SMU | Dedman School of Law

SMU Law Review

Volume 39
Issue 1 *Annual Survey of Texas Law*

Article 19

January 1985

Criminal Procedure: Arrest, Search, and Confessions

Mike McColloch

CRIMINAL PROCEDURE: ARREST, SEARCH, AND CONFESSIONS

by

*Mike McColloch**

THIS Article details the most significant developments in the law of arrest, search, and confessions during the survey period. It reviews federal and state cases implicating the critical procedural applications of the fourth and fifth amendments of the United States Constitution and the corresponding provisions of Texas constitutional and statutory law. Because of their direct and pervasive impact on the Texas criminal justice system, several crucial opinions of the United States Supreme Court are discussed at length. The survey period was indeed a dramatic one in this area, characterized by the continued dilution of judicially created limitations on police power that previous courts had seen fit to impose for the enforcement of the constitutional protections of the individual accused at the earliest stages of the prosecution. This trend was primarily manifested in the fashioning of several substantial exceptions to established procedural mechanisms that were designed to further those ends, most notably to the now controversial exclusionary rule.

I. THE GOOD FAITH EXCEPTION

The most significant procedural change effected on the law of search and seizure in decades was wrought by the United States Supreme Court last term in the companion cases of *United States v. Leon*[1] and *Massachusetts v. Sheppard*.[2] In those two cases the Court finally adopted a so-called good faith exception to the fourth amendment exclusionary rule.[3] This much-heralded exception, however, was hardly a surprise[4] and may ultimately

* B.A., Washington and Lee University; J.D., St. Mary's University School of Law. Attorney at Law, Bruner, McColl, McColloch & McCurley, Dallas, Texas.

1. 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

2. 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984).

3. The doctrine that eventually became known as the exclusionary rule had its roots in Boyd v. United States, 116 U.S. 616, 638 (1886), and was formally adopted by the unanimous Supreme Court in Weeks v. United States, 232 U.S. 383, 398 (1914). The Court extended the rule to the states in Mapp v. Ohio, 367 U.S. 643, 660 (1961), and ultimately applied it to violations of the fifth amendment. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966); Malloy v. Hogan, 378 U.S. 1, 3 (1964). The Court also applied the rule to sixth amendment rights. *See, e.g.*, Stovall v. Deno, 388 U.S. 293, 296 (1967); Gilbert v. California, 388 U.S. 263, 274 (1967); Escobedo v. Illinois, 378 U.S. 478, 490-92 (1964); Massiah v. United States, 377 U.S. 201, 201-04 (1964).

4. The Court manifested its enthusiasm for adopting a good faith exception in its opinion

have little practical effect in light of the Court's decision a year earlier in *Illinois v. Gates*.[5] The Court in *Gates* drastically amended substantive fourth amendment law by abandoning the traditional *Aguilar-Spinelli*[6] two-pronged test and replacing it with a much less strict totality of the circumstances approach to probable cause determinations.[7] The *Gates* opinion also stated clearly that a magistrate's decision to issue a warrant was to be upheld on review as long as the magistrate had a substantial basis to conclude that probable cause existed.[8] In addition, the Court arguably lowered the standard for probable cause by defining it as "fair probability."[9]

The Court in *Leon* and *Sheppard* could have easily sustained the searches at issue under the diluted standards of *Gates*, but chose not to do so.[10] Instead, the Court formulated and pronounced what might be more accurately described as an objectively reasonable reliance exception to the fourth amendment exclusionary rule. Specifically, the Court held that the rule should not be applied so as to bar the use, in the prosecution's case-in-chief, of evidence obtained by officers acting in objectively reasonable reliance on a search warrant, issued by a detached and neutral magistrate, but ultimately found to be invalid.[11] The Court ostensibly based its conclusion on the results of a cost-benefit analysis it applied to the rule, which predictably resulted in a determination that the "substantial costs"[12] clearly outweighed the "marginal or non-existent benefits."[13]

An analysis of the circumstances that will still require suppression of evidence obtained in violation of the fourth amendment aids in understanding the meaning and scope of the Court's holding. Suppression remains "an appropriate remedy if the magistrate . . . in issuing a warrant was misled by

---

the previous year in Illinois v. Gates, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), in which the Court had ordered re-argument on the proposed adoption of the exception, but eventually apologized for not addressing the issue since it had not been pressed or passed upon below. *Id.* at 2322, 76 L. Ed. 2d at 532. Previously at least five of the Justices now sitting had at some time expressed sympathy for the adoption of a good faith exception. *See* Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1363-78 (1981).

5. 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

6. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

7. 103 S. Ct. at 2332, 76 L. Ed. 2d at 548; *see* McColloch, *Annual Survey of Texas Law, Criminal Procedure*, 38 SW. L.J. 529, 530-31 (1984).

8. 103 S. Ct. at 2332, 76 L. Ed. 2d at 549.

9. *Id.* at 2332, 76 L. Ed. 2d at 548.

10. The Court could have remanded the cases for reconsideration or could have assessed the sufficiency of the probable cause under the *Gates* totality of the circumstances approach. Instead, the Court ignored its usual practice of deferring the rendering of decisions on important constitutional issues when unnecessary for resolution of the case and decided the case on its newly formulated good-faith exception. Justice White, writing for the majority, declared:

> Although it undoubtedly is within our power to consider the question whether probable cause existed under the "totality of the circumstances" test . . . it is also within our authority, which we choose to exercise, to take the case as it comes to us, accepting the [lower court's] conclusion that probable cause was lacking under the prevailing legal standards.

United States v. Leon, 104 S. Ct. at 3412, 82 L. Ed. 2d at 687.

11. *Id.* at 3419-20, 82 L. Ed. 2d at 696-97.

12. *Id.* at 3413, 82 L. Ed. 2d at 688.

13. *Id.* at 3421, 82 L. Ed. 2d at 698.

information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"[14] or where the issuing magistrate wholly abandons his judicial role such that he does not qualify as neutral and detached.[15] Objective good faith would also not be present in cases where the warrant was based on an affidavit that lacked sufficient indicia of probable cause, thereby rendering official reliance upon it entirely unreasonable.[16] Finally, the warrant itself may be so clearly deficient on its face that the executing officers could not have reasonably presumed it to be valid.[17]

Cases would be few in which a search warrant based on an affidavit so deficient as to fail even under the diluted standards set forth in *Gates* would be sufficient to permit an officer to rely objectively upon it. In this light, the benefits of this particular good faith exception are greatly diminished, if not eliminated altogether. Its eventual impact may not be felt unless and until the exception itself is strengthened or extended to the warrantless search and arrest context.[18]

II. THE INEVITABLE DISCOVERY EXCEPTION

In *Nix v. Williams*[19] the Supreme Court embraced the inevitable discovery exception to the exclusionary rule's application for violations of the individual's sixth amendment right to counsel. Following Williams's arrest and arraignment for murder of a young girl, his attorney obtained an agreement with the police that they would not question Williams while transporting him back to the city where the girl disappeared. During the trip a police detective delivered the now infamous "Christian burial speech,"[20] which resulted in William's agreement to take them to the girl's body.[21] He indeed led them to the body, and the prosecution introduced evidence of its location and condition at trial. The Supreme Court held that even though the body was found as a result of a violation of Williams's sixth amendment right to

14. *Id.*; *see* Franks v. Delaware, 438 U.S. 154 (1978).

15. 104 S. Ct. at 3422, 82 L. Ed. 2d at 699; *see* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979).

16. 104 S. Ct. at 3422, 82 L. Ed. 2d at 699; *see* Brown v. Illinois, 422 U.S. 590, 610-11 (1975).

17. 104 S. Ct. at 3422, 82 L. Ed. 2d at 699.

18. The good faith exception the Court recognized in *Leon* and *Sheppard* applies presumably only to searches conducted pursuant to warrants. *Id.*

19. 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

20. *Id.* at 2505, 81 L. Ed. 2d at 382. The detective urged Williams to reveal the body's location so that the girl could receive a Christian burial. *Id.*

21. This appeal was Williams's second before the Court. In Brewer v. Williams, 430 U.S. 387 (1977), the Court reversed his conviction for murder because of the admission of his incriminating statements made during the detective's discussion with Williams on the need for a Christian burial for the little girl. The Court concluded that the discussion constituted interrogation in violation of Williams's right to counsel. *Id.* at 400-01. The Court's opinion noted, however, that even though these incriminating statements were inadmissible at a second trial, evidence of the body's location and condition "might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." *Id.* at 407 n.12.

counsel,[22] the exclusionary rule was inapplicable because the evidence showed that searchers would have discovered the body eventually and in substantially the same condition.[23] The prosecution had presented evidence showing that authorities were conducting a systematic search of the area at the time with the aid of 200 volunteers, who were only about three to five hours away from discovery of the body. All nine Justices agreed[24] that evidence is admissible if the prosecution can show by a preponderance of the evidence that lawful means would inevitably have led to the discovery of the challenged information. Under such circumstances suppression would not deter any further violations of constitutional rights.[25] The majority further held that the prosecution need not prove the absence of bad faith in order to take advantage of the inevitable discovery exception.[26] The Court observed that the doctrine of inevitable discovery, which all eleven circuits had previously recognized,[27] had its roots in the independent source doctrine[28] and was closely related in purpose to the harmless error rule.[29]

Several months prior to *Williams* the Texas Court of Criminal Appeals in *Miller v. State*[30] explicitly adopted the inevitable discovery exception on its own. The court took the doctrine two steps further, however, by applying it to both the fourth amendment exclusionary rule and the fifth amendment exclusionary rule.[31] For the first time, the court held that when evidence is seized pursuant to an illegal search, it will nevertheless be admissible if a court can later determine that the police would have ultimately discovered the evidence.[32] In *Miller* police officers were on a routine patrol at night

22. *Id.* at 407 n.12.

23. 104 S. Ct. at 2512, 81 L. Ed. 2d at 391.

24. *Nix v. Williams* was a 7-2 decision. The dissenters, Justices Brennan and Marshall, disagreed only with the burden of proof adopted by the Court. *Id.* at 2517-18, 81 L. Ed. 2d at 397-98.

25. *Id.* at 2509, 81 L. Ed. 2d at 387.

26. *Id.* at 2510, 81 L. Ed. 2d at 388. The court of appeals had reversed Williams's conviction on the ground that the prosecution had not met the requirement of proving that the police did not act in bad faith. Nix v. Williams, 700 F.2d 1164, 1169 (8th Cir. 1983).

27. United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980); United States v. Fisher, 700 F.2d 780, 784 (2d Cir. 1983); Government of V.I. v. Gereau, 502 F.2d 914, 927-28 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); United States v. Brookins, 614 F.2d 1037, 1042-44 (5th Cir. 1980); Papp v. Jago, 656 F.2d 221, 222 (6th Cir. 1981); United States *ex rel.* Owens v. Twomey, 508 F.2d 858, 865-66 (7th Cir. 1974); United States v. Apker, 705 F.2d 293, 306-07 (8th Cir. 1983); United States v. Schmidt, 573 F.2d 1057, 1065-66 n.9 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982); United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982).

28. 104 S. Ct. at 2509, 81 L. Ed. 2d at 387.

29. *Id.* at 2509 n.4, 81 L. Ed. 2d at 387 n.4; *see* Chapman v. California, 386 U.S. 18, 22 (1967).

30. 667 S.W.2d 773, 778 (Tex. Crim. App. 1984).

31. *Id.* at 776-78.

32. *Id.* at 778. Without actually calling it such, the court of criminal appeals has used the inevitable discovery rationale in various other contexts before. *See* Vanderbilt v. State, 629 S.W.2d 709, 722-23 (Tex. Crim. App. 1981), *cert. denied*, 456 U.S. 910 (1982); McMahon v. State, 582 S.W.2d 786, 789 (Tex. Crim. App. 1978), *cert. denied*, 444 U.S. 919 (1979); Wyatt v. State, 566 S.W.2d 597, 601 (Tex. Crim. App. 1978); Johnson v. State, 496 S.W.2d 72, 74 (Tex. Crim. App. 1973); *Ex parte* Parker, 485 S.W.2d 585, 589 (Tex. Crim. App. 1972), *aff'd on other grounds sub nom.* Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974), *cert. denied*, 421 U.S.

when they happened upon the defendant who appeared intoxicated. One of the officers stopped him and observed a clear plastic baggie containing a white powdery substance sticking out of the defendant's shirt pocket. Because the officer suspected that the substance was a narcotic, he grabbed the baggie from the defendant's pocket and placed the defendant under arrest for possession of a controlled substance. The court held that, assuming the seizure was illegal under the plain view doctrine, the officer conducted a frisk in accordance with the Supreme Court's holding in *Terry v. Ohio*,[33] which presumably would have resulted in a discovery and seizure of the baggie anyway.[34] Further, because the officer testified that he already intended to arrest the defendant for public intoxication at the time he saw the baggie, the court decided that he would have had the right to conduct a search incident to that arrest.[35] The police would, therefore, have eventually found the baggie even had it not been seen in plain view.[36] Thus, the court of criminal appeals appears to encourage a reviewing court to conduct a de novo determination of a right to search under alternative justifications based on the likely scenarios presented by the facts and circumstances of the case.[37]

The Texas Court of Criminal Appeals approved the application of the inevitable discovery doctrine to the fifth amendment exclusionary rule in *Wicker v. State*.[38] The evidence showed that the defendant had abducted a

963 (1975); Santiago v. State, 444 S.W.2d 758, 761 (Tex. Crim. App. 1969); *cf.* Pitts v. State, 614 S.W.2d 142, 143-44 (Tex. Crim. App. 1981); Nicholas v. State, 502 S.W.2d 169, 172-73 (Tex. Crim. App. 1973); Noble v. State, 478 S.W.2d 83, 84-85 (Tex. Crim. App. 1972) (in all three cases, the Texas courts refused to admit evidence obtained in violation of constitutional privileges, regardless of other lawful means to the evidence).

33. 392 U.S. 1 (1968). A police officer may detain and frisk an individual, even if he does not have probable cause to arrest that person, if he has reason to believe that the person threatens the public's or the officer's own safety. *Id.* at 20-27.

34. 667 S.W.2d at 778.

35. *Id.*; *see* United States v. Robinson, 414 U.S. 218, 227 (1973).

36. 667 S.W.2d at 778.

37. The court actually held that the officer performed a valid plain view seizure on the ground that experience and common sense justified his suspicion. 667 S.W.2d at 777. This holding is inconsistent, however, with the Supreme Court's decision in Texas v. Brown, 103 S. Ct. 1535, 1543-44, 75 L. Ed. 2d 502, 514-15 (1983), and the Texas Court of Criminal Appeals' own opinion the previous year in Gonzales v. State, 648 S.W.2d 684, 687 (Tex. Crim. App. 1983). In *Miller* the officer testified as to his general law enforcement training but failed to state that he had any prior narcotics training or experience in narcotics arrests. 667 S.W.2d at 776. The officer suspected it was a narcotic, but offered no explanation as to what led him to this suspicion. 667 S.W.2d at 777. In *Brown* and *Gonzales*, however, the courts held that a *nexus* must be shown to exist between the officer's past training and experience and his assessment that he has probable cause to seize a substance pursuant to the immediately apparent requirement of the plain view doctrine. *Brown*, 103 S. Ct. at 1543, 75 L. Ed. 2d at 514; *Gonzales*, 648 S.W.2d at 687. This nexus is established by testimony demonstrating the validity of the officer's suspicion in light of his specific experience or training with regard to similar suspicious circumstances. *Brown*, 103 S. Ct. at 1543, 75 L. Ed. 2d at 514; *Gonzales*, 648 S.W.2d at 687; *see also* Sullivan v. State, 626 S.W.2d 58, 60 (Tex. Crim. App. 1982) (state can show the officer's specialized knowledge, in combination with the circumstances of the particular case, to establish the nexus); DeLao v. State, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977) (officer's suspicions can be based on well-known facts, such as the popular method of storing heroin in balloons). The court upheld the seizure in *Miller* despite the lack of any articulable facts concerning such specialized knowledge or training which would have established the nexus. 667 S.W.2d at 777.

38. 667 S.W.2d 137 (Tex. Crim. App. 1984).

young woman and taken her to a beach in Galveston, where he choked her and then buried her alive. After he was arrested, he gave two written statements and three oral statements to the police. One of the oral statements led the police to the discovery of the body. The defendant challenged the admissibility of that oral statement as well as all of the evidence that resulted from the statement and discovery of the body. The court of criminal appeals held that deciding the admissibility of the oral statement was unnecessary because the state presented evidence under the doctrine of the inevitable discovery rule.[39] The trial court had entered a conclusion of law that either law enforcement officers or private citizens inevitably would have discovered the body. With little discussion or explanation, the court of criminal appeals concluded that the record supported that finding[40] and that in any event the body could have been recovered because of a precise description of its location provided in one of the defendant's written statements that was found to be admissible.[41]

III. THE TOTALITY OF THE CIRCUMSTANCES AND WARRANTLESS SEARCHES

Because the Supreme Court's opinion in *Illinois v. Gates*[42] dealt only with a search pursuant to a warrant, the question remained whether or not *Gates*'s "totality of the circumstances" approach would apply to warrantless searches. Both the Fifth Circuit and the Texas Court of Criminal Appeals answered this question affirmatively during the survey period. In *United States v. Mendoza*[43] the court applied the *Gates* analysis to the warrantless search of an automobile made pursuant to a tip from an anonymous informant.[44] Without discussing its reasons for its application,[45] the Fifth Circuit concluded that the totality of the circumstances, which included substantial corroboration of virtually all of the details of the informant's tip, was sufficient to establish probable cause.[46]

The Texas Court of Criminal Appeals greatly expanded the *Gates* approach in *Eisenhauer v. State*,[47] by holding not only that the totality of the circumstances standard applies to warrantless arrests and searches, but also that the substantial basis standard of review permitted in deference to magistrates' decisions applies in an assessment of a police officer's actions as well.[48] A police officer in *Eisenhauer* received a tip from an unnamed informant, whose credibility was not shown, that the defendant would be de-

39. *Id.* at 141-42.
40. Presumably, beachcombers or police officers would have eventually happened upon the body after it had become exposed due to beach erosion. *Id.* at 141.
41. *Id.* at 141-42.
42. 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *see supra* notes 5-9 and accompanying text.
43. 722 F.2d 96 (5th Cir. 1983).
44. *Id.* at 100-02.
45. The Court merely cited Draper v. United States, 358 U.S. 307 (1959). 722 F.2d at 100 n.5.
46. 722 F.2d at 102.
47. 678 S.W.2d 947 (Tex. Crim. App. 1984).
48. *Id.* at 952-53.

parting from a Houston airport that day at a specified time on a flight to Miami and would return to Houston later that day with cocaine in his possession. The informant had also given the officer a detailed description of the defendant, including the clothes that he would be wearing. The officer independently confirmed that the defendant was on the flight and awaited his return that evening. He saw an individual who fitted the tipster's description leave the plane. That individual, the defendant, carried a bag and nervously scanned the gate lobby as he walked toward an exit. The officer and his partner stopped and questioned him. They were joined by four plainclothes officers who accused the defendant of transporting narcotics. The defendant appeared anxious, according to the officers, but finally handed over his coat, in which a bag of cocaine was found. The court of criminal appeals held that the police officer's corroboration of the tipster's information, along with the defendant's actions in the airport terminal and his nervous reaction when the officers accused him of possessing cocaine, established a substantial basis for the officer to decide that probable cause existed to arrest the defendant under the totality of the circumstances test.[49] Thus the court clearly used the diminished substantial basis standard of review, even though a court can justifiably use that standard only when assessing the legality of searches conducted pursuant to warrants. Courts have long held that the standards applicable in determining whether the facts of the case support an officer's probable cause assessment at the time of the challenged warrantless arrest and search are at least as stringent as the standards applied when reviewing the decisions of a magistrate.[50] The Supreme Court in *Gates* firmly established a more lenient and deferential standard for reviewing magistrates' decisions. The sole rationale for this substantial basis standard is the principle that a magistrate's "determination of probable cause should be paid great deference by reviewing courts,"[51] which "serves the purpose of encouraging recourse to the warrant procedure."[52] This standard is probably best understood in light of the court's advice that despite difficulties in determining whether a warrant shows probable cause, courts should decide marginal cases by according preference to warrants.[53] The Texas Court of Criminal Appeals, in using the substantial basis standard in its decision in *Eisenhauer v. State*,[54] has at least implicitly abrogated the Supreme Court's policy of encouragement of the warrant process and has attached the same degree of deference to the actions of the police officer as

49. *Id.* at 955.

50. *See* Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 565-67 (1971); Ochs v. State, 543 S.W.2d 355, 357 (Tex. Crim. App. 1976), *cert. denied*, 429 U.S. 1062 (1977); Truitt v. State, 505 S.W.2d 594, 596 (Tex. Crim. App. 1974); Cole v. State, 484 S.W.2d 779, 781-82 (Tex. Crim. App. 1972); Brown v. State, 481 S.W.2d 106, 109 (Tex. Crim. App. 1972).

51. Spinnelli v. United States, 393 U.S. 410, 419 (1969); *see* Illinois v. Gates, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527, 547 (1983).

52. 103 S. Ct. at 2331, 76 L. Ed. 2d at 547. The Court has observed that "a grudging or negative attitude by reviewing courts toward warrants" is inconsistent with the fourth amendment's strong preference for searches conducted pursuant to a warrant. United States v. Ventresca, 380 U.S. 102, 108 (1965).

53. United States v. Ventresca, 380 U.S. 102, 109 (1965).

54. 678 S.W.2d 947 (Tex. Crim. App. 1984); *see supra* note 48 and accompanying text.

that accorded the neutral and detached magistrate. Thus, the precedential value of this aspect of *Eisenhauer* is questionable.

IV. FACTORY SURVEYS

In *Immigration & Naturalization Service v. Delgado*[55] the Supreme Court held that INS "factory surveys" do not violate fourth amendment principles, at least during those surveys in which government agents imposed no acts of individual physical restraint.[56] The "survey" at issue in *Delgado* involved numerous agents who appeared unannounced in a workplace pursuant to an administrative warrant. Some agents stood near the exit doors while the rest roamed about the interior of the building questioning workers as to their citizenship. The agents displayed badges, carried walkie-talkies, and were armed, although their weapons were never drawn. The agents placed no one individually under actual physical restraint. The process lasted from one to two hours. The Ninth Circuit had previously held that by fourth amendment standards the entire work force was seized for the duration of the survey, on the ground that the stationing of agents at the doors to the buildings would have led a reasonable worker to believe that he could not leave.[57] The Ninth Circuit further held that the individual questioning of the workers violated the fourth amendment because the agents had no reasonable suspicion that any particular employee being questioned was an alien illegally in the country.[58] The Supreme Court, however, concluded that neither the individual workers nor the individuals questioned were seized within the meaning of the fourth amendment.[59] The mere fact that agents remained near the factory doors during the survey was insufficient to constitute the degree of intimidation necessary to create a reasonable belief in a person that he was not free to leave.[60] No individual fourth amendment seizure would have occurred unless agents had physically detained one of the workers for refusal to answer the agents' questions.[61] In so holding, the Court has revealed a strong skepticism towards arguments that an intimidating psychological environment sufficiently demonstrates that a reasonable person

55. 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

56. 104 S. Ct. at 1765, 80 L. Ed. 2d at 258. A factory survey is a sweep search through a workplace, in which agents look for illegal aliens. *Id.* at 1763.

57. International Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624, 634 (9th Cir. 1982), *rev'd sub nom.* INS v. Delgado, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

58. 681 F.2d at 639-45. *Delgado* reached the Supreme Court as an appeal from summary judgment for the INS in a suit by four of the workers for injunctive relief directed at preventing the INS from questioning them personally during any future surveys. 104 S. Ct. at 1761, 80 L. Ed. 2d at 253.

59. 104 S. Ct. at 1763, 80 L. Ed. 2d at 256.

60. *Id.* at 1764, 80 L. Ed. 2d at 256. The Court observed that the agents did not actually prevent the workers from either moving about the factories or walking outside pursuant to their employment duties. *Id.*

61. *Id.* The Court relied upon its recent opinion in Florida v. Royer, 103 S. Ct. 1319, 1326, 75 L. Ed. 2d 229, 239 (1983), wherein DEA agents approached the defendant because he matched a drug courier profile and asked him for his airplane ticket and driver's license, which the agents examined. The majority of the Court concluded that the request and examination of the documents were permissible in themselves. 103 S. Ct. at 1337-38 n.3, 75 L. Ed. 2d at 253 n.3.

would have believed he was not free to leave.[62]

V. OPEN FIELDS DOCTRINE

The open fields doctrine, which the Supreme Court first enunciated some sixty years ago in *Hester v. United States*,[63] permits police officers to enter and search a field without a warrant. Since then the Court has clearly stated that the overriding test for determining the scope of fourth amendment protection is whether a person has a constitutionally protected reasonable expectation of privacy.[64] Some courts have used this expectation of privacy approach to attach some degree of fourth amendment protection to spaces that should be considered open fields.[65] The Court last term finally dispelled the notion that a legitimate expectation of privacy could attach to open fields in some circumstances in *Oliver v. United States*,[66] in which police officers had trespassed on a farm after passing a locked gate and a no-trespassing sign. They eventually found a field of marijuana approximately a mile from the defendant's house. The marijuana patch was growing in a highly secluded field, bound on all sides by woods, fences, and embankments, and was not visible from any point of public access.[67] The Court reaffirmed *Hester*[68] and held that an individual cannot reasonably expect privacy for outside activities, except in the immediate vicinity of his home.[69] The search of an

62. 104 S. Ct. at 1763, 80 L. Ed. 2d at 256. The Court does not appear to embrace the approach discussed in United States v. Mendenhall, 446 U.S. 544 (1980), in which the Court suggested that such circumstances might include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554.

63. 265 U.S. 57 (1924). The doctrine was grounded in the precise wording of the fourth amendment, which extends its protection to the people only in their "persons, houses, papers, and effects," not open fields. *Id.* at 59.

64. Katz v. United States, 389 U.S. 347, 361 (1967); *see* Smith v. Maryland, 442 U.S. 735, 740-41 (1979).

65. Indeed, the Maine Supreme Judicial Court so held in the companion case to *Oliver*. State v. Thornton, 453 A.2d 489, 495 (Me. 1982); *cf.* State v. Brady, 406 So. 2d 1093, 1095-96 (Fla. 1981); State v. Buyers, 359 So. 2d 84, 87 (La. 1978) (in both cases courts refused to apply the open fields doctrine).

66. 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

67. The defendant was indicted for manufacturing a controlled substance under 21 U.S.C. § 841(a)(1) (1982). The trial court suppressed the evidence of the marijuana fields under *Katz*, *see supra* note 64 and accompanying text, concluding that this was not an open field that invited casual intrusion. The Sixth Circuit, sitting en banc, reversed the district court, finding no sufficient reasonable expectation of privacy. United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982).

68. *See supra* note 63.

69. 104 S. Ct. at 1741, 80 L. Ed. 2d at 224. The land juxtaposing the home is the curtilage. In common law "the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Id.* at 1742, 80 L. Ed. 2d at 225 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)). This contiguous area is, therefore, considered part of the home itself for fourth amendment purposes. Courts have defined the curtilage in regard to factors that determine whether someone may reasonably expect that an area adjacent to his home will remain private. 104 S. Ct. at 1742, 80 L. Ed. 2d at 225; *see* United States v. van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981); United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978); Care v. United States, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).

open field simply does not constitute a search within the scope of the fourth amendment because an individual cannot expect open fields to remain free of warrantless intrusion by government officials.[70] The fact that government agents' intrusion onto private property may constitute a common law or statutory trespass is insufficient to legitimize any privacy expectations.[71] Similarly situated defendants in Texas might fare better by invoking Texas law since the statutory exclusionary rule contained in article 38.23 of the Code of Criminal Procedure[72] would very likely result in suppression under facts such as those in *Oliver*.[73]

VI. COLLECTIVE KNOWLEDGE AND PROBABLE CAUSE

A sharply divided court of criminal appeals held in *Woodward v. State*[74] that the collective knowledge of all law enforcement personnel connected with a case may be used on review to support a finding of probable cause.[75] This doctrine is applicable even if the arresting officer or agency has no probable cause at the time of an arrest or search, and even when the officers or agencies involved have had no substantial degree of communication.[76] In *Woodward* the Austin police transmitted statewide a "BOLO" message[77] for the defendant, who was a suspect in a murder that had occurred several hours earlier. The Austin police did not have probable cause to arrest the defendant at the time they issued the bulletin.[78] A deputy sheriff in another county stopped and arrested the defendant, who was found on a road leading away from Austin some two hours after the killing. A subsequent search of his automobile revealed the murder weapon, which the state introduced at trial. On original submission, the court of criminal appeals unanimously reversed the conviction on the grounds that the police did not have probable

70. 104 S. Ct. at 1742, 80 L. Ed. 2d at 225-26.

71. *Id.* at 1743-44, 80 L. Ed. 2d at 227. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. *Id.*; *see* Rakas v. Illinois, 439 U.S. 128, 144-45 n.12 (1978). The dissent in *Oliver* emphasized the fact that the officers' actions in that case appeared to have constituted a violation of the state's criminal trespass statute, KY. REV. STAT. §§ 511.070(1), .080, .909(4) (1975 & Supp. 1982). 104 S. Ct. at 1747-48, 80 L. Ed. 2d at 231-32 (Marshall, J., dissenting).

72. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1979) provides:

> 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.

73. Criminal trespass is proscribed by § 30.05 of the Texas Penal Code, which provides that "[a] person commits an offense if he enters or remains on property or in a building of another without effective consent and he had notice that the entry was forbidden." TEX. PENAL CODE ANN. § 30.05(a)(1) (Vernon Supp. 1984). The code defines the notice element as including "fencing or other enclosure obviously designed to exclude intruders" or "a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden." *Id.* § 30.05(b)(2)(B), (C).

74. 668 S.W.2d 337 (Tex. Crim. App. 1984) (opinion on rehearing en banc).

75. *Id.* at 344.

76. *Id.* at 346.

77. A "BOLO" is a "be on the look-out" bulletin.

78. The message contained the name of the defendant and a description of his automobile, along with a request that he be held for questioning if located.

cause when they issued the "BOLO."[79] This decision was consistent with a prior holding in which the court had stated that "[t]he test as to probable cause in such cases where the officers act solely upon a request for arrest is the information known to the officer who requests another officer to effect the arrest."[80] On the state's motion for rehearing, however, a bare majority upheld the validity of the defendant's arrest by concluding that the facts known to the arresting agency, when added to the suspicious facts known to the requesting agency, were sufficient to constitute probable cause.[81]

The Fifth Circuit has previously recognized a more limited version of the collective knowledge doctrine, emphasizing that cooperative efforts among police produce more effective police work, given the mobile nature of society today.[82] The Fifth Circuit, however, has generally required a showing of substantial communication among the various officers and agencies before invoking the doctrine.[83] The court of criminal appeals, however, held that the doctrine applied to cases in which law enforcement agencies or personnel cooperated in some way,[84] which will always be the case when one officer or agency is conducting an arrest or resultant search at the request of another. Thus, Texas courts can now conduct a de novo review of the total information known to all the police or government agents working on the case in determining whether probable cause was sufficient for an arrest or search.[85]

Several months later the court of criminal appeals clarified the *Woodward* principle by ruling that it could validate any aspect of an arrest or search, not just the probable cause determination. In *Bain v. State*[86] officers in Dalhart issued a bulletin for the apprehension of the defendant who was suspected of a murder, but did not obtain an arrest warrant before sending out the bulletin. Another law enforcement agency arrested the defendant in another town the next day and transported him back to Dalhart where he signed a confession while in custody. The court of criminal appeals, relying on *Woodward*, held that the escape exception to the warrant requirement was applicable in light of the collective knowledge of all of the law enforcement personnel working on the case,[87] regardless of whether the arresting officer knew or thought the defendant was in the process of escaping.[88]

---

79. 668 S.W.2d at 341.

80. Colston v. State, 511 S.W.2d 10, 12 (Tex. Crim. App. 1974).

81. 668 S.W.2d at 346.

82. Moreno-Vallejo v. United States, 414 F.2d 901, 904 (5th Cir. 1969).

83. *See* United States v. Sanchez, 689 F.2d 508, 512 (5th Cir. 1982); United States v. Clark, 559 F.2d 420, 424 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977); Moreno-Vallejo v. United States, 414 F.2d 901, 904 (5th Cir. 1969).

84. 668 S.W.2d at 344.

85. *Id.* Indeed, the court in *Woodward* went so far as to base probable cause in part upon a fact of which the court took judicial notice. The state produced no evidence, however, that any of the law enforcement officers were aware of the fact. *Id.* at 343 n.6.

86. 677 S.W.2d 51 (Tex. Crim. App. 1984).

87. 677 S.W.2d at 55-56.

88. *Id.* at 56 n.5.

VII. ADMINISTRATIVE SEARCHES

Even though a legitimate expectation of privacy may no longer attach to open fields,[89] a plurality of the Supreme Court reaffirmed the salience of this test for defining fourth amendment protection in other contexts. Specifically, the Court held in *Michigan v. Clifford*[90] that the test applies to administrative searches.[91] The Court also demonstrated that authorities cannot use the administrative search as a guise to evade the warrant requirement if the true purpose of the search is to gather evidence of criminal activity.[92] Arson investigators in *Clifford* entered a fire-damaged house without a warrant hours after the fire had been extinguished. Authorities showed no exigent circumstances and did not obtain the homeowner's consent to enter the house. Through Justice Powell, the Court held that because the home had not been totally destroyed, a reasonable expectation of privacy remained.[93] This expectation, coupled with the fact that the primary objective of the search was to find criminal evidence, rendered the warrantless search unconstitutional.[94]

The Court has long held that even administrative searches generally require warrants.[95] Except in certain carefully defined classes of cases that mostly involve heavily regulated businesses or industries,[96] the warrant requirement of the fourth and fourteenth amendments governs the nonconsensual entry and search of property. The Court held several years ago in *Michigan v. Tyler*[97] that, once having entered a fire-damaged building, officials need no warrant to remain for a reasonable period while investigating the fire's cause.[98] But the Court pointed out in *Clifford* that if reasonable expectations of privacy remain after the fire has been extinguished and officials have left the scene, further investigations generally require a warrant or the existence of some new exigency.[99] If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice.[100] Of course, if officials discover evidence of criminal activity during the course of a valid administrative search, they may seize such evi-

89. *See supra* notes 63-73 and accompanying text.
90. 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984).
91. *Id.* at 647, 78 L. Ed. 2d at 485.
92. *Id.*, 78 L. Ed. 2d at 484.
93. *Id.* at 648-49, 78 L. Ed. 2d at 486.
94. *Id.*, 78 L. Ed. 2d at 487.
95. *See* Michigan v. Tyler, 436 U.S. 499, 511 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978); Camara v. Municipal Court, 387 U.S. 523, 531-33 (1967); See v. City of Seattle, 387 U.S. 541, 545-46 (1967).
96. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981) (mining); United States v. Biswell, 406 U.S. 311 (1972) (sale of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry).
97. 436 U.S. 499 (1978).
98. *Id.* at 510.
99. 104 S. Ct. at 647, 78 L. Ed. 2d at 484.
100. Probable cause for the issuance of an administrative warrant exists if the circumstances of the particular case meet reasonable legislative, administrative, or judicially prescribed standards for conducting an inspection of the particular dwelling. *See* Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

dence under the plain view doctrine.[101] If the primary object of the search, however, is to gather evidence of criminal activity, officials must obtain a criminal search warrant, which requires a showing of probable cause to believe that they will find such evidence in the place to be searched.[102] Thus, administrative investigations into the causes and origins of fires are not exempt from the warrant requirement unless officials can show certain exigent circumstances to justify a post-fire search.[103] Because the fire in *Clifford* had long been extinguished and part of the house remained intact, the arson investigators' warrantless search for criminal evidence was not justified.[104]

VIII. THE PUBLIC SAFETY EXCEPTION TO *MIRANDA*

For the first time, the Supreme Court has carved out an exception to the clear rule it set out eighteen years ago in *Miranda v. Arizona*.[105] In *Miranda* the Court extended the fifth amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police.[106] Hence, statements made under those circumstances are inadmissible unless the police specifically informed the suspect of his *Miranda* rights, and the defendant then freely decided to waive them.[107] In *New York v. Quarles*[108] the Court created a public safety exception to the requirement that police must give a suspect the warnings outlined in *Miranda* before a court will admit a suspect's answers into evidence.[109] In *Quarles* several policemen with drawn pistols confronted and surrounded the suspect in a supermarket, into which the police had chased him after receiving information that he had just committed a rape and was armed with a gun. The

101. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971). Law enforcement agencies may then use evidence so obtained for the purpose of establishing probable cause to obtain a criminal search warrant to discover additional evidence. *Clifford*, 104 S. Ct. at 647, 78 L. Ed. 2d at 484.

102. 104 S. Ct. at 647, 78 L. Ed. 2d at 484.

103. *Id.* at 646, 78 L. Ed. 2d at 484. As the Court in *Clifford* pointed out, an imminent threat that the fire might start again would present an exigency justifying a warrantless and nonconsensual post-fire investigation. *Id.* at 647 n.4, 78 L. Ed. 2d at 484 n.4. As the Court had previously observed in *Tyler*, a need could exist for immediate investigation in order to preserve evidence from intentional or accidental destruction. 436 U.S. at 510.

104. Although the search at issue in *Tyler* also involved a re-entry several hours after the fire had been extinguished, the Court upheld the warrantless search because it was considered a mere continuation of the initial investigation begun while firemen were still extinguishing the flames. Officials could not complete the original investigative search into the origin of the fire because of smoke and darkness, and resumed their investigation promptly the next morning. 436 U.S. at 511. The four-Justice dissent in *Clifford* relied upon *Tyler* in claiming that the subsequent warrantless search of the fire-damaged portion of the home was authorized. *Clifford*, 104 S. Ct. at 653, 78 L. Ed. 2d at 492 (Rehnquist, J., dissenting). Even the dissent, however, agreed that officials could not have searched the remaining parts of the house without a warrant issued upon probable cause. *Id.*

105. 384 U.S. 436 (1966).

106. *Id.* at 460-61.

107. The warnings required by *Miranda* involved the right to remain to silent, the right not to answer questions or give a statement, and the right to advice of counsel. *Id.* at 468. Suspects are also informed that they have the right to appointed counsel in the event that they cannot afford to retain a lawyer. *Id.*

108. 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

109. *Id.* at 2632, 81 L. Ed. 2d at 557.

policemen frisked the suspect and discovered that he was wearing an empty shoulder holster. After handcuffing him, one of the officers asked him where the gun was. The suspect nodded in the direction of some empty cartons and responded that the gun was there. The officer then retrieved a loaded, .38 caliber revolver from one of the cartons and formally placed the suspect under arrest and read him his *Miranda* rights from a printed card. The New York courts held that the gun and the suspect's statement were inadmissable as a result of the *Miranda* violation.[110] The Supreme Court, though, held that statements and evidence derived therefrom are now admissible despite the failure to administer the *Miranda* warnings if police officers obtain statements in response to questions "reasonably prompted by a concern for the public safety."[111] The Court noted that the police in *Quarles* faced the urgent need to discover the location of a gun that they could reasonably believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun remained in the supermarket, it threatened the police and the public in that an accomplice might make use of it or a customer or employee might later come upon it.[112] The Court concluded that the need for answers to questions in a situation posing a threat to the public safety outweighed the benefits from a rigid application of the holding in *Miranda*.[113]

Although the Court did not explicitly so state, the test for determining whether the public safety exception applies is an objective one, once again necessitating de novo judicial review. Indeed, the Court conceded that no evidence was found in the record that concern for the public safety in fact motivated the officer in *Quarles* to ask his question about the gun.[114] The Court specifically held that the decision to apply the exception in a particular case does not turn on the officers' motivation.[115] The Court also acknowledged that to some degree it had lessened the desirable clarity of the *Miranda* rule.[116] But the Court believed that, despite the lack of clarity,[117] police officers can apply the exception with little difficulty because they can

110. People v. Quarles, 85 A.D.2d 936, 447 N.Y.S.2d 84 (1981), *aff'd*, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982).

111. 104 S. Ct. at 2632, 81 L. Ed. 2d at 557.

112. *Id.*

113. *Id.* at 2633, 81 L. Ed. 2d at 558.

114. *Id.* at 2630-32, 81 L. Ed. 2d at 555. The New York Court of Appeals found no evidence suggesting that any of the officers feared for his own physical or the public's safety. 444 N.E.2d at 985, 458 N.Y.S.2d at 521.

115. 104 S. Ct. at 2632, 81 L. Ed. 2d at 557.

116. *Id.* at 2633, 81 L. Ed. 2d at 558. The Court has often recognized the importance of a clear and workable rule especially for police officers who must make frequent and quick choices with only limited legal expertise. *Id.*; *see* Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (Court noting need for a single, understandable standard for police to follow).

117. Justice O'Connor based her dissent in part on her view that the exception complicates the requirements of *Miranda*. She opined that "[t]he end result will be a fine-spun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our fourth amendment jurisprudence." 104 S. Ct. at 2636, 81 L. Ed. 2d at 562. (O'Connor, J., concurring in part and dissenting in part). Three other Justices joined in dissent, and Justice Marshall observed that law enforcement agencies will have to suffer the frustration of uncertainty while the courts decide what this new doctrine means. *Id.* at 2634, 81 L. Ed. 2d at 573 (Marshall, J., dissenting).

know "almost instinctively" the difference between questions asked in regard to their own or the public's safety and questions asked to produce testimonial evidence.[118]

IX. SELF-INCRIMINATION: THE FIFTH AMENDMENT AND PROBATION OFFICERS

In *Minnesota v. Murphy*[119] the Supreme Court confronted the question of whether the requirements placed on federal or state probationers to meet regularly with probation officers and truthfully answer their questions, as a condition of remaining on their conditional release, implicates the fifth amendment privilege against self-incrimination. The Court has previously recognized that, if an officer of a state asks a person a question under circumstances that deprive him of a free choice to affirm or deny or to remain silent and he answers the question without attempting to assert his privilege against self-incrimination, the law will label his response "compelled" and courts will not admit the response as evidence against him.[120] The state will have deprived the person of the choice to answer if the defendant is threatened after he chooses not to answer.[121] The defendant in *Murphy* met with his probation officer pursuant to a requirement of his probation that he attend such meetings periodically and be truthful with the officer. His probation officer had previously received information from a treatment counselor that the defendant had admitted to a 1974 rape and murder. The officer questioned him on the subject and Murphy confessed. The probation officer did not advise Murphy of his rights with any *Miranda* warnings and Murphy did not attempt to invoke his fifth amendment privilege against self-incrimination when he was questioned. The Minnesota Supreme Court held that because the probationer was under court order to respond truthfully and the probation officer had substantial reason to believe that Murphy's answers were likely to be incriminating, the confession was inadmissible.[122] The Supreme Court reversed, holding that a probationer in this situation must assert the privilege against self-incrimination or the court will consider it waived.[123] The Court observed that the legal compulsion to attend a meeting with a probation officer and to answer his questions truthfully is indistinguishable from the compulsion felt by any witness who must appear and give testimony.[124] Furthermore, the probationer was not in custody for

118. *Id.* at 2633, 81 L. Ed. 2d at 559. The gun may very well have been admissible under these facts pursuant to the inevitable discovery exception announced earlier in *Nix v. Williams*, 104 S. Ct. at 2508, 81 L. Ed. 2d at 386; *see supra* notes 19-29 and accompanying text. The dissent would have remanded the case to the New York courts for further consideration in light of *Williams*, 104 S. Ct. at 2650, 81 L. Ed. 2d at 579 (Marshall, J., dissenting), but the majority saw no need to discuss that doctrine in light of its holding that no constitutional need existed for suppression in the first place. 104 S. Ct. at 2634 n.9, 81 L. Ed. 2d at 559 n.9.

119. 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

120. *See* Garner v. United States, 424 U.S. 648, 656-57 (1976); Lisenba v. California, 314 U.S. 219, 241 (1941).

121. Lefkowitz v. Turley, 414 U.S. 70, 82-83 (1973).

122. Murphy v. State, 324 N.W.2d 340, 344 (Minn. 1982).

123. 104 S. Ct. at 1149, 79 L. Ed. 2d at 428.

124. *Id.* at 1147, 79 L. Ed. 2d at 426.

purposes of receiving the protection dictated by *Miranda*, because no formal arrest or restraint on freedom of movement of the degree associated with a formal arrest was present.[125] Generally, if the state presents a person with the choice of incriminating himself or suffering a penalty and he nevertheless refuses to respond, the state cannot constitutionally make good on its threat to penalize him.[126] Conversely, if the threatened person decides to talk instead of asserting his privilege, the state can use the admissions against him in a subsequent criminal prosecution.[127] In the probation context, the *Murphy* court concluded that the probation officer did not compel the probationer to answer because revocation of probation for refusing to answer questions under an assertion of a fifth amendment privilege would be unconstitutional, and the state could not effect its threat.[128] Probationers therefore have the right to invoke the fifth amendment privilege when answering a probation officer's questions, regardless of any court-imposed requirement that the probationer answer all of the officer's questions truthfully. Any admissions he does make to the officer, however, will be admissible in a subsequent prosecution.[129]

X. THE EXCLUSIONARY RULE AND VIOLATIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY

The Texas Court of Criminal Appeals in *Pannell v. State*[130] confronted a question of first impression involving the applicability of Texas's statutory exclusionary rule[131] to evidence obtained in violation of the Code of Professional Responsibility. In *Pannell* the defendant, charged with murder, was represented by two court-appointed attorneys. The district attorney subsequently interviewed the defendant prior to trial without attempting to obtain the consent of the attorneys, action which violated DR 7-104(A)(1).[132]

125. *Id.* at 1144-45, 79 L. Ed. 2d at 425. The Court noted that the probationer's situation is essentially indistinguishable from that facing suspects who are questioned in noncustodial settings and grand jury witnesses who are unaware of the scope of an investigation or that they are considered potential defendants. *Id.* at 1145, 79 L. Ed. 2d at 425; *see* United States v. Washington, 431 U.S. 181, 188-89 (1977); Beckwith v. United States, 425 U.S. 341, 346-48 (1976). Thus, the probationer cannot claim the benefit of the custodial interrogation exception to the general rule that the fifth amendment right is not self-executing. 104 S. Ct. at 1146, 79 L. Ed. 2d at 424.

126. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation, 392 U.S. 280, 284 (1968); Gardner v. Broderick, 392 U.S. 273, 277-78 (1968).

127. Garrety v. New Jersey, 385 U.S. 493, 500 (1967).

128. 104 S. Ct. at 1148, 79 L. Ed. 2d at 427.

129. *See supra* note 127 and accompanying text. One previous Texas court confronted this same question and reached the same result. In Trimmer v. State, 651 S.W.2d 904, 906 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd), the court held that the court could use statements made to a probation officer in preparation of a court-ordered pre-sentence report in assessing punishment, despite the lack of any *Miranda* warnings. *See also* Baumann v. United States, 692 F.2d 565, 575-78 (9th Cir. 1981) (not necessary to warn a convicted defendant of his rights during a pre-sentencing interview).

130. 666 S.W.2d 96 (Tex. Crim. App. 1984).

131. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1979); *see supra* note 72.

132. Disciplinary Rule 7-104(A)(1) provides:

(A) During the course of his representation of a client a lawyer shall not:

Thus, the question presented was whether a violation of a disciplinary rule constitutes a violation of state law. The court of criminal appeals decided it does not.[133] The court considered the term "laws" in article 38.23 to be tantamount to "statutes."[134] The judicial branch prepared the disciplinary rules for an administrative agency, the State Bar of Texas, and courts have described them as "quasi-statutory."[135] Since the rules were not statutory enactments of the legislature,[136] their violation does not constitute a violation of the laws of the State of Texas.[137] Thus, such violations committed by a prosecutor will not bar the introduction of evidence resulting therefrom at trial under the Texas statutory exclusionary rule.[138]

XI. FIFTH AMENDMENT RIGHT TO COUNSEL: *EDWARDS* REVISITED

The issue of whether and when an accused waives his right to counsel under the fifth amendment after the accused has invoked that right continues as a fertile source of litigation in state and federal courts. The Supreme Court held in *Edwards v. Arizona*[139] in 1981 that once an accused has invoked his right to have counsel present during custodial interrogation, the accused does not waive that right by responding to custodial interrogation,

---

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) DR 7-104(A)(1) (1973); *see* State Bar of Texas, Comm. on Interpretation of the Canons of Ethics, Op. 137 (1956).

133. 666 S.W.2d at 98.

134. *Id.*

135. *See* State *ex rel.* Chandler v. Dancer, 391 S.W.2d 504, 506 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); Cochran v. Cochran, 333 S.W.2d 635, 640 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.); Rattikin Title Co. v. Grievance Comm. of the State Bar of Texas, 272 S.W.2d 948, 951 (Tex. Civ. App.—Fort Worth 1954, no writ).

136. The Texas Supreme Court promulgated the current Code of Professional Responsibility in 1971 pursuant to the enabling provisions of TEX. REV. CIV. STAT. ANN. art. 320a-1, § 4 (Vernon 1973).

137. 666 S.W.2d at 98.

138. *Id.* The court relied heavily upon opinions from various federal circuits holding that similar disciplinary rule violations by prosecutors do not violate the constitution and thus do not necessitate suppression under federal law. *See* United States v. Thomas, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); United States v. Four Star, 428 F.2d 1406, 1407 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970); Wilson v. United States, 398 F.2d 331, 333 (5th Cir. 1968), *cert. denied*, 393 U.S. 1069 (1969). The court in *Pannell* made no mention of Henrich v. State, 666 S.W.2d 185 (Tex. App.—Dallas 1983, pet. granted), which held precisely the opposite in a very similar fact situation. The prosecutor in *Henrich* had secretly recorded conversations between the defendant and co-defendant, without the knowledge of the defendant's attorney. The Dallas court of appeals held that this clear violation of DR 7-104 required suppression, in that the disciplinary rules have the same force and effect of the Texas Rules of Civil Procedure, which courts have held to have the same force and effect as statutes. *See* Missouri Pac. R.R. v. Cross, 501 S.W.2d 868 (Tex. 1973); Freeman v. Freeman, 160 Tex. 148, 327 S.W.2d 428 (1959). The court concluded that the district attorney's violation of the disciplinary rule was the same as violating a statute, and required suppression under article 38.23 of the Texas Code of Criminal Procedure. *Henrich*, 666 S.W.2d at 186. Obviously, *Pannel* subsilentio overruled *Henrich*.

139. 451 U.S. 477 (1981).

even if the police have already advised him of his rights.[140] After an accused has expressed his desire to communicate with the police only through counsel, he cannot be subject to further interrogation until counsel is available to him, unless he himself initiates further communication with the police.[141] The question of waiver thus turns on whether the state has met its heavy burden of establishing a conscious waiver of a known right or privilege, a matter that a court must decide upon the particular facts and circumstances of each case.[142] Since *Edwards*, the Texas Court of Criminal Appeals has consistently held that the state has not met this burden unless the evidence clearly shows that the accused himself initiated the conversation or exchange that resulted in the incriminating statement at issue. When the record is silent or unclear as to which party initiated the exchange, the court will find no waiver.[143] The Supreme Court held last term in *Solem v. Stumes*,[144] however, that courts should not apply *Edwards* retroactively, at least on collateral attack.[145] The Court observed that complete retroactive effect is most appropriate only in cases wherein the purpose of a new constitutional principle is to enhance the accuracy of criminal trials,[146] and noted that the *Edwards* rule has only a tangential relation to truth-finding at trial.[147] The Court further opined that expecting law enforcement authorities to have conducted themselves in accordance with the *Edwards* rule prior to its announcement would be unreasonable, and that retroactive application would disrupt the administration of justice.[148]

The Texas Court of Criminal Appeals nevertheless demonstrated in two cases during the survey period that the *Edwards* test will be applied retroactively on direct appeal. In *Wilkerson v. State*[149] the accused's attorney told the police that the accused did not wish to speak with them further without the attorney's presence. A police detective subsequently told the accused

---

140. *Id.* at 484.

141. *Id.* at 484-85.

142. *Id.* at 482 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Some of the relevant circumstances include the background, experience, and conduct of the accused. 451 U.S. at 482.

143. *See* Phifer v. State, 651 S.W.2d 774, 780-81 (Tex. Crim. App. 1983); Coleman v. State, 646 S.W.2d 937, 940-41 (Tex. Crim. App. 1983).

144. 104 S. Ct. 1338, 79 L. Ed. 2d 579 (1984).

145. *Id.* at 1345, 79 L. Ed. 2d at 592. The Court established the general principles of retroactivity in criminal cases in Tehan v. Shott, 382 U.S. 406, 419 (1966), Johnson v. New Jersey, 384 U.S. 719, 726-29 (1966), and Linkletter v. Walker, 381 U.S. 618, 629-39 (1965). Under these cases, as the Court in *Stumes* noted, 104 S. Ct. at 1341, 79 L. Ed. 2d at 586-87, the criteria for determining whether new judicially imposed standards apply retroactively are (a) the purpose served by the new standards, (b) the extent to which law enforcement authorities rely on the old standards, and (c) the effect of a retroactive application on judicial administration. Stovall v. Denno, 388 U.S. 293, 297 (1967). A majority of the Court in United States v. Johnson, 457 U.S. 537 (1982), endorsed a slightly different approach regarding retroactivity of new fourth amendment standards. In *Johnson* the Court held that a decision construing the fourth amendment that was not clearly different from prior decisions is applicable to all convictions not yet final when the Court issued the decision, at least on direct review. *Id.* at 562.

146. *See* Williams v. United States, 401 U.S. 646, 653 n.6 (1971).

147. 104 S. Ct. at 1342, 79 L. Ed. 2d at 587-88.

148. *Id.* at 1345, 79 L. Ed. 2d at 592.

149. 657 S.W.2d 784 (Tex. Crim. App. 1983).

that the decision as to whether to talk was his alone and that he was free to change his mind. Several hours later, the accused met with police officers and expressed his desire to talk about the offense. After the officers read him his rights, he gave a full confession to his involvement in a murder coupled with robbery and kidnapping, which formed the basis of his conviction for capital murder. Soon after, the accused fortuitously came into contact with his attorney. His attorney asked him whether he really knew what he was doing, to which the accused replied, "I had to do it." He then signed the confession, which the court admitted into evidence at his trial. The court of criminal appeals held that because the state failed to prove which party had initiated the conference at which the accused gave his statement, the fact that he appeared to understand fully his right to counsel and freely waived it could not save the confession from suppression.[150] The accused's failure to request an attorney at the conference and his chance encounter with his attorney in the hallway were insufficient to satisfy the government's heavy burden of proving a knowing and intelligent waiver of right to counsel under the *Edwards* standard.[151] Thus, a silent record on the question of who initiated the further exchange with the police that results in a confession clearly requires a finding that the accused did not knowingly and intelligently waive the fifth amendment right to counsel.[152]

In *Green v. State*[153] the accused repeatedly refused to respond to interrogation and requested an attorney subsequent to his arrest for murder. Over a period of several days, he contacted three different attorneys, but he did not retain any of them because he could not afford their respective attorneys' fees. Each of these attorneys, however, gratuitously advised the accused not to give a statement. In the meantime, a police detective summoned the accused to his office each day "to talk." The accused never gave any incriminating information at these meetings and continued his requests for the assistance of counsel. The accused requested that an attorney be appointed to represent him on grounds of indigency, but the police did not comply. He then met with another attorney whose fee he was also unable to afford. He finally relented and signed a confession because he was worried about the charges and was feeling pressure from the detectives. The El Paso court of appeals held that he knowingly and intelligently relinquished his right to counsel because he had voluntarily given his confession after fee consultations with several attorneys who had told him not to give any statements to

150. *Id.* at 791-93.

151. *Id.* at 792; *see supra* notes 139-47 and accompanying text. The court conceded that the confession was given voluntarily, but emphasized that such analysis was separate and different from the question of waiver. However voluntary such incriminating statements may be, the *Edwards* approach must resolve the issue of waiver. 657 S.W.2d at 792.

152. The *Wilkerson* court observed that the appellant therein could more simply have sought suppression on fourth amendment grounds, since his detainment was illegal for lack of probable cause. *Id.* at 791 n.18; *see* Green v. State, 615 S.W.2d 700, 706 (Tex. Crim. App. 1981). The court in *Wilkerson* neglected to discuss whether TEX. CONST. art. I, §§ 10 & 19 required its holding as well, although the appellant had invoked these provisions on appeal. 657 S.W.2d at 791.

153. 667 S.W.2d 528 (Tex. Crim. App. 1984).

the police.[154] The Texas Court of Criminal Appeals unanimously reversed, holding that the state had not met its heavy burden under *Edwards*[155] and that the accused had never received effective assistance of counsel in the first place.[156] The court found that a brief conversation with an attorney regarding fees for future services, even including free advice, is not sufficient consultation so as to render the accused's decision as a knowing and intelligent waiver.[157] Significantly, the court held that the prosecution's failure to meet its heavy burden under *Edwards* established a violation of the accused's right to counsel under both the federal and state constitutions.[158]

154. Green v. State, 641 S.W.2d 272, 274 (Tex. App.—El Paso 1982, no pet.).
155. *See supra* notes 139-47 and accompanying text.
156. 667 S.W.2d at 533-34.
157. *Id.*
158. The pertinent state constitutional provisions are contained in TEX. CONST. art. I, §§ 10 & 19. The court thus appears to have adopted the *Edwards* rationale as a matter of state constitutional law. In light of the current trend in the Supreme Court toward easing the prophylactic rules it has imposed upon the government in other exclusionary rule contexts (*see supra* notes 105-18 and accompanying text), defendants should always invoke these independent state constitutional provisions, both at the trial court level and on appeal.