiguous or equivocal request for counsel":

Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions . . . have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the [suspect's] desires respecting counsel.⁴⁸

The United States Supreme Court granted certiorari to squarely address this issue of an ambiguous reference to counsel by a suspect during questioning.⁴⁹ The Court held that when applying *Edwards*,⁵⁰ the inquiry of whether or not an accused actually has invoked his right to counsel is an objective one:

Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."⁵¹ But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.⁵²

In sum, the Court held that in order to require law-enforcement personnel to cease their questioning of a suspect under *Edwards*, the suspect "must unambiguously request counsel."⁵³ The Court added that:

[a]lthough a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officer stop questioning the suspect.⁵⁴

48. *Id.*

49. "Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial, [citations omitted], and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions." *Davis*, 114 S. Ct. at 2354.

50. "[I]f a suspect requests counsel at any time during [an] interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Davis*, 114 S. Ct. at 2354-55 (citing *Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1884-85).

51. *Davis*, 114 S. Ct. at 2355 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).

52. *Davis*, 114 S. Ct. at 2355.

53. *Id.*

54. *Id.*

As the rationale for its decision, the Court reasoned that if it "were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney . . . Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong."⁵⁵

3. *The Federal Confession Statute*

Another important case handed down by the United States Supreme Court during the Survey period was *United States v. Alvarez-Sanchez*,⁵⁶ a case which centered around the scope of 18 U.S.C. section 3501,⁵⁷ the statute governing the admissibility of confessions in federal prosecutions.⁵⁸

In *Alvarez-Sanchez*, Los Angeles Sheriff's Department officers, while executing a search warrant of Alvarez-Sanchez's home for illegal drugs, found not only evidence of illegal drugs, but also found over \$2000 in counterfeit Federal Reserve Notes. The day of this search was a Friday, and Alvarez-Sanchez was arrested and booked on state felony narcotics charges that evening. He spent the entire weekend in jail.

It was not until Monday morning that Sheriff's Department personnel advised the United States Secret Service of the fact that they had found counterfeit Federal Reserve Notes during their search. That same day, two Secret Service agents were dispatched to interview Alvarez-Sanchez. After being advised of and waiving his *Miranda* rights, Alvarez-Sanchez admitted that he had known that the currency was counterfeit. After making this admission, the agents arrested Alvarez-Sanchez and booked

55. *Id.* at 2356.

56. 114 S. Ct. 1599 (1994).

57. 18 U.S.C. § 3501 (1988) provides in pertinent part as follows:

(a) In any criminal prosecution brought by the United States . . . a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given . . .

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment . . .

(c) In any criminal prosecution by the United States . . . , a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or detention . . .

(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (1988) (emphasis added).

58. *Id.* at 1600.

him on federal charges. However, he was not presented to a magistrate until the following day due to congestion in the magistrate's docket.

Relying on 18 U.S.C. section 3501(c), Alvarez-Sanchez moved to suppress the admission made during his interview with the Secret Service agents. The thrust of Alvarez-Sanchez's argument was that the delay between his arrest on state charges and his presentment on the federal charge rendered his confession inadmissible under 18 U.S.C. section 3501(c).

The threshold inquiry in this case was whether section 3501(c) was triggered when Alvarez-Sanchez was arrested by the Sheriff's Department (a state entity) on Friday evening. If so, Alvarez-Sanchez's statements to the federal agents on Monday were well beyond the six-hour safe harbor contained in section 3501(c).⁵⁹ Rejecting Alvarez-Sanchez's contention that the "any law-enforcement officer or law-enforcement agency" language from the statute means that the language of section 3501(c) was triggered when he was arrested by the Sheriff's Department officers,⁶⁰ the Supreme Court stated that such a construction by Alvarez-Sanchez failed to consider the remainder of the statute.⁶¹ Focusing instead on the word "delay," the Supreme Court stated that "there can be no delay in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place. Plainly, a duty to present a person to a federal magistrate does not arise until the person has been arrested for a federal offense."⁶²

Therefore, the key inquiry is whether or not the defendant has been arrested for a federal offense. If arrested for a federal offense — whether by a local, state or federal officer — "then that person is under 'arrest or other detention' for purposes of section 3501(c) and its 6-hour safe harbor period."⁶³ However, "[a]s long as a person is arrested and held only on state charges by state or local authorities, the provisions of section 3501(c) are not triggered."⁶⁴ Because Alvarez-Sanchez had only been arrested for state charges at the time that he was interviewed by the Secret Service agents and made his admission regarding the counterfeit notes, section 3501(c) was not triggered. Rather, section 3501(c) was not triggered until Alvarez-Sanchez was arrested on federal charges, which was after he made his confession.⁶⁵

59. *Id.* at 1602-03. However, the Court stated that if § 3501(c) was not triggered in this case, then there would be no need for the Court to address the question of whether § 3501(c) "requires suppression of a confession that is made by an arrestee prior to presentment and more than six hours after arrest, regardless of whether the confession was voluntarily made." *Alvarez-Sanchez*, 114 S. Ct. at 1603.

60. Alvarez-Sanchez had contended that "the § 3501(c) 6-hour time period begins to run whenever a person is arrested by local, state or federal officers." *Id.* at 1603.

61. *Id.*

62. *Id.* at 1603-04.

63. *Id.* at 1604.

64. *Id.*

65. *Alvarez-Sanchez*, 114 S. Ct. at 1604.

In a concurring opinion, Justice Ginsburg, with whom Justice Blackmun joined, wrote to emphasize the fact that the Court did not decide the effect of section 3501(c) on confessions obtained more than six hours after an arrest on federal charges.⁶⁶

B. FIFTH CIRCUIT CASES

1. *Abandoned Property*

During the Survey period, the Fifth Circuit had several occasions to address the issue of abandoned property.

In *United States v. Alvarez*,⁶⁷ the Fifth Circuit asked the question of whether or not a defendant had standing to assert a privacy interest in seized property. Alvarez violated his parole and the El Paso police obtained a warrant for his arrest. After locating in front of a hotel the vehicle which Alvarez was last known to have driven, the officers set up a surveillance of the room in front of which the car was parked. When Alvarez finally appeared in the doorway, the officers approached him and told him that he was under arrest. On being told he was under arrest, "Alvarez backed away from the door toward the interior of [the] room."⁶⁸ Alvarez was then arrested and handcuffed.

A woman was in the room with Alvarez at the time of the arrest. She stated that a purse and a leather jacket were the only items in the room which belonged to her. Alvarez, however, stated that he owned nothing in the room and that everything in the room belonged to the woman.

One of the items in the room was a garment bag hanging in a closet area. After noticing a bulge in the garment bag, one of the officers discovered a .38 caliber pistol. Alvarez was convicted in the district court, after the denial of a motion to suppress the pistol, for being in possession of a firearm while also being a previously convicted felon.

Citing *United States v. Colbert*,⁶⁹ the court stated that "it is settled law that one has no standing to complain of search or seizure of property he has voluntarily abandoned."⁷⁰ However, "[i]t is clear that the abandonment must be voluntary and not influenced by improper police conduct."⁷¹ But, "a lawful arrest does not amount to such compulsion so as to render an otherwise voluntary abandonment involuntary."⁷² Since Alvarez was approached and arrested with a valid arrest warrant, "the voluntariness of Alvarez's abandonment of the hanging close bag was not tainted by any illegal or improper act by the police in executing the arrest

66. *Id.* at 1605 (Ginsburg, J., joined by Blackmun, J., concurring).

67. 6 F.3d 287 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1384 (1994).

68. *Id.* at 289.

69. 474 F.2d 174, 176 (5th Cir. 1973).

70. *Alvarez*, 6 F.3d at 289.

71. *Id.* (citing *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979)).

72. *Id.* at 289-90 (citing *United States v. Maryland*, 479 F.2d 566, 568 (5th Cir. 1973)).

warrant.”⁷³ Alvarez, therefore, voluntarily abandoned the property, and he had no standing to object to the search of the garment bag.⁷⁴

Another case, *United States v. Thomas*,⁷⁵ also dealt with the issue of standing to object to the seizure of property which was voluntarily abandoned by a defendant. While driving a vehicle which was weaving between lanes, Steven Darrel Gregg was stopped by a Mississippi deputy sheriff. Because Gregg had violated traffic laws, initial detention of Gregg by the officer was lawful under *Terry v. Ohio*,⁷⁶ which states that “where there is a reasonable and articulable suspicion the person has committed a crime, a limited search and seizure is not unreasonable.”⁷⁷ After stopping Gregg, the officer smelled marijuana coming from inside the vehicle and on Gregg himself. These facts, when coupled with the fact that Gregg lied to the officer and stated that he had never been arrested and was not the registered owner of the vehicle, gave probable cause for the officer to believe that there was contraband inside the vehicle, thereby giving the officer the right to search the vehicle.⁷⁸ During the search, a camera bag was discovered by the officer. On being asked who owned the camera bag, Gregg shrugged his shoulders and stated that he did not know. By taking this action, Gregg was deemed to have abandoned the bag and thereby allowed the officer freedom to examine its contents, which revealed marijuana and cocaine. The Fifth Circuit once again cited the rule that “[o]nce a bag has been abandoned, and the abandonment is not a product of improper police conduct, the defendant cannot challenge the subsequent search of the bag.”⁷⁹ Because the officer “had probable cause both to stop Gregg’s vehicle and to search it, Gregg could not have abandoned the bag as a result of improper police conduct.”⁸⁰ Consequently, Gregg had no standing to object to the search.

2. Search Warrants

In *United States v. Hill*⁸¹ the Fifth Circuit addressed the recurring problem of how specific a search warrant must be as to the description of the items which are to be seized under the authority of that warrant. *Hill* adopted the Sixth Circuit’s “functionally equivalent” test, which upholds the constitutionality of seized items not specifically enumerated in the search warrant if those unenumerated items are “functionally equivalent” to items which are specifically enumerated in the warrant.⁸²

In *Hill* the first search warrant at issue “authorized seizure of a wide variety of records for the period from January 1986 through May 1992,

73. *Id.* at 290.

74. *Id.*

75. 12 F.3d 1350 (5th Cir. 1994).

76. 392 U.S. 1, 88 S. Ct. 1868 (1968).

77. *Thomas*, 12 F.3d at 1366 (citing *Terry*, 392 U.S. at 21).

78. *Id.*

79. *Id.* at 1367 (citing *United States v. Piaget*, 915 F.2d 138, 140 (5th Cir. 1990)).

80. *Id.* at 1367.

81. 19 F.3d 984 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 320 (1994).

82. *Id.* at 987-88.

including 'Bank Statements, Deposit Slips, Canceled checks, Withdrawal Slips, Debit Memos, and Credit Memos' and 'Cash Receipt Journal(s), Cash Receipt Book(s) and Cash Disbursement Journal(s).'

⁸³ Hill argued that the search exceeded the scope of the warrant because some items were seized which were dated before 1986 and because 2000 to 3000 check stubs from the years covered by the warrant were seized even though the term "check stubs" was not covered by the warrant.

The Fifth Circuit found that "in accounting systems, both check stubs and cash disbursement journals serve virtually identical functions."⁸⁴ Since cash disbursement journals were specifically listed in the warrant and since check stubs are the "functional equivalent" to cash disbursement journals, the seizure of the check stubs was constitutional, as they "were within the scope of the warrant."⁸⁵ However, as to the items seized that predated 1986, the Fifth Circuit held that the trial court was correct in suppressing these items as they were outside the scope of the warrant.⁸⁶

3. *Exigent Circumstances*

In *United States v. Shannon*⁸⁷ the Fifth Circuit considered the "exigent circumstances" exception to the search warrant requirement of the Fourth Amendment. The defendant in this case, Timothy Wayne Shannon, committed two armed robberies of banks within the span of two weeks in early 1992. During his holdup of the second bank, one of the tellers was able to give Shannon bait money which contained a tracking device. After leaving the bank, Shannon drove to a motel and went to a room which was rented by one of Shannon's acquaintances. The police used an "Electronic Tracking System" unit (ETS) to track Shannon to the motel. However, the officers believed that the bank robber was in room 211, when in actuality, Shannon was in room 210.⁸⁸

As a precautionary measure, the officers decided to clear out the rooms which surrounded room 211 for the safety of the occupants in those other rooms. After knocking on room 210, the door was opened, and Shannon was seen sitting on the bed, along with two acquaintances. Since all three men in room 210 fit the description of the suspect who robbed the bank,

83. *Id.* at 986.

84. *Id.* at 988. The court set out how check stubs and cash disbursement journals serve virtually identical functions: "Both serve to maintain a running balance in an account and to trace the disposition of cash out of that account. Like check stubs, a cash disbursement journal provides a chronological record of all cash payments. Both also function as a contemporaneous record of transactions. With respect to these transactions, both the cash disbursement journal and a check stub include the date of the transaction, the debit and credit changes in the account, and a brief explanation of the transaction." *Hill*, 19 F.3d at 988.

85. *Id.* at 988-89. The court went on to find that the seizure of the check stubs would also have been allowed under the "plain view exception to the warrant requirement" as well. *Id.* at 989.

86. *Id.* at 990.

87. 21 F.3d 77 (5th Cir. 1994).

88. *Id.*

the police asked all three men to exit the motel room. "As Shannon walked past the officer carrying the ETS unit, the signal 'went directly' to one of Shannon's boots. The officers searched the boot and discovered the bait money and tracking device."⁸⁹ At this point, the police arrested all three men, and all three men were given *Miranda* warnings. However, Shannon believed that the ETS unit was some sort of a metal detector, so Shannon confessed to the police officers that he had hidden his gun under the mattress in the motel room.⁹⁰ Only at this point, after Shannon had stated where he had hidden a gun, did the police officers enter the motel room and take possession of the gun from underneath the mattress. Prior to trial, Shannon challenged the search of the motel room.

The Fifth Circuit began its analysis of the search by setting out the presumption regarding a warrantless search of a suspect's motel room:

The warrantless search of someone's motel room is presumptively unreasonable unless the occupant consents or exigent circumstances exist to justify the intrusion. If the officers have no warrant or consent, they must have exigent circumstances to enter a suspect's motel room, even if they already have probable cause to arrest the suspect.

The exigent circumstances that must exist include . . . danger to the lives of officers or others.⁹¹

The court found that the three men were arrested with probable cause after the ETS unit alerted the policemen to Shannon's boot.⁹² Furthermore, it was not until after all three men had been given *Miranda* warnings that Shannon revealed to the officers that a gun remained in the motel room. In that the police officers had not as of that time entered the hotel room, the officers had no idea whether or not someone else might still be inside. The court therefore found it was "reasonable for the officers to believe that there was a possibility of danger to themselves or other motel guests if an unknown suspect who might still be inside the room were to gain access to the gun after hearing Shannon tell the officers where the gun was located."⁹³ Therefore, the court found the existence of exigent circumstances in this case and upheld the search.⁹⁴

89. *Shannon*, 21 F.3d at 80.

90. *Id.*

91. *Id.* at 81.

92. *Shannon*, 21 F.3d at 81.

93. *Id.* at 81-82.

94. *Id.* at 82. The court also noted that the fact that Shannon told the police officers the exact location of the gun "may have lead the officers to reasonably believe in good faith that Shannon had consented to their entry into the motel room and their seizure of the gun." *Id.* at 82 n.1 (citing *United States v. DeLeon-Reyna*, 930 F.2d 396, 399 (5th Cir. 1991)) (noting that a search is valid if the officers' belief that they had consent, in light of all circumstances, was objectively reasonable). However, the court did not specifically hold that Shannon had given consent to the search of the motel room.

4. *Passenger in Vehicle — Standing to Object to Stop and Search of Vehicle*

The issue of whether a passenger in a stopped automobile has standing to challenge the seizure of the automobile as unconstitutional was taken up by the Fifth Circuit in *United States v. Roberson*.⁹⁵ After a minivan had been pulled over by a state trooper for making an illegal lane change without signaling and for going three miles over the speed limit, the subsequent search of the minivan revealed the existence of cocaine.⁹⁶ One of the passengers in the minivan raised the question on appeal of whether the stop and search of the mini-van was constitutional.⁹⁷

The Fifth Circuit began its analysis of the passenger's challenge by setting out the following important rule: "Typically, a passenger without a possessory interest in an automobile lacks standing to complain of its search because his privacy expectation is not infringed."⁹⁸ However, in *Roberson*, the Fifth Circuit, for the first time, affirmatively stated that a passenger in a stopped automobile can challenge a seizure:

Whereas the search of an automobile does not implicate a passenger's fourth amendment rights, a stop results in the seizure of the passenger and driver alike. Thus, a passenger of a stopped automobile does have standing to challenge the seizure as unconstitutional.⁹⁹

However, even though the passenger had standing to challenge the seizure as unconstitutional, since the trooper "had a legitimate basis for stopping the van" — the illegal lane change — and was not acting simply "on some vague suspicion," the court held that the stop of the minivan did not violate the Fourth Amendment.¹⁰⁰ As to the search of the minivan, the court stated that the passenger "lacks standing to challenge the search of the car's contents."¹⁰¹

95. 6 F.3d 1088 (5th Cir. 1993).

96. *Id.* at 1089-90.

97. *Id.* at 1091.

98. *Id.*

99. *Id.*

100. *Roberson*, 6 F.3d at 1092.

101. *Id.* at 1093 (citing *United States v. Mendoza-Curciaga*, 981 F.2d 192 (5th Cir. 1992), *cert. denied*, 114 S. Ct. 356 (1993)).