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Criminal Procedure: Confession, Search and Seizure

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CRIMINAL PROCEDURE: CONFESSION, SEARCH AND SEIZURE

by

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THE areas of confession, search and seizure are in a constant evolution. Each year brings major modifications and changes to this area of the law. This Article discusses some of the important decisions in this field of criminal law during the survey period.

I. STANDING

The question whether a defendant challenging an illegal search and seizure has standing is addressed as a preliminary matter in all cases. Absent a demonstration of standing, the defendant has no legal basis to complain of the illegal police conduct or benefit from a court ruling finding the conduct illegal. As a result, illegally obtained evidence can be used against a defendant who fails to establish his or her standing to complain of police illegality.[1]

In *Minnesota v. Olson*[2] the United States Supreme Court found that a defendant, an overnight guest in a private home, had standing to challenge a warrantless entry into the home to effect his arrest. The police suspected the defendant of being the driver of the getaway car used in a robbery-murder. The police surrounded the home of two women with whom the defendant was staying. When the defendant did not come out, the police entered the home without consent and arrested him.

Citing *Katz v. United States*[3] and *Rakas v. Illinois*,[4] the Court explained that the

> capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.[5]

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1. United States v. Payner, 447 U.S. 727, 731 (1980).
2. 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).
3. 389 U.S. 347 (1967).
4. 439 U.S. 128 (1978).
5. *Olson*, 110 S. Ct. at 1687, 109 L. Ed. 2d at 92.

The Court in *Olson* explained that an overnight guest has a legitimate expectation of privacy in his host's home for a number of reasons. Citing social custom, the Court explained that staying overnight in other persons' homes is a long standing social practice and is done in order to obtain privacy when staying in one's own home is impractical. The fact that the host has ultimate control over the house was found to be consistent with the guest having a legitimate expectation of privacy.[6]

The Court rejected the State's argument that the residence must be the defendant's own home in order for him to establish standing.[7] Again citing *Katz,* the Court stated that "the Fourth Amendment protects people, not places."[8]

The United States Court of Appeals for the Fifth Circuit also issued two important decisions concerning standing. In *United States v. Kye Soo Lee*[9] three defendants prevailed in district court on their motions to suppress the fruits of a search of a rented truck which revealed counterfeit handbags.[10] One defendant, Min Sik Lee, rented the truck in New York, padlocked the cargo in the back of the truck, and gave the keys to Kye Soo Lee and Min Ho Chay, the other two defendants. Kye Soo Lee and Min Ho Chay were stopped in Louisiana after committing a traffic violation. A subsequent search of the truck revealed the counterfeit merchandise.

The government challenged the standing of Kye Soo Lee and Min Ho Chay to complain of an illegal search and seizure because they did not rent the truck or have the keys to the cargo hold, did not own the merchandise in the truck, and claimed not to know what was in the truck. The court rejected this argument finding that Kye Soo Lee and Min Ho Chay had a legitimate expectation of privacy.[11] Citing *United States v. Martinez,*[12] a case with similar facts, the court found that when a person borrows a vehicle from another, with the other's consent, the borrower becomes a lawful possessor of the vehicle, and thus has standing to challenge its search.[13]

Min Sik Lee's standing to complain of the search of the vehicle was likewise challenged by the government. The court also found Min Sik Lee to

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6. Apparently a person staying in a hotel room will also have standing to challenge an illegal search or entry into the hotel room. The Court stated that

> [w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth - 'a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.'

Id. at 1689, 109 L. Ed. 2d at 94, 95 (quoting *Katz,* 389 U.S. at 361 (Harlan, J., concurring)).

7. *Id.* at 1688, 109 L. Ed. 2d at 93.

8. *Id.* at 1688 n. 5, 109 L. Ed. 2d at 93 n. 5 (quoting *Katz,* 389 U.S. at 351).

9. 898 F.2d 1034 (5th Cir. 1990).

10. The district court ruling that the search was violative of the fourth amendment was reversed by the court of appeals. *Id.* at 1035.

11. *Id.* at 1038.

12. 808 F.2d 1050 (5th Cir. 1987), *cert. denied,* 481 U.S. 1032 (1987).

13. United States v. Kye Soo Lee, 898 F.2d at 1038.

have standing.[14] Quoting *United States v. Haydel*,[15] the court stated that "no one circumstance is talismanic to the Rakas inquiry."[16] Factors to be considered are property rights, whether the defendant has a possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.[17] The *Kye Soo Lee* court found all of the above factors, with the exception being legitimately on the premises, weighed in favor of finding Min Sik Lee to have standing, and the court so held.[18]

In *United States v. Boruff*[19] the Fifth Circuit again addressed the standing issue in the context of a rental car and a vehicle owned by another person. The defendant purchased a truck to be used in a drug smuggling operation. He had the title and insurance for the truck placed in the name of the co-conspirator. The defendant then had his girlfriend rent a car for him to use in the smuggling operation. The girlfriend rented the car in her own name and turned it over to the defendant. The standard rental agreement signed by the girlfriend required that only she would drive the car and prohibited the car's use for any illegal purpose.

During the smuggling operation, and at the time of the arrest, the defendant drove the rental car and his co-conspirator, in whose name the truck had been purchased, drove the truck. Police stopped both vehicles and a search revealed evidence and contraband. The government challenged the defendant's standing to complain of the search of either vehicle.

The defendant asserted that he had a legitimate expectation of privacy in the truck for several reasons. First, he was the equitable owner and had a possessory interest in the truck. Second, he exercised joint control over the truck during the smuggling operation. Finally, he had a subjective expectation of privacy in the truck and took precautionary measures to safeguard that privacy.

The court rejected these arguments and found that the defendant lacked standing to challenge the search of the truck.[20] The fact that he went through steps to disassociate himself from the truck at the time of its purchase, and that he was not driving the truck, was not present when the truck was actually stopped, and that he disavowed any knowledge of the truck and its contents when stopped were found sufficient to conclude that he lacked a legitimate expectation of privacy in the truck.[21]

The court likewise found the defendant to lack a legitimate expectation of

14. *Id.*
15. 649 F.2d 1152 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).
16. United States v. Kye Soo Lee, 898 F.2d at 1038.
17. United States v. Haydel, 649 F.2d at 1155.
18. United States v. Kye Soo Lee, 898 F.2d at 1038.
19. 909 F.2d 111 (5th Cir. 1990).
20. *Id.* at 116.
21. *Id.*

privacy in the rental car.[22] Under the rental agreement, the defendant's girlfriend was the only legal operator of the car and had no authority to allow him to drive. Additionally, the rental agreement expressly forbade the use of the vehicle for illegal purposes. These restrictions on the use of the vehicle defeated the defendant's assertion of standing.[23]

II. DWI ROADBLOCKS

Roadblocks, strategically set up by the police near bars and taverns at closing time, have spawned considerable litigation throughout the country. Defendants caught in these roadblocks have had considerable success in attacking their legality in Texas. The United States Supreme Court, however, in a Michigan case, has undercut most, if not all, of the arguments that have proven successful in Texas courts. This survey period contained several important cases dealing with this issue.

In October of 1989, the Texas Court of Criminal Appeals entered into the roadblock debate with a strong opinion condemning DWI roackblocks as violative of the Fourth Amendment. In *Hibgie v. State*[24] Dallas Police set up a roadblock close to several bars just before closing time. Police stopped only traffic coming from the bars. Most of the officers participating in the roadblock were members of the DWI Task Force. Officers detained every car coming to the stop and allowed the car to proceed only after the driver produced a valid driver's license and only if the questioning officer had no suspicion that the driver was intoxicated.

The court initially held that the stopping of an individual at a roadblock was a seizure within the meaning of the Fourth Amendment.[25] The roadblocks themselves were found to be in violation of the Fourth Amendment.[26] Citing United States Supreme Court cases discussing the right to privacy,[27] the right to be left alone,[28] and the right to travel,[29] the Court of Criminal Appeals found that stopping a motorist at a roadblock without probable cause or reasonable suspicion was unconstitutional.[30] The roadblock violated the standards set forth in *Terry v. Ohio*[31] because the police made the stops without reasonable suspicion on the part of the officer that the motorist had violated any law.

In concluding that the roadblocks were illegal, the court reviewed several exceptions the Supreme Court has developed to searches requiring probable cause or reasonable suspicion.[32] These searches are administrative inspec-

22. *Id.* at 117.
23. *Id.*
24. 780 S.W.2d 228 (Tex. Crim. App. 1989).
25. *Id.* at 230-31.
26. *Id.* at 233.
27. Griswold v. State of Connecticut, 381 U.S. 479, 484 (1965).
28. Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973); Olmstead v. United States, 277 U.S. 438, 478 (1928).
29. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).
30. Higbie v. State, 780 S.W.2d at 232-33.
31. 392 U.S. 1 (1968).
32. Higbie v. State, 780 S.W.2d at 233-37.

tions,[33] permanent border patrol checkpoints,[34] and roadblocks for the purpose of checking drivers licenses and vehicle registration.[35] Noted but left undiscussed by the Texas court were three other types of permissible searches allowing customs officials: boarding vessels capable of making open sea to inspect their documents,[36] allowing I.N.S. agents to make immigration sweeps at a workplace[37] and requiring railroad personnel and customs service agents to submit random blood or urine samples.[38]

These suspicionless searches satisfy the application of a balancing test, balancing the intrusion on the individual against the societal interest in the suspicionless search. The specific factors considered in the balancing test vary depending on the search at issue. This balancing test is generally engaged in when a court finds that a specific seizure is "substantially less intrusive" than a typical arrest.[39] The theory behind the balancing test is that a suspicionless seizure may not be unreasonable when it is substantially less intrusive than a typical arrest, and the public receives substantial benefits from the practice.

While the court of criminal appeals implicitly found this seizure to be less intrusive than a typical arrest, it nevertheless determined that the DWI roadblock failed the balancing test and violated the Fourth Amendment.[40] The first part of the balancing test cited by the court is to determine whether there is a long history of judicial and public acceptance of the particular practice. The court found no public consensus as to the efficacy or legality of DWI roadblocks.[41] The court then examined whether roadblocks represent the only effective means of accomplishing the societal purpose of detecting drunk drivers. This factor likewise weighed against the State since there are other ways to detect and deter drunken driving.[42] The third part of the test was to determine whether the practice is designed primarily to detect criminal activity or whether the practice is for other purposes. The court found the DWI roadblocks to be aimed primarily at detecting criminal activity; this was cited as a factor militating against approval as suspicionless searches.[43] Of the suspicionless searches approved by the United States Supreme Court, detection of illegal activity was generally found to be a secondary purpose of the search.

The Texas Court of Criminal Appeals concluded that, at a minimum, the Fourth Amendment requires "reasonable suspicion" of illegal activity to de-

33. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).
34. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
35. Delaware v. Prouse, 440 U.S. 648 (1979).
36. United States v. Villamonte-Marquez, 462 U.S. 579 (1983).
37. INS v. Delgado, 466 U.S. 210 (1984).
38. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989).
39. Dunaway v. New York, 442 U.S. 200, 210 (1979).
40. Higbie v. State, 780 S.W.2d at 240.
41. *Id.* at 238.
42. *Id.*
43. *Id.* at 238-39.

tain persons at a DWI roadblock.[44] *Higbie* constituted a strong blow against the use of DWI roadblocks in Texas. The Dallas court of appeals in *State v. Wagner*[45] followed the reasoning of *Higbie* in finding another Dallas roadblock improper. The issuance of the United States Supreme Court's decision in a roadblock case emanating from Michigan cut short roadblock opponents' victory party.

In *Michigan Department of State Police v. Sitz*[46] the Supreme Court issued its first decision addressing the constitutionality of DWI roadblocks. The Michigan roadblocks, like the Texas roadblocks, provided that all motorists passing a certain location be stopped and examined briefly for signs of intoxication. The Michigan court found the roadblocks unconstitutional, concluding that they were generally an ineffective means of apprehending intoxicated drivers and that the intrusion on the individual was substantial.[47]

The United States Supreme Court, through Chief Justice Rhenquist, employed the balancing test of *Brown v. Texas*[48] and *United States v. Martinez-Fuerte*,[49] in assessing the legality of the DWI roadblocks. This test resembled the test used by the Texas Court of Criminal Appeals in *Higbie*. The Supreme Court accepted the Michigan court's characterization of the test as involving "balancing the state's interest in preventing accidents caused by drunken drivers with the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints."[50] Initially the Supreme Court agreed that a Fourth Amendment seizure occurs when a vehicle is stopped at a roadblock.[51] The Supreme Court's application of the balancing test resulted in a different conclusion than the Michigan courts.

The Supreme Court found that drunk driving was a substantial problem, citing statistics showing injuries and property damage resulting from drunk driving.[52] The intrusion on the individual was found to be slight because of the short duration of the stop. The Michigan court also erred in considering the effectiveness of the roadblocks in apprehending intoxicated drivers to be minimal and weighing this as a factor against the State. Chief Justice Rhenquist concluded that since evidence showed that some intoxicated drivers would be detected at a roadblock,[53] the choice between different law enforcement alternatives rests not with the courts but with law enforcement

44. *Id.* at 240.
45. 791 S.W.2d 573 (Tex. App.—Dallas 1990, pet. granted).
46. 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).
47. 170 Mich. App. 433, 429 N.W.2d 180 (1988).
48. 443 U.S. 47 (1979).
49. 428 U.S. 543 (1976).
50. Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2484, 110 L. Ed. 2d at 419.
51. *Id.* at 2485, 110 L. Ed. 2d at 420.
52. Each year drunk drivers cause more than 25,000 deaths, one million personal injuries, and over five billion dollars in property damage. *Id.* at 2485-86, 110 L. Ed. 2d at 420-21.
53. During operation on the Saginaw County, Michigan checkpoint, the detention of each of the 126 vehicles that entered the checkpoint resulted in the arrest of two drunken drivers. In addition, an expert witness testified at the trial that experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around one percent of all motorists stopped.

officials.[54]

Three dissenting justices strongly disputed the conclusion of the majority that the roadblocks did not violate the Fourth Amendment.[55] The *Sitz* opinion, however, in unequivocal language, silenced the nationwide debate concerning whether DWI roadblocks violate the Fourth Amendment. Some states may still prohibit them under state statutes or constitutions, but the federal constitution lends no support to those persons challenging this practice.

Following *Sitz*, the Texas Court of Criminal Appeals again faced a roadblock case. In *King v. State*[56] the court stated that *Sitz* resolved the question of whether the Fourth Amendment prohibits DWI roadblocks and effectively overruled the court of criminal appeals decision in *Higbie*. *King* was remanded back to the Dallas court of appeals to determine whether DWI roadblocks violate article 1, section 9 of the Texas Constitution.[57] Roadblocks most likely will not be found unconstitutional under the Texas Constitution since the Texas Constitution is generally interpreted to be in harmony with the United States Constitution.[58]

III. AUTOMOBILES ON PREMISES OF SEARCH

Both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit addressed the issue of searches of automobiles on premises during the past year. The question the courts faced was whether vehicles that are on the premises where a search warrant is being executed or which arrive at the premises during the lawful search can be searched. The two courts have come to somewhat different conclusions on this question.

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54. Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2487, 110 L. Ed. 2d at 422.

55. Justice Brennan, joined by Justice Marshall, stated that "[w]ithout proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the public against even the minimally intrusive seizures involved in this case." *Id.* at 2490, 110 L. Ed. 2d at 426.

Justice Stevens, joined in part by Justice Brennan and Justice Marshall, wrote that

> [t]he Court today misapplies the balancing test announced in Brown v. Texas, 443 U.S. 47, 50-51 (1979). The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is "virtually no difference" between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint. I believe this case is controlled by our several precedents condemning suspicionless random stops of motorists for investigatory purposes.

Id. at 2492, 110 L. Ed. 2d at 428.

56. No. 1005-87 (Tex. Crim. App. Nov. 14, 1990).

57. The Texas Constitution provides that

> 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. 1, § 9.

58. In Eisenhauer v. State, 754 S.W.2d 159 (Tex. Crim. App. 1988), *cert. denied*, 488 U.S. 848 (1988), the court held that article 1, § 9 of the Texas Constitution is the same as the federal constitution in determining probable cause.

In *State v. Barnett*[59] the police obtained a search warrant authorizing the sheriff or any police officer of the County "to enter the suspected place and premises (including all other structures, places and vehicles on the premises) described in said affidavit and to there search for methamphetamine."[60] The affidavit described the suspected place in great detail, but failed to list any suspected vehicles. Initially, the court found the affidavit and warrant insufficient to support the search of any vehicles found on the premises. In *Ybarra v. Illinois*[61] the United States Supreme Court held that "a person's mere propinquity to others independently suspected of criminal activity does not . . . give rise to probable cause to search that person."[62] The Texas Court of Criminal Appeals in *Barnett* applied this reasoning to vehicles parked at a location where a search warrant is being executed. Without particular information in the affidavit in support of the search warrant establishing probable cause to search the vehicle, the vehicle search is not authorized.

The defendant in *Barnett* drove onto the premises while the search was in progress. The police arrested him and searched his vehicle, which revealed a small amount of drugs. The court found this search to be improper even if the search warrant's authorization to search all vehicles parked at the residence was sufficient.[63] The defendant's vehicle was not one of the vehicles on the premises when the warrant was issued and therefore was not covered by the warrant.

In *United States v. Alva*[64] the Fifth Circuit came to the opposite conclusion reached by the Texas Court of Criminal Appeals in *Barnett*. Following a recent trend in the Fifth Circuit, the court allowed the police considerable leeway in the execution of searches. In *Alva* the officers arrested a third person for possession of cocaine and obtained a search warrant for a house. The warrant commanded the search of the house, all structures located on the lot, and "any and all motor vehicles found parked on the premises."[65] While the search was being conducted, the defendant, the owner, and the lessor of the premises arrived in his pickup truck. The defendant parked within fifteen feet of the house and entered without knocking. The police detained him and searched his truck, finding a pistol.

The defendant argued that the search warrant did not authorize search of his vehicle because he arrived at the premises after the police began searching and did not actually live at the house. The court held that the search of the vehicle was authorized by the warrant.[66] In so holding, the court cited several cases where the search of vehicles parked on premises of a search were upheld.[67] The Fifth Circuit essentially gave a broad reading to the

59. 788 S.W.2d 572 (Tex. Crim. App. 1990).
60. *Id.* at 575.
61. 444 U.S. 85 (1979).
62. *Id.* at 91.
63. State v. Barnett, 788 S.W.2d at 577.
64. 885 F.2d 250 (5th Cir. 1989).
65. *Id.* at 252.
66. *Id.*
67. United States v. Freeman, 685 F.2d 942, 955 (5th Cir. 1982) (warrant authorizing search of premises encompassed Jeep parked on same); United States v. Cole, 628 F.2d 897,

language of the search warrant, while the Texas Court of Criminal Appeals has given a restrictive interpretation to similar warrants.

IV. PRETEXT ARRESTS

The area of pretext arrests is another search and seizure issue where divergent opinions have come from the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit. In *State v. Garcia*[68] the El Paso court of appeals followed the Fifth Circuit's lead, rather than the court of criminal appeals' view, setting the stage for a review of the entire area of pretext arrests by the Texas courts.

In Texas, the holding of *Black v. State*[69] invalidates an arrest used as a pretext to search for evidence, and any evidence discovered as a result of the improper arrest may not be used at trial. Evidence is suppressed regardless of the validity of the underlying arrest. In the Fifth Circuit, *United States v. Causey*[70] specifically disavowed this rule and allowed such arrests. The *Causey* court stated that as long as the police do no more than they are authorized and legally permitted to do, their motives in doing so are irrelevant.[71]

In *Black* the police spotted the defendant driving a vehicle. They wanted to question him about a murder and followed him until he committed a traffic violation. When he committed the violation the police stopped and subsequently questioned him about the murder. Although the police had a right to stop him for the traffic violation, they admitted their true motive in stopping him was to question him regarding the murder. The court found this stop to be an illegal pretext arrest and suppressed his resulting confession. Under the Fifth Circuit rule in *Causey,* the arrest was legal and the confession admissible.

The legality of pretext arrests is a divisive issue without any judicial consensus. The *Black* case was decided with five judges joining the opinion. Two judges concurred in the result and two judges dissented. *Causey* was an *en banc* decision by the Fifth Circuit with eight judges joining in the decision and six judges dissenting.

In *Black* the Texas Court of Criminal Appeals cited *Amador-Gonzales v. United States*[72] as support for its decision. *Amador-Gonzales* was a Fifth Circuit case which held, as did *Black*, that an arrest for a traffic violation whose true purpose was to facilitate a search for drugs was illegal.[73] *Causey* specifically overruled *Amador-Gonzales.* The *Causey* opinion has embold-

899 (5th Cir. 1980) (upheld search by police of vehicle that arrived simultaneously with police at premises described in warrant); United States v. Napoli, 530 F.2d 1198, 1200 (5th Cir. 1976) (search of premises known as 3027 Napolean Avenue encompassed vehicle parked in driveway of premises).

68. 794 S.W.2d 472 (Tex. App.—El Paso 1990, pet. granted).
69. 739 S.W.2d 240 (Tex. Crim. App. 1987).
70. 834 F.2d 1179 (5th Cir. 1987).
71. *Id.* at 1184.
72. 391 F.2d 308 (5th Cir. 1968).
73. *Id.* at 315.

ened Texas prosecutors to challenge continually the holding of *Black* and to push for it to be overruled.

In *Garcia* the prosecutors found an ally in the El Paso court of appeals. In a hard hitting and frequently sarcastic opinion the El Paso court refused to follow *Black*. A petition for discretionary review has been granted on *Garcia* setting the stage for the Texas Court of Criminal Appeals to review the validity of the *Black* rule. *Garcia* is also interesting in that the El Paso court of appeals has deliberately refused to follow an applicable precedent from the Texas Court of Criminal Appeals.

In *Garcia* the officers saw a vehicle that they suspected was involved in a drug offense. Lacking any reasonable suspicion or probable cause to stop the vehicle, they followed the vehicle and observed the driver commit a traffic offense. A chase of the vehicle ensued and eventually officers stopped the vehicle, arrested the driver and discovered cocaine. The trial court granted a motion to suppress finding the attempt to stop the defendant for the traffic violation an illegal pretext stop. The State appealed to the El Paso court of appeals which specifically declined to follow *Black*. The evidence was found admissible and the trial court's granting of the motion to suppress reversed.[74]

Other state court of appeals have not followed the El Paso court's lead on the pretext arrest issue. In *Hamilton v. State*[75] the Fort Worth court of appeals rejected the State's suggestion that *Causey* be followed and *Black* disregarded. In *Hamilton* the court stated that

> Insofar as the Texas Court of Criminal Appeals has held that when an arrest is used as a pretext, it is an illegal arrest and evidence discovered pursuant to it may not be used at trial, we are bound by the authority of their decision in construing a defendant's rights under article I, section 9 of the Texas Constitution and Texas Code of Criminal Procedure Annotated section 38.23 (Vernon 1979).[76]

Additionally, in *Boyles v. State*[77] the court of criminal appeals, in a footnote citing *Black*, stated that the pretext arrest doctrine is still viable. *Boyles* is currently on rehearing. No additional comment concerning the pretext

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74. State v. Garcia, 794 S.W.2d at 478-79.

75. 772 S.W.2d 571 (Tex. App.—Fort Worth 1989, no pet.).

76. *Id.* at 573. Article 38.23 of the Texas Code of Criminal Procedure, titled "Evidence Not to be Used," reads as follows:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained. It 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 (Vernon 1979).

77. No. 69,743 (Tex. Crim. App., Oct. 4, 1989).

arrest doctrine has been forthcoming from the Texas Court of Criminal Appeals.

V. USE OF ILLEGALLY OBTAINED EVIDENCE FOR IMPEACHMENT

The exclusionary rule is the primary means by which various constitutional safeguards are enforced. Generally, under the exclusionary rule, illegally obtained evidence is excluded from trial. In two cases during this survey period, however, the United States Supreme Court discussed one exception to this rule.

In *Michigan v. Harvey*[78] the Supreme Court held that statements taken from a defendant in violation of his right to counsel under the Sixth Amendment may be used to impeach conflicting testimony by the defendant. The Supreme Court had previously held that statements taken from a defendant in violation of his rights under *Miranda v. Arizona*[79] and his right to remain silent under the Fifth Amendment may be used for impeachment.[80] *Harvey* simply held that the same rule will apply when police violate a defendant's Sixth Amendment right to counsel and the statements can likewise be used for impeachment.

In *Harvey* the defendant had been arraigned on rape charges and counsel was appointed for him. During interrogation by the police the defendant said he wanted to make a statement but did not know whether he should talk to his lawyer first. The officers told the defendant he did not need to talk to his lawyer because his lawyer would get a copy of the statement anyway. The defendant then gave an incriminating statement. The statement was inadmissible in the State's case-in-chief based on a violation of the defendant's Sixth Amendment right to counsel.

The Court in *Harvey* pointed out that involuntary statements are inadmissible for any purpose, including impeachment.[81] Under *Harvey* and the previous cases allowing the use of statements for impeachment taken in violation of the Fifth Amendment, the state must not have coerced the statement from the defendant. However, if the basis for the exclusion of the statement is the denial of right to counsel or the initiation or continuation of police interrogation, following an invocation of the right to silence, the statement is still admissible for impeachment.

In *James v. Illinois*[82] the Court held that the impeachment exception to the exclusionary rule would not be expanded to allow the prosecution to introduce illegally obtained evidence to impeach the testimony of a defense witness. In *James* the police illegally obtained a statement from the defendant concerning his appearance on the day of a murder. A defense witness testified contrary to this statement concerning the defendant's appearance on

78. 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).
79. 384 U.S. 436 (1966).
80. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).
81. New Jersey v. Portash, 440 U.S. 450, 459 (1979) (compelled incriminating statements inadmissible for impeachment purposes); Mincey v. Arizona, 437 U.S. 385, 398 (1978).
82. 110 S. Ct. 648, 107 L. Ed. 2d 676 (1990).

the day of the murder. The State then introduced the defendant's statement to impeach the defense witness. The Illinois Supreme Court approved of the use of the illegally obtained statement, expanding the impeachment exception to include impeachment of defense witnesses.[83]

The United States Supreme Court, with Justice Brennan writing for a majority of five, reversed, stating that this extension of the impeachment exception to the exclusionary rule was improper.[84] Justice Brennan wrote that the expansion of this rule would unnecessarily chill some defendants from presenting defense witnesses and would not significantly further the truth seeking function of a trial.[85] The Supreme Court also stated that the expansion of the rule would significantly weaken the exclusionary rule's deterrent effect on police misconduct.[86]

The conclusion of the Court in *James* indicates that the persistent attacks on the exclusionary rule have not yet garnered a majority vote on the United States Supreme Court. Justice Stevens concurred in the opinion and Justice Kennedy wrote a dissent, joined by Chief Justice Rhenquist, Justice O'Connor, and Justice Scalia. While the exclusionary rule is not as strong as in years past, it retains some life and some hope for future survival.

VI. ORAL CONFESSIONS

In the past, the Texas Code of Criminal Procedure article 38.22(3)(C) has significantly limited the use of oral confessions in state prosecutions.[87] In *Port v. State*[88] the Texas Court of Criminal Appeals reinterpreted the meaning of article 38.22(3)(C) in a manner that considerably eases the restrictions on the use of oral confessions and statements. *Port* arose from a murder prosecution in Houston. At trial the State introduced, over objection, two oral statements made by the defendant. On direct appeal the court of appeals held that the statements were inadmissible because they "did not lead to the discovery of any evidence found to be true conducing to establish appellant's guilt."[89] On rehearing, the court of appeals persisted in its reversal of the conviction restating its conclusion that the oral statements were inadmissible.[90]

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83. People v. James, 123 Ill. 2d 523, 528 N.E.2d 723 (1988).
84. James v. Illinois, 110 S. Ct. at 650, 107 L. Ed. 2d at 681.
85. *Id.* at 653-54, 107 L. Ed. 2d at 685-86.
86. *Id.* at 654, 107 L. Ed. 2d at 686-87.
87. Article 38.22 § 3 of the Texas Code of Criminal Procedure provides that
> (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding . . . (c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon Supp. 1990).
88. 791 S.W.2d 103 (Tex. Crim. App. 1990).
89. Port v. State, 736 S.W.2d 865, 874 (Tex. App.—Austin 1987).
90. Port v. State, 738 S.W.2d 787 (Tex. App.—Austin 1987), *rev'd*, 791 S.W.2d 103 (Tex. Crim. App. 1990).

The phrase of article 38.22(3)(c) at issue in *Port* is the requirement that the oral statement contain "assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused."[91] In *Port* the defendant orally told a police officer that he had shot the victim twice in the head. This statement was corroborated by an autopsy performed on the victim. Additionally, the defendant told a police officer that the gun which the officer was holding was the one the defendant used to kill the victim. This statement was found to be true when a ballistics test was performed on the gun. The defendant's oral statements did not lead to the discovery of any new evidence not already in the possession of the police.

The court of appeals found the statements inadmissible based on the fact that no new evidence was discovered as a result of the statement. This was the position also taken by Judge Teague in dissent from the *Port* opinion.[92] Judge Teague and the court of appeals considered the requirement that the statement lead to new evidence to be integral to establishing the reliability of the oral statement and thus its admissibility. The *Port* majority, citing *Briddle v. State*,[93] concluded that article 38.22(3)(C) requires only that the statement contain facts or circumstances that are found to be true and which conduce to establish the guilt of the accused.[94] Under *Port* the oral statement need not lead to or result in the discovery of incriminating evidence. As long as the oral statement has some corroboration, it becomes admissible.

The code provision gives examples of facts or circumstances that would result in the admissibility of an oral statement. The two examples provided are "the finding of secreted or stolen property or the instrument with which he states the offense was committed."[95] Under *Port* these examples are illustrative only and are not limitations on what type of information can result in the admissibility of an oral statement.

Judge Teague, in dissent, noted that *Port* was a significant departure from past interpretations of the Texas oral confession statute, article 38.22(3)(C). He cited numerous cases that have held that the oral statement must lead the police to evidence not yet in their possession or within their knowledge in order to become admissible.[96] Judge Teague also contended that under the interpretation of the statute by the *Port* majority the admission of oral confessions will become commonplace in Texas courts.

The requirement that the oral statement contain assertions of facts or circumstances that are found to be true should be, as Judge Teague notes, relatively easy for the State to meet. Prior to *Port* oral confessions were considered suspect and generally unreliable, which resulted in very few being admitted in evidence in Texas courts. Under *Port* this will change and oral confessions to police officers will likely constitute a significant piece of evidence in many prosecutions.

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91. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c) (Vernon Supp. 1990).
92. Port v. State, 791 S.W.2d at 109 (Teague, J., dissenting).
93. 742 S.W.2d 379 (Tex. Crim. App. 1987), *cert. denied*, 488 U.S. 986 (1988).
94. Port v. State, 791 S.W.2d at 106.
95. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(c) (Vernon Supp. 1990).
96. Port v. State, 791 S.W.2d at 109 (Teague, J., dissenting).

VII. POLICE INTERROGATION AND THE RIGHT TO COUNSEL

During the survey period several significant decisions addressed the attachment of a criminal suspect's right to counsel and limitations on police interrogation after that point. In *Holloway v. State*[97] the Texas Court of Criminal Appeals clarified the difference between the right to counsel under the Fifth Amendment and the Sixth Amendment, as well as the different requirements for waiver of this right. The court concluded that a defendant can unilaterally waive his Fifth Amendment right to counsel, but cannot waive his Sixth Amendment right to counsel without the concurrence of his attorney.[98]

In *Holloway* the court explained that the Fifth Amendment right to counsel is based on *Miranda v. Arizona*[99] and is designed to assist a suspect in the assertion of his Fifth Amendment right against self incrimination. This right most often arises when the government arrests a suspect and interrogates him before filing formal charges. The Sixth Amendment, by contrast, provides specifically that an accused in a criminal proceeding shall have the assistance of counsel. The Sixth Amendment right to counsel attaches at the initiation of formal criminal proceedings.[100] This right to counsel is crucial to the fair operation of the criminal justice system and is designed to prevent unjust outcomes. The different functions of the right to counsel in the Fifth Amendment, as opposed to the Sixth Amendment, necessitates different rules for waiver of those rights.

The police arrested the defendant in *Holloway* for shooting a Longview police officer; he was taken before a magistrate to receive his warnings pursuant to Texas Code of Criminal Procedure article 15.17.[101] On the day of the

97. 780 S.W.2d 787 (Tex. Crim. App. 1989).

98. *Id.* at 796.

99. 384 U.S. 436 (1966).

100. *See generally* Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Mempa v. Rhay, 389 U.S. 128 (1967) (constitutional right to appointed counsel attaches at any point in criminal process in which substantial rights of accused may be affected or at critical stages in the proceedings against the accused); United States v. Wade, 388 U.S. 218 (1967) (critical stages of prosecution held to include post-indictment line-up in which accused is physically present); Powell v. Alabama, 287 U.S. 45, 57 (1932) (arraignment).

101. Article 15.17 of the Texas Code of Criminal Procedure provides that:

> (a) In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested or, if necessary to provide more expeditiously to the person arrested the warnings described by this article, before a magistrate in a county bordering the county in which the arrest was made. The arrested person may be taken before the magistrate in person or the image of the arrested person may be broadcast by closed circuit television to the magistrate. The magistrate shall inform in clear language the person arrested, either in person or by closed circuit television, of the accusation against him and of any affidavit filed therewith, . . . of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the

arrest, the grand jury indicted the defendant for capital murder. The trial court then appointed a lawyer who visited with the defendant in jail and told him not to submit to any questioning.

The following day, without notice to the defendant's lawyer, two Longview police investigators interrogated the defendant. After being informed of his *Miranda* warnings, the defendant stated he did not want an attorney present and made incriminating statements, which the state used against him at his trial. He was convicted of capital murder and the death penalty assessed.

On direct appeal the Texas Court of Criminal Appeals affirmed the conviction finding no violation of the defendant's right to counsel.[102] The United States Supreme Court summarily granted appellant's petition for certiorari.[103] The Supreme Court remanded the case to the Texas Court of Criminal Appeals for reconsideration of the right to counsel issue in light of *Michigan v. Jackson*[104] and *Moran v. Burbine*.[105]

Jackson extended the rule of *Edwards v. Arizona*[106] into the Sixth Amendment area. *Edwards*, following *Miranda's* dictate, held that if a suspect asserted his right to counsel during interrogation all questioning must stop and may begin again only when counsel is provided or the suspect himself initiates further communication with the police.[107] In *Jackson*, the Court extended the *Edwards* rule to the Sixth Amendment and held that if a suspect requests a lawyer at arraignment or some similar proceeding, further police interrogation is prohibited.[108]

In *Burbine* the authorities failed to inform the suspect that his retained counsel was trying to reach him. Additionally, the authorities misled the suspect's counsel by telling him that his client would not be interviewed without the presence of counsel. The police, nevertheless, obtained a waiver of counsel from the defendant, continued interrogation, and obtained inculpatory statements. The Supreme Court held that the police conduct did not vitiate the confession and the suspect could waive his right to counsel.[109]

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person arrested to bail if allowed by law. A closed circuit television system may not be used under this subsection unless the system provides for a two-way communication of image and sound between the arrested person and the magistrate. A recording of the communication between the arrested person and the magistrate shall be made. The recording shall be preserved until the earlier of the following dates: (1) the date on which the pre-trial hearing ends; or (2) the 91st day after the date on which the recording is made if the person is charged with a misdemeanor or the 120th day after the date on which the recording is made if the person is charged with a felony. The counsel for the defendant may obtain a copy of the recording on payment of a reasonable amount to cover costs of reproduction.

TEX. CODE CRIM. PROC. ANN. art. 15.17 (Vernon Supp. 1990).

102. Holloway v. State, 691 S.W.2d 608, 614-15 (Tex. Crim. App. 1984).
103. 475 U.S. 1105 (1986).
104. 475 U.S. 625 (1986).
105. 475 U.S. 412 (1986).
106. 451 U.S. 477 (1981).
107. *Id.* at 484-85.
108. Michigan v. Jackson, 475 U.S. at 632.
109. Moran v. Burbine, 475 U.S. at 421-24.

The *Burbine* decision rested solely on the Fifth Amendment right to counsel since the defendant had not been formally charged and therefore, no Sixth Amendment right to counsel had attached. Of significance to the *Holloway* case was the Court's dicta, indicating that if the Sixth Amendment right to counsel had attached the result may have been different.

With the added consideration of these two cases, the Texas Court of Criminal Appeals again reviewed the *Holloway* case, concluding that the police interrogation of Holloway violated his Sixth Amendment right to counsel. Relying primarily upon *Burbine*, the court concluded that since Holloway had been formally charged, he had a Sixth Amendment right to counsel and this right could not be waived without the concurrence of his attorney. Since police questioning resulted in the defendant giving incriminating statements without counsel's presence or concurrence in the purported waiver of counsel, the court of criminal appeals reversed the conviction.[110]

In *Minnick v. Mississippi*[111] the Supreme Court added an additional requirement to the rule of *Edwards v. Arizona*.[112] In *Edwards* the Court held that once a suspect requested a lawyer, all questioning must cease. In *Minnick* the Court added the requirement that officials may not re-initiate questioning of a suspect in his attorney's absence, even after he has been allowed to speak with an attorney.[113]

The Mississippi Supreme Court interpreted *Edwards* as permitting further police-initiated questioning once the suspect has met with and received advice from his attorney. This interpretation allowed the police to re-initiate interrogation of the suspect after he had consulted with a lawyer, without the continued presence of the lawyer.[114] The United States Supreme Court rejected this, stating that the requirement that counsel be made available to the accused refers to the right of the suspect to have counsel present during further contact with the police.[115] Under *Minnick*, once the suspect requests an attorney, no further interrogation from the police is permissible without the presence of counsel.

110. Holloway v. State, 780 S.W.2d at 795-97.
111. 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).
112. 451 U.S. 477 (1981).
113. Minnick v. Mississippi, 111 S. Ct. at 491.
114. 551 So.2d 77 (Miss. 1988).
115. Minnick v. Mississippi, 111 S. Ct. at 490.