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Criminal Procedure: Confession, Search and Seizure

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CRIMINAL PROCEDURE: CONFESSION, SEARCH AND SEIZURE

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TABLE OF CONTENTS

I. TEXAS CASES	854
A. INVENTORY SEARCHES	854
B. INVESTIGATORY DETENTION	855
C. PLAIN FEEL EXCEPTION TO THE WARRANT REQUIREMENT	857
D. BODILY SEARCHES	858
E. PRETEXT ARRESTS	859
F. INVOKING THE RIGHT TO COUNSEL	859
G. THE REQUIREMENT OF GOVERNMENTAL INTRUSION ..	860
H. VOLUNTARINESS OF CONFESSIONS	861
II. FEDERAL CASES	861
A. UNITED STATES SUPREME COURT CASES	861
1. <i>A "Categorical Exception" to the Exclusionary Rule</i>	861
2. <i>Random Drug Testing of Student Athletes and the Fourth Amendment</i>	863
3. <i>The "Knock and Announce" Principle is an Element of the Fourth Amendment Reasonableness Inquiry</i>	865
B. FIFTH CIRCUIT CASES	866
1. <i>The Warrantless Use of Thermal Imagers</i>	866
2. <i>Standing to Contest Search of Another's Hotel Room</i>	868
3. <i>The Admissibility of Polygraph Tests</i>	869

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

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United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.

I. TEXAS CASES

A. INVENTORY SEARCHES

As noted in previous survey articles,¹ Texas courts have generally been hesitant to interpret the Texas Constitution as providing greater protections than its federal counterpart.² However, a significant exception occurred during the Survey period in the context of the so-called inventory search. In *Autran v. State*, the Court of Criminal Appeals rewrote Texas law on inventory searches.³

Autran was stopped by the Orange County Sheriff's department for a traffic violation. After providing suspicious and inconsistent responses to questions posed by the sheriff, Autran was arrested for failure to drive within a single lane. The sheriff conducted an inventory search of the vehicle in which he opened a cardboard box, a shopping bag and an ice chest. The search revealed cocaine and a large sum of cash.

Autran moved to suppress the incriminating evidence, arguing that it was seized in violation of the Fourth Amendment and Article I, Section 9 of the Texas Constitution. The Court of Criminal Appeals rejected Autran's claim of a Fourth Amendment violation, holding that, since the inventory was conducted pursuant to a routine sheriff's department policy, it was permissible.⁴ This ruling is consistent with a long line of federal authority⁵ that justifies the inventory search on the basis of police safety as well as a rebuttal to claims of lost or stolen property.

But the court then went forward with a five factor analysis of whether the search was permissible under the Texas Constitution. The Court articulated the factors as follows: (1) textual examination of the constitutional provision, (2) the framer's intent, (3) history and application of the constitutional provision, (4) comparable jurisprudence from other states; and (5) practical policy considerations.⁶

A review of these factors convinced a plurality of the Court that the Texas Constitution afforded greater protection with respect to inventory searches than the federal constitution.⁷ Relying primarily on jurisprudence from other states, including California, South Dakota, and Alaska, the Court rejected the notion that inventory searches conducted pursuant

1. See, e.g., Thomas M. Melsheimer & Thomas B. Walsh IV, *Criminal Procedure: Confession, Search & Seizure, Annual Survey of Texas Law*, 47 SMU L. REV. 977 (1994).

2. See, e.g., *Muniz v. State*, 865 S.W.2d 513 (Tex. App.—San Antonio, writ ref'd). The possibility of interpreting the Texas Constitution to provide broader protection was recognized by the Court of Criminal Appeals in *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

3. 887 S.W.2d 31 (Tex. Crim. App. 1994, no writ).

4. *Id.* at 35-36.

5. See, e.g., *Florida v. Wells*, 495 U.S. 1 (1990).

6. *Autran*, 887 S.W. 2d at 37.

7. *Id.* at 41-42.

to a standard policy were presumptively reasonable. Speaking for the plurality, Justice Baird wrote:

[W]e hold that art. I, §9 provides a privacy interest in closed containers which is not overcome by the general policy considerations underlying an inventory. . . . The officers [sic] interest in the protection of appellant's property as well as the protection of themselves from danger and the agency from claims of theft, can be satisfied by recording the existence of and describing and/or photographing the closed or locked container.⁸

Justices Campbell, Clinton, Maloney and Meyer concurred in the result only. These justices would have held that the inventory search of *Au-tran's* vehicle violated the Fourth Amendment. Justice McCormick filed a vigorous dissent characterizing the plurality opinion as a "slippery slope of judicial activism" and "unprincipled, result-oriented decision-making."⁹ If the divisions in *Au-tran* are a harbinger of things to come, the Court of Criminal Appeals will not quietly or easily expand the constitutional protections of Article I, section 9.

B. INVESTIGATORY DETENTION

It is axiomatic that the police may briefly detain an individual for the purpose of investigating whether a crime has occurred, even when the police lack probable cause to make an arrest.¹⁰ The parameters of this type of detention, known as a *Terry* stop, were the focus of several cases during the Survey period.

In *Shelby v. State*,¹¹ Houston police stopped Shelby and conducted a "pat-down" search based on the following circumstances: (1) Shelby was wearing a heavy jacket on a warm night; (2) he was traveling by foot in a high-crime area; (3) in the officer's experience, he had encountered defendants in the area with firearms, and (4) the officer knew, based on experience, that drug dealers often carry weapons.

The Houston court found these circumstances inadequate to support the officer's detention and search which led to the discovery of cocaine in Shelby's pocket.¹² Attempting to reinforce the necessary limits on the expanding use of investigative detentions in high crime areas, the court emphasized that "[t]he mere reputation of the high crime area where detainees are seen, without more, cannot serve as the basis for an investigative detention."¹³

That the propriety of any investigative detention is, of necessity, an extremely fact specific inquiry as was demonstrated in the El Paso Court of Appeals decision in *Cardwell v. State*.¹⁴ In this case, El Paso police

8. *Id.*

9. *Id.* at 43.

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

11. 888 S.W.2d 231 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd).

12. *Id.* at 234.

13. *Id.*

14. 890 S.W.2d 563 (Tex. App.—El Paso 1994, writ ref'd).

detained Ms. Cardwell under the following circumstances: (1) police observed "some type of transaction" among Cardwell, a companion known by the police as a drug user, and two Hispanic men; (2) the transaction was conducted in an area known for drug trafficking; and (3) the police had received a tip that a large drug transaction would occur in the area that day.¹⁵ The subsequent detention and frisk of Cardwell revealed a small quantity of cocaine in a folded up piece of paper.

The El Paso court concluded that the *Terry* stop was proper because it was based on reasonable suspicion.¹⁶ The search of Cardwell, however, exceeded the scope of a permissible pat down search because the officers had no reason to believe that Cardwell was armed and, when the frisk revealed no weapons, the police simply continued "looking for contraband in [Cardwell's] jacket, and they clearly exceeded the scope of a permissible *Terry* weapons pat-down in doing so."¹⁷

Cardwell emphasizes that an analysis of the propriety of a *Terry* stop is a multiple step inquiry. Even if a brief detention is justified under the circumstances, the permissible scope can be exceeded by a search that is no more than a fishing expedition.

In the absence of reasonable suspicion, police authority to detain an individual remains highly circumscribed, even in the context of otherwise legal driver's license checks. The limits of such checks as a law enforcement tool were considered in *Garcia v. State*.¹⁸

In *Garcia*, the defendant was under surveillance for possible drug trafficking. Officers stopped him for a driver's license check. During this stop, the officers noticed a white powdery substance in the defendant's wallet. The officer subsequently arrested Garcia for possession of a controlled substance.

In response to Garcia's motion to suppress, the State argued that he was legally stopped pursuant to a state statute that allows any peace officer to stop any motor vehicle for a license check.¹⁹

The court rejected the state's position and held that the statute was not a license to conduct narcotic fishing expeditions.²⁰ The stop could have been justified as a *Terry* stop if the officers could have articulated a reasonable suspicion. However, the state could produce no information linking Garcia to the drugs or to any specific criminal activity. Consequently, the evidence obtained from the stop should have been suppressed.²¹

Garcia illustrates an investigative detention's limits. Although the Texas courts are flexible in reviewing the surrounding circumstances,

15. *Id.* at 566.

16. *Id.*

17. *Id.* at 567.

18. 894 S.W.2d 865 (Tex. App.—Corpus Christi 1995, no writ).

19. *Id.* at 867 (citing TEX. REV. CIV. STAT. ANN. Art. 6687b, § 13 (Vernon Supp. 1994)).

20. *Id.*

21. *Id.* at 869.

those limits cannot be avoided by a driver's license check or any other permitted detention.

The final significant treatment of the investigatory detention issue during the survey period came in *Melugin v. State*.²² This case involved a common fact pattern in the investigative detention jurisprudence—an airport stop.

Houston police stopped Melugin at Houston's Intercontinental Airport under the following circumstances: Melugin appeared nervous; he paid cash for his plane ticket; he carried his bags on the plane; and he arrived at the gate after boarding had begun.

The court rejected the state's claim that the seizure of Melugin—which revealed a bulge in his pants that turned out to be a packet of cocaine—was the product of a valid investigative stop.²³ Indeed, were the result otherwise, nearly every harried business traveler would be subject to a "stop and frisk." *Melugin* emphasizes that such stops, though widely permitted in a variety of circumstances and an important component of the war on drugs, must still be supported by "specific, articulated facts that, in light of the officer's experience and general knowledge, lead him to the reasonable conclusion that the suspect is connected to ongoing criminal activity."²⁴

C. PLAIN FEEL EXCEPTION TO THE WARRANT REQUIREMENT

Although the Fourth Amendment has been interpreted to make all warrantless searches presumptively unreasonable, there exists a variety of recognized exceptions. One exception of recent vintage is the so-called plain feel doctrine, which was recognized by the United States Supreme Court in *Minnesota v. Dickerson*.²⁵ This doctrine, a tactile analog to plain view, allows an officer, while conducting a lawful frisk, to seize without a warrant "an object whose contour or mass makes its identity immediately apparent."²⁶

In *Graham v. State*,²⁷ the Dallas Court of Appeals considered the scope of this doctrine. Graham was stopped for a motor vehicle violation and subjected to a pat-down search after he appeared to reach under his seat for a weapon. The officer discovered no weapons on Graham's person but noticed a "crackling" sound in Graham's pocket that felt like two small objects, and upon further squeezing, "like little capsules or pills or something like that."²⁸ The capsules turned out to contain cocaine.

The Dallas court reviewed the trial court's denial of a motion to suppress and held that the officer had exceeded the scope of the plain feel

22. 908 S.W.2d 12 (Tex. App.—Houston 1995, no writ).

23. *Id.* at 16.

24. *Id.* at 15.

25. 113 S. Ct. 2130 (1993).

26. *Id.* at 2137.

27. 893 S.W.2d 4 (Tex. App.—Dallas 1994, no writ).

28. *Id.* at 6.

exception by his persistent squeezing and rubbing of Graham's pocket.²⁹ The key to proper application of the exception, according to the court, was the notion that the identity of whatever is felt be "immediately apparent."³⁰ Without such immediacy, the plain feel exception does not apply. The officer's persistent rubbing and squeezing made clear that the character of the pills in Graham's pocket was not immediately apparent.

D. BODILY SEARCHES

In *State v. Avila*, the El Paso court considered the propriety of the most invasive type of search contemplated by the Fourth Amendment—a search inside a defendant's body.³¹ Avila was indicted for murdering his wife during an exchange of gunfire in which he received a bullet wound in the abdomen.

A few days after the shooting, local police obtained a warrant to remove the bullet from Avila by surgery. Emergency room physicians extracted the bullet.

The trial court granted a motion to suppress.³² The state appealed and the El Paso court held that the "search" was reasonable under the Fourth Amendment,³³ relying on the test set forth in *Winston v. Lee*.³⁴ In *Winston*, the Court set out six factors for consideration in determining the reasonableness of a surgical search:

1. Probable cause and warrant.
2. Life and health of suspect.
3. All reasonable medical precautions, no unusual or untested medical practices.
4. Performed by a physician in a hospital according to accepted medical practices.
5. Unjustified if search endangers life or health of the accused.
6. The extent of intrusion upon the individual's dignitary interests, personal privacy, and bodily integrity.³⁵

The *Avila* court concluded that the surgical procedure was reasonable under the *Winston* factors.³⁶ The procedure was described by the attending physician as routine and required no unusual procedures. A local anesthetic was used and the procedure took an hour.

In rejecting Avila's argument, the court also rejected creating a new Texas rule for surgical searches which would require an adversarial hearing before such a search.³⁷ Such a hearing is a requirement in other jurisdictions, the court observed, but it could find no Texas case supporting

29. *Id.* at 8.

30. *Id.*

31. 910 S.W.2d 505 (Tex. App.—El Paso 1994, no writ).

32. *Id.* at 507.

33. *Id.* at 511.

34. 470 U.S. 753 (1985).

35. *Avila*, 910 S.W. 2d at 509-10.

36. *Id.* at 510.

37. *Id.*

the requirement.³⁸

E. PRETEXT ARRESTS

A pretextual arrest has been defined as one accomplished for an ulterior or unstated purpose. It has generally been held to violate the Fourth Amendment, although as the Court of Criminal Appeals observed during the Survey period, Texas law on the issue has not been "a model of clarity and concise legal analysis."³⁹

Crittendon involved a challenge to an allegedly pretextual arrest under the Texas Constitution. The defendant was stopped in his car for failing to make a proper signal before a right turn. The officer discovered narcotics on his person. The defendant argued that his detention by the officer was a pretext used to verify no more than a "hunch" that he might have illegal drugs.⁴⁰

The issue before the court was whether an officer's subjective motivation should be an issue in evaluating a claim of a pretextual arrest or whether the focus should be solely on the objective circumstances surrounding the detention.⁴¹ The court, having previously ruled that the federal constitution mandates an objective analysis,⁴² held that the Texas Constitution requires no different result.⁴³

The court's ruling effectively eliminates the pretext doctrine from Texas jurisprudence. If the objective circumstances surrounding an arrest are the sole focus of both a federal and state constitutional analysis, there can never be an inquiry into the officer's "real" intent and thus never a claim of pretext. *Crittendon* reveals that, in spite of *Autran*,⁴⁴ the Court of Criminal Appeals will rarely be inclined to interpret the Texas Constitution differently from its federal counterpart.

F. INVOKING THE RIGHT TO COUNSEL

Under long-standing Texas law, once a suspect makes an ambiguous request for counsel, all substantive questioning must cease and the officer must limit his inquiry to determining whether the suspect indeed intends to invoke his right to counsel.⁴⁵ In *State v. Panetti*, the San Antonio Court of Appeals abandoned this rule, in a case remanded from the Court of Criminal Appeals.⁴⁶

In *Panetti*, a capital murder suspect asked the interrogating officer: "Should I be answering these questions without my lawyer, or does it

38. *Id.*

39. *Crittendon v. State*, 899 S.W.2d 668, 670 (Tex. Crim. App. 1995, no writ).

40. *Id.* at 669.

41. *Id.* at 671.

42. *Garcia v. State*, 827 S.W.2d 937 (Tex. Crim. App. 1992, no writ).

43. *Crittendon*, 899 S.W. 2d 668.

44. See *supra* text accompanying note 3.

45. *Russell v. State*, 727 S.W.2d 573 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856 (1987).

46. 891 S.W.2d 281 (Tex. App.—San Antonio 1994, writ ref'd).

matter or I mean, I—I give up, anyway.”⁴⁷ This statement qualified as an ambiguous request for counsel. In a previous unpublished opinion, the court had ruled that the subsequent incriminating statements were inadmissible under *Russell*.

However, the underpinning for the *Russell* jurisprudence was federal, not Texas law. That federal law changed with the United States Supreme Court decision in *Davis v. United States*.⁴⁸ The rule in *Davis* permits substantive questioning until the suspect *unequivocally* invokes his right to counsel.⁴⁹ Thus, the basis for the *Russell* rule no longer exists and the *Panetti* court found no reason under the federal constitution to suppress the confession.

Moreover, the court also declined to find a basis for suppressing the confession under the Texas Constitution. Without any substantive analysis, the court simply declared that “we see no reason to adopt the *Russell* rule as a matter of state law. . . .”⁵⁰

A different analysis has been applied in cases where the suspect makes an unequivocal request for a lawyer. In such a circumstance, all interrogation of the suspect must cease.⁵¹ The Texarkana Court of Appeals reaffirmed this distinction during the Survey period in *Rule v. State*.⁵² The *Rule* court noted that the interrogation must cease even if the interrogation is initiated by the suspect, unless there is a clear showing of waiver.⁵³

G. THE REQUIREMENT OF GOVERNMENTAL INTRUSION

Because the Fourth Amendment’s proscription against unreasonable searches and seizures applies only to governmental acts, and not those of private actors, the state will occasionally have the opportunity to argue, in defense of an otherwise unreasonable search, that the search was conducted by a private citizen. Such a case arose during the Survey period in *Riordan v. State*.⁵⁴

In *Riordan*, police officers conducted a warrantless search of the defendant’s home while he was at work. Unable to sustain the search based on consent provided by an elderly neighbor, the state argued that the defendant’s twelve year old son, in a unique display of filial loyalty, actually conducted the search for narcotic contraband. If the son was acting on his own, the contraband discovered on the premises was admissible.⁵⁵ If he was acting as “agent” for the state, the evidence obtained should have been suppressed.⁵⁶

47. *Id.* at 282.

48. 114 S. Ct. 2350 (1994).

49. *Id.*

50. *Panetti*, 891 S.W.2d at 284.

51. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

52. 890 S.W.2d 158 (Tex. App.—Texarkana 1994, writ ref’d).

53. *Id.* at 163.

54. 905 S.W.2d 765 (Tex. App.—Austin 1995, no writ).

55. *Id.* at 773.

56. *Id.*

The court articulated a two part test for determining if Riordan's son was an agent for the state: (1) whether the police participated in the intrusive conduct and (2) whether the private citizen intended to assist the police or further his own ends.⁵⁷ The court concluded that since the police summoned the boy home, they effectively participated in the intrusive conduct.⁵⁸ Moreover, the boy's compliant and speedy exposure of his father's narcotics suggested that he was not merely acting for his own purposes.⁵⁹

H. VOLUNTARINESS OF CONFESSIONS

The rules governing admissions of a confession in a Texas Court have in large measure been codified in Article 38.22 of the Texas Code of Criminal Procedure. During the Survey period, the Court of Criminal Appeals held, in *Garcia v. State*, that the provisions of Article 38.22 must be strictly construed.⁶⁰

In *Garcia*, the defendant signed a statement implicating himself that contained an acknowledgment of the right against self incrimination, the right to counsel, and the other rights required to be "on the face" of an admissible confession under Article 38.22. However, the statement did not show, on its face, *waiver* of each of those rights.⁶¹ The state argued that, when Garcia initialed each sentence describing one of his rights, he effectively "waived" them under Article 38.22.

The Court of Criminal Appeals rejected this argument and held that the requirements of Article 38.22 were not satisfied because an express waiver of each right was not apparent on the face of the confession.⁶² The court specifically avoided the issue of whether "substantial compliance" will ever justify the mandates of Article 38.22.⁶³ Given Article 38.22's clear language—and the relative ease of full compliance—it seems unlikely that the high court will ever opt for a "substantial compliance" approach.⁶⁴

II. FEDERAL CASES

A. UNITED STATES SUPREME COURT CASES

1. A "Categorical Exception" to the Exclusionary Rule

During the Survey period, the Supreme Court decided the case of *Arizona v. Evans*—a case which established a "categorical exception to the

57. *Id.*

58. *Id.*

59. *Riordan*, 905 S.W.2d at 773.

60. No. 71417, 1994 WL 706957 (Tex. Crim. App.—Dec. 21, 1994, reh'g granted) (not yet released for publication).

61. *Id.*

62. *Id.*

63. *Id.*

64. *But see Williams v. State*, 883 S.W.2d 317 (Tex. App.—Dallas 1994, writ ref'd) (holding substantial compliance sufficient under Art. 38.22).

exclusionary rule for clerical errors of court employees."⁶⁵

Defendant Evans was stopped by a Phoenix police officer for driving the wrong way on a one-way street. The officer entered Evans' name into a computer terminal located in the officer's car. The officer learned from the computer that there was an outstanding warrant for Evans' arrest, and Evans was arrested. A bag of marijuana was discovered during a search of Evans' car after the arrest and Evans was charged with possession of marijuana.

The warrant utilized to arrest Evans, however, had been quashed 17 days prior to Evans' arrest. Evans therefore argued that the marijuana seized "should be suppressed as the fruit of an unlawful arrest."⁶⁶ The trial court granted the motion to suppress, the Arizona Court of Appeals reversed that decision, and the Arizona Supreme Court reversed the Court of Appeals. The U.S. Supreme Court granted certiorari "to determine whether the exclusionary rule requires suppression of evidence seized incident to an arrest resulting from an inaccurate computer record, regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police computer."⁶⁷

In an opinion by Chief Justice Rehnquist, the U.S. Supreme Court utilized *U.S. v. Leon*⁶⁸ to reverse the decision of the Arizona Supreme Court. *Leon* involved "a police search in which the officers had acted in objectively reasonable reliance on a search warrant, issued by a neutral and detached Magistrate, that later was determined to be invalid."⁶⁹ In *Leon*, "[o]n the basis of three factors,⁷⁰ [the Supreme Court] determined that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants,"⁷¹ and the Court went on to conclude that "[e]xcluding the evidence can in no way affect [the officer's] future con-

65. 115 S. Ct. 1185, 1193 (1995).

66. *Id.* at 1188. Evans argued before the trial court that the marijuana seized should be suppressed because "the purposes of the exclusionary rule would be served here by making the clerks for the court, or the clerk for the Sheriff's office, whoever is responsible for this mistake, to be more careful about making sure that warrants are removed from the records." *Id.*

67. *Id.* at 1189. It should be noted that the state of Arizona conceded that Evans' arrest violated the Fourth Amendment. *Id.* at n.1.

68. 468 U.S. 897 (1984).

69. *Evans*, 115 S. Ct. at 1191.

70. The three factors relied upon in *Leon* were set forth by the *Evans* Court as follows:

First, . . . the exclusionary rule was historically "designed to deter police misconduct rather than to punish the errors of judges and magistrates." Second, there was "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires the application of the extreme sanction of exclusion." Third, and of greatest importance, there was no basis for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate.

Id. (citing *Illinois v. Krull*, 480 U.S. 340, 348 (1987) (quoting *Leon*, 468 U.S. at 916)).

71. *Id.*

duct unless it is to make him less willing to do his duty.”⁷² Similarly, in *Evans*, the Court stated that “[i]f court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction.”⁷³ The Court went on to apply the three factors from *Leon*:

First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. Second, [*Evans*] offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion

Finally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.⁷⁴

Finally, the *Evans* Court stated that if the person responsible for the error appearing on the police computer was a court clerk, “application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer.”⁷⁵ The Court also noted the lack of any “indication that the arresting officer was not acting objectively reasonable when he relied upon the police computer record”⁷⁶ and concluded that “[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.”⁷⁷ It should be noted, however, that the *Evans* Court declined to address the issue of whether the same analysis applied in *Evans* should be applied “to determine whether the evidence should be suppressed if police personnel were responsible for the error.”⁷⁸

2. *Random Drug Testing of Student Athletes and the Fourth Amendment*

The controversial topic of random drug testing was addressed during the Survey period by the Supreme Court in *Vernonia School District 47J v. Acton*.⁷⁹ *Acton* centered around the constitutionality of randomly drug testing student athletes. In an opinion authored by Justice Scalia, the Court found that the random drug testing policy at issue to be

72. *Id.* at 1192 (citing *Leon*, 468 U.S. at 919-20 (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting))).

73. *Evans*, 115 S. Ct. at 1193.

74. *Id.* (citations omitted).

75. *Id.*

76. *Id.* at 1194.

77. *Id.* (citing *Leon*, 468 U.S. at 916-22).

78. *Evans*, 115 S. Ct. at 1194, n.5.

79. 115 S. Ct. 2386 (1995).

constitutional.⁸⁰

After noticing an increase in drug use by students during the middle to late 1980s, the Vernonia school district in Oregon implemented its "Student Athlete Drug Policy" in the fall of 1989.⁸¹ Under the Policy, which applied to "all students participating in interscholastic athletics," "[s]tudents wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents."⁸² At the beginning of a season for a particular sport, the athletes for that sport are tested. Ten percent of the athletes are then randomly tested once each week during the season.⁸³ The testing requires the student to be tested to provide a urine sample.⁸⁴ Because seventh-grader James Acton and his parents refused to sign the consent forms for the testing, Acton was denied the opportunity to play football at his school, which prompted the filing of this lawsuit by the Actons.⁸⁵ The trial court denied the Actons' claims and dismissed the lawsuit.⁸⁶ However, the Ninth Circuit reversed this decision and held "that the Policy violated both the Fourth and Fourteenth Amendments and Article I, Section 9, of the Oregon Constitution."⁸⁷

The U.S. Supreme Court began its analysis of the case by noting that "state-compelled collection and testing of urine, such as that required by the Student Athlete Drug Policy, constitutes a 'search' subject to the demands of the Fourth Amendment."⁸⁸ The Court then stated that the "ultimate measure of the constitutionality of a governmental search is 'reasonableness'" and that

in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁸⁹

The Court then considered various factors to reach the conclusion that the Policy at issue was "reasonable and hence constitutional."⁹⁰ Factors considered by the Court included "the decreased expectation of pri-

80. *Id.* at 2396.

81. *Id.* at 2388-89.

82. *Id.* at 2389.

83. *Id.*

84. *Acton*, 115 S. Ct. at 2389.

85. *Id.* at 2390.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Acton*, 115 S. Ct. at 2390 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *Deleware v. Prouse*, 440 U.S. 648, 654 (1979))).

90. *Id.* at 2396.

vacy,⁹¹ the relative unobtrusiveness of the search,⁹² and the severity of the need met by the search⁹³." Of the factors discussed by the Court, the most significant factor was that "the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."⁹⁴ However, the Court did "caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."⁹⁵

3. *The "Knock and Announce" Principle is an Element of the Fourth Amendment Reasonableness Inquiry*

In the case of *Wilson v. Arkansas*,⁹⁶ the Supreme Court, in an opinion authored by Justice Thomas, held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."⁹⁷

Defendant Wilson sold narcotics to an informant over a two month period. After obtaining a warrant to search Wilson's home, police arrived at Wilson's home and found the main door open. The officers entered the home through an unlocked screen door, "identified themselves as police officers and stated that they had a warrant."⁹⁸ The officers then seized various narcotics found in the home.⁹⁹

Wilson moved to suppress the evidence at trial based on various theories. One of Wilson's theories was that the search was invalid because "the officers had failed to 'knock and announce' before entering her

91. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases

Legitimate privacy expectations are even less with regard to student athletes

By choosing to 'go out for the team', they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

Id. at 2392-93.

92. Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

Id. at 2393.

93. [T]his program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, . . . the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes."

Id. at 2395.

94. *Acton*, 115 S. Ct. at 2396.

95. *Id.*

96. 115 S. Ct. 1914 (1995).

97. *Id.* at 1915. The knock and announce principle generally requires a law enforcement officer to "announce his presence and authority" before breaking open the doors of a dwelling. *Id.*

98. *Id.*

99. *Id.* at 1915-16.

home".¹⁰⁰ The trial court denied Wilson's motion to suppress, and the Arkansas Supreme Court affirmed Wilson's conviction.¹⁰¹ The Arkansas Supreme Court also "rejected [Wilson's] argument that 'the Fourth Amendment requires officers to knock and announce prior to entering the residence'"¹⁰² and "concluded that neither Arkansas law nor the Fourth Amendment required suppression of the evidence."¹⁰³ Because there was "conflict among the lower courts as to whether the common-law knock-and-announce principle forms a part of the Fourth Amendment reasonableness inquiry," the U.S. Supreme Court granted certiorari.¹⁰⁴ The U.S. Supreme Court concluded that "[a]n examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."¹⁰⁵ However, the Court also explicitly stated that there does not have to be an announcement before every entry.¹⁰⁶ After detailing a few examples from jurisprudence of when announcement need not be made,¹⁰⁷ the Court stated that it was leaving "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."¹⁰⁸ Additional litigation on this issue can be expected.

B. FIFTH CIRCUIT CASES

1. *The Warrantless Use of Thermal Imagers*

The utilization of advanced technology by law enforcement personnel in their efforts to stop crime continues to raise interesting issues regarding whether the particular technology used in a given situation has violated a defendant's expectation of privacy. During the Survey period, the Fifth Circuit had occasion to address such a situation. In *U.S. v. Ishmael*,¹⁰⁹ the technology at issue was the thermal imager.¹¹⁰ In *Ishmael*, the Fifth Circuit held that "the warrantless use of a thermal imager in an 'open field' does not violate the Fourth Amendment."¹¹¹

100. *Id.* at 1916.

101. *Wilson*, 115 S. Ct. at 1916.

102. *Id.* (quoting *Wilson v. State*, 878 S.W.2d 755, 758 (Ark. 1994)).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1918.

107. Such as "under circumstances presenting a threat of physical violence" or "in cases where a prisoner escapes from [an officer] and retreats to [the prisoner's] dwelling." *Id.* at 1919.

108. *Id.*

109. 48 F.3d 850 (5th Cir. 1995).

110. A thermal imager detects differences in surface temperature of targeted objects and displays those differences through a viewfinder in varying shades of white and gray. In other words, a warm object will appear white on the device's viewfinder, whereas a cool object will appear gray. The device can record its readings on a standard videocassette. *Id.* at 851-52.

111. *Id.* at 853.

The Ishmaels owned land which contained a mobile home and a large steel building. Based upon information learned from a confidential source, from physical entrances onto the land, and from other investigatory techniques, DEA officers began to suspect that the Ishmaels were cultivating marijuana in a structure located underneath the steel building.¹¹² The DEA officers utilized a thermal imager while flying 500 to 1000 feet above the Ishmaels' property in a helicopter and while entering the Ishmaels' property on foot and determined that "an unusual amount of heat was emanating from the substructure and the ground adjacent to it."¹¹³ These findings, along with other information gathered by DEA officers, were utilized "to obtain a warrant to search the steel building and its substructure on the Ishmaels' property."¹¹⁴ Several firearms and 770 marijuana plants were found as a result of the search, and the Ishmaels attempted to suppress the evidence found. The Ishmaels "argued that the readings from the thermal imager constituted an unconstitutional search and that, without those readings, the DEA did not have probable cause to obtain a warrant."¹¹⁵ The district court agreed and granted the motion to suppress.¹¹⁶

On appeal, the Fifth Circuit focused on the case of *Katz v. U.S.*,¹¹⁷ which sets forth the two-prong test to be utilized in any Fourth Amendment surveillance case "for determining whether a warrantless search violated a defendant's legitimate expectation of privacy: the defendant must have exhibited a subjective expectation of privacy, and that expectation must be one society is prepared to recognize as reasonable."¹¹⁸ The Court found that the first prong—a subjective expectation of privacy—was satisfied by the Ishmaels.¹¹⁹ However, as to the issue of "whether the government's intrusion on the Ishmaels' subjective expectation of privacy with a thermal imager is a reasonable one,"¹²⁰ the Court found that it was. According to the U.S. Supreme Court in *Dow Chemical Co. v. U.S.*,¹²¹ as relied upon by the Fifth Circuit in *Ishmael*, the "crucial inquiry, as in any search and seizure analysis, is whether the technology reveals 'intimate details.'"¹²² The Fifth Circuit found that the thermal imager "poses no greater intrusion on one's privacy than a precise mapping camera, an electronic beeper, or a pen register."¹²³ The Court also found the "manner in which a thermal imager was used in this case [to be] equally

112. *Id.* at 851.

113. *Id.* at 851-52.

114. *Ishmael*, 48 F.3d at 852.

115. *Id.*

116. *Id.*

117. 389 U.S. 347 (1967).

118. *Ishmael*, 48 F.3d at 853 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

119. *Id.* at 854-55.

120. *Id.* at 855.

121. 476 U.S. 227 (1986).

122. *Ishmael*, 48 F.3d at 855 (citing *Dow Chemical*, 476 U.S. at 238).

123. *Id.* at 856. A thermal imager "does not send any beams or rays into the area on which it is fixed or in any way penetrate structures within that area." *Id.* (quoting *U.S. v. Penny-Feeney*, 773 F. Supp. 220, 223 (D. Haw. 1991)).

significant in assessing the reasonableness of the intrusion" in that "the officers never physically invaded the Ishmael's residential or commercial curtilage".¹²⁴ Finally, the Court also stated that the fact that the steel building at issue "stood in an open field" meant that "the officers in this case were entitled to observe the steel building either by air or on foot".¹²⁵ The Court therefore concluded "that the DEA's warrantless use of a thermal imager in this case was not an unconstitutional search" and "that probable cause existed for the issuance of the warrant."¹²⁶

2. *Standing to Contest Search of Another's Hotel Room*

The issue of whether an individual had standing to contest the search of another's hotel room was addressed during the Survey period in the case of *U.S. v. Wilson*.¹²⁷ In *Wilson*, a U.S. Postal Inspector developed information which led him to believe that defendant Wilson was in possession of stolen mail and that Wilson could be found in a particular hotel room in Arlington, Texas.¹²⁸ The inspector and an Arlington police officer arrived at the hotel room and were invited inside by James Stiles, the guest to whom the room was registered.¹²⁹ It is important to note at this point that "Stiles had resided in the hotel room for three years" and that "Wilson had slept in Stiles' hotel room the previous night with Stiles' permission."¹³⁰ After learning that Wilson was in the bathroom and making him come out of it, the police officer proceeded to make a "protective sweep"¹³¹ of the room, and when he stepped into the darkened bathroom, the officer was able to view a checkbook located inside a trash can.¹³² After discovering the checkbook, and after Wilson, Stiles, and Stiles' girlfriend all denied knowledge of the checkbook, the officers obtained permission from Stiles' to conduct a complete search of the room, which Stiles gave in writing.¹³³ Wilson then gave a handwriting sample to the Inspector, and he also accompanied the Inspector to the Inspector's office.¹³⁴ At the Inspector's office, Wilson "gave an oral and written confession to having possession of the stolen mail."¹³⁵ Wilson was ultimately "indicted for possession of stolen mail, to wit: a personal check which had been mailed . . . in a letter or parcel."¹³⁶ Wilson's motion to

124. *Id.*

125. *Id.* at 857.

126. *Id.*

127. 36 F.3d 1298 (5th Cir. 1994).

128. *Id.* at 1301.

129. *Id.*

130. *Id.*

131. *Id.* "A 'protective sweep' is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 1305-06.

132. *U.S. v. Wilson*, 36 F.3d at 1301.

133. *Id.*

134. *Id.* at 1301-02.

135. *Id.* at 1302.

136. *Id.* at 1301.

suppress the checkbook was denied because the "district court found that Wilson had no standing to contest the search because he had no expectation of privacy in Stiles' hotel apartment."¹³⁷

The Fifth Circuit relied upon *Minnesota v. Olson*¹³⁸ to determine that Wilson had "standing to challenge the search and seizure of the checkbook."¹³⁹ Relying upon the following language from *Olson*—"status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable"¹⁴⁰—the Fifth Circuit noted that Stiles had lived in the hotel room for approximately three years, that "Wilson was an overnight guest in Stiles' 'home'"¹⁴¹, and the Court concluded that Wilson therefore "had an *Olson* expectation of privacy."¹⁴²

As to the warrantless seizure of the checkbook, the Fifth Circuit determined that "the checkbook was not admissible under the 'inevitable discovery' doctrine,"¹⁴³ that because the "search of the hotel room was not made as an incident to an arrest . . . it does not fit within the 'protective sweep' exception to the warrant requirement",¹⁴⁴ and that the "checkbook was not in plain view in the bathroom."¹⁴⁵ The Court therefore held that the "seizure of the checks was unreasonable and was therefore prohibited by the Fourth Amendment."¹⁴⁶

3. *The Admissibility of Polygraph Tests*

One of the more controversial subjects in the area of American jurisprudence has been whether the results of polygraph tests should be admissible in a court of law. Until the precedent setting case of *U.S. v. Posado*,¹⁴⁷ the Fifth Circuit, "with few variations, has unequivocally held that polygraph evidence is inadmissible in a federal court for any purpose."¹⁴⁸ However, in *Posado*, the Fifth Circuit "remove[d] the obstacle of the per se rule against admissibility"¹⁴⁹ and in so doing "opened the

137. *U.S. v. Wilson*, 36 F. 3d at 1302. The trial court also determined that "because Stiles subsequently consented to the search, it was clear that the checkbook would ultimately have been discovered." *Id.*

138. 495 U.S. 91 (1990).

139. *U.S. v. Wilson*, 36 F.3d at 1303.

140. *Olson*, 495 U.S. at 96-97.

141. *U.S. v. Wilson*, 36 F.3d at 1303.

142. *Id.*

143. *Id.* at 1305.

144. *Id.* at 1306.

145. *Id.*

146. *U.S. v. Wilson*, 36 F.3d at 1306. The Court also found that "Wilson's confession resulted from an exploitation of the illegally seized checks". *Id.* at 1308. Therefore, "the admissibility of the confession falls with that of the checkbook." *Id.*

147. 57 F.3d 428 (5th Cir. 1995). In *Posado*, three defendants had their luggage searched by law enforcement personnel at an airport. In order to establish that they had not consented to the search of their luggage before the bags were opened, the defendants attempted to arrange for the introduction of the polygraph evidence at the pretrial hearing on their motion to suppress the cocaine found in their luggage. *Id.* at 429-30.

148. *Id.* at 429.

149. *Id.* at 434.

door to the possibility of polygraph evidence in certain circumstances.”¹⁵⁰ To reach this conclusion, the Fifth Circuit examined evidentiary principles contained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁵¹ and the Federal Rules of Evidence. Because it concluded that the district court had “applied a per se rule against admitting polygraph evidence,”¹⁵² the Fifth Circuit remanded the case back to district court “for consideration of the evidentiary reliability and relevance of the polygraph evidence proffered by the defendants under the principles embodied in the Federal Rules of Evidence and the Supreme Court’s decision in *Daubert*.”¹⁵³

150. *Id.* at 436.

151. 113 S. Ct. 2786 (1993).

152. *Posado*, 57 F.3d at 432.

153. *Id.* at 436.