

**FOURTH AMENDMENT ISSUES: ARREST, SEARCH & SEIZURE  
STATE AND FEDERAL LAW UPDATE**

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**CHAPTER 41**



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"Privileges," Tex. Cen. for the Judiciary, Annual Conference, 1991.

"Lesser Included Offenses," Tex. Crim. Def. Lawyers Assn.. D.W.I. Seminar, 1988

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"Search and Seizure under State and Federal Law," Advanced Criminal Law Courses, State Bar of Texas, 1991-1995.

"Privileges," 15th and 16th Advanced Criminal Law Courses, State Bar, 1989-1990.

"Identification and Pretrial Lineups," Matthew Bender, Jan. 1993.

"Defenses," Matthew Bender, publication date Jan. 1993

"Justifications," Matthew Bender, publication date July 1993.

"Evidence," Texas Municipal Courts Training Center, 1992-3.

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"The New State's Right to Appeal: A Tempered Review," Voice For the Defense, Texas Criminal Defense Lawyers Association, Feb. 1988.

"Capital Murder: Punishment Evidence," Texas Prosecutors' Trial Manual, Nov. 1987.



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## FOURTH AMENDMENT ISSUES: ARREST, SEARCH & SEIZURE STATE AND FEDERAL LAW UPDATE

This update includes significant cases through June 20, 2004. Opinions from the United States Supreme Court, Fifth Circuit Court of Appeals, Texas Court of Criminal Appeals, and Texas appeals courts are covered. When reference is made to court of appeals opinions, the reader is cautioned to check petition histories before considering such cases final.

### I. DEFINITION OF “SEARCH” AND PRIVACY INTERESTS.

#### A. Subjective expectation of privacy society considers objectively reasonable.

1. D.N.A. prisoner collection programs constitutional.

In Groceman v. United States Department of Justice, et al, 354 F.3d 411 (5<sup>th</sup> Cir. 2004), the court held that extraction of blood from prisoners to collect DNA samples is reasonable under the Fourth Amendment in light of an inmate’s diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime. See also Velasquez v. Woods, 329 F.3d 420 (5<sup>th</sup> Cir. 2000)(per curiam)(Texas DNA collection program constitutional).

2. Search occurs if subjective expectation of privacy violated.

The United States Supreme Court reaffirmed the rule that a search occurs under the Fourth Amendment when the government violates a subjective expectation of privacy that society considers objectively reasonable in Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038 (2001). In this case, the Court prohibited use of a thermal imaging device without a warrant and extended the definition of “search” to include obtaining information by sense-enhancing technology regarding the interior of a home that could not otherwise have been obtained without a physical intrusion into the home. In so holding, the Court rejected the dissent’s view that any definition of “search” should include the type of information obtained. The majority concluded with a strong statement of how technology and the Fourth Amendment should be viewed:

We have said that the Fourth Amendment draws a firm line at the entrance to the house, Payton, 445 U.S., at 590. That line, we think, must be not only firm but also bright, which requires clear specification of those methods of surveillance that require a

warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no significant compromise of the homeowner’s privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

Kyllo, 121 S.Ct. at 2043.

This 5 to 4 decision by the Supreme Court represents an important shift back to the focus of the Fourth Amendment: protection of areas covered by reasonable privacy expectations. The Court considered the area invaded, rather than the technology used by officers to gain the information acquired. If the police acquire information from an area in which a person has an objectively reasonable expectation of privacy, then they must have a warrant to support their actions, or an applicable exception to the warrant requirement, in order to meet Fourth Amendment requirements.

The Fifth Circuit Court of Appeals referred to the Kyllo decision in its opinion in United States v. Runyan, 275 F.3d 449 (5<sup>th</sup> Cir. 2002), when discussing whether a search occurred. [See discussion under Federal law: private party searches.].

#### B. Texas law: secretly recorded conversation not prohibited.

In State v. Scheineman, 77 S.W.3d 810 (Tex. Crim. App. 2002), the Court of Criminal Appeals held that society does not recognize as reasonable an arrestee’s expectation of privacy in a conversation with another arrestee that took place in a county law enforcement building in. Officers took two suspects, Trevino and the defendant, into custody for questioning. Trevino asked to speak alone with the defendant before speaking with authorities. The Sheriff’s deputy brought the men to a room and left them alone to converse, but secretly recorded the conversation. The trial court granted the defendant’s motion to suppress and the State appealed.

The San Antonio Court of Appeals affirmed. State v. Scheineman, 47 S.W.3d 754 (Tex. App. – San Antonio 2001, pet. granted). The court noted that generally a suspect does not have an expectation of privacy in conversations made in police cars or interrogation rooms. In this case, however, the officer led the men to believe that they were speaking alone and “society should not sanction the use of deliberate misrepresentations to enable police to gather possible incriminating evidence.” State v. Scheineman, 47 S.W.3d at 756. The court concluded that when a law enforcement officer lulls an arrestee into believing that his conversation with another will be private, but then secretly records the conversation only to gather

criminal evidence, the arrestee's subjective expectation of privacy is objectively reasonable.

The State Prosecuting Attorney filed a petition for discretionary review, which the Court granted. In its opinion, the Court cited Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984), for the rule that society does not recognize as legitimate any subjective expectation of privacy a prisoner might have in his prison cell. The Court disagreed with the Court of Appeals that the record showed that law enforcement officers engaged in deception by placing the defendant in a room, allowing him to talk to Trevino alone, then recording their conversation. Officers did not threaten or trick the defendant into waiving his rights, nor did they subject him to custodial interrogation. The record lacked evidence that the officers gave the defendant assurances of privacy. The Court compared the facts of the case to those when one jail inmate talks to another inmate in a jail cell. Finding no objectively reasonable expectation of privacy, the Court wrote:

We do not believe that society is prepared to recognize a legitimate expectation of privacy in conversations between arrestees who are in custody in a county law enforcement building, even when only the arrestees are present and they subjectively believe that they are unobserved.

State v. Scheineman, 77 S.W.3d 810, 813 (Tex. Crim. App. 2002). The Court reversed the appellate court's judgment and remanded the case.

Judge Meyers filed a concurring opinion, joined by Judge Price, in which he generally agreed with the majority's recital of the applicable law, but did not join the majority opinion to the extent that the holding went beyond that which was necessary to decide the appeal. The language quoted above forecloses any arguments for privacy that could arise under the Texas Constitution or statutes, according to Judge Meyers. Also, Judge Meyers noted that the majority opinion seems to resolve the issue presented by Scheineman's co-defendant, Trevino, in State v. Trevino, 63 S.W.3d 512 (Tex. App. – San Antonio 2001, pet. granted), even though the facts in that case are slightly different: Trevino asked to talk alone with Scheineman. [Since Scheineman did not initiate the conversation with Trevino and since the officers made no assurances to Scheineman, the Court of Appeals' language regarding deception has less application to Scheineman than to Trevino.] Also, the broad language in Scheineman seems to foreclose application of the attorney-client privilege law. Judge Meyers concluded that in this case, no deception arose and Scheineman had no reasonable expectation of privacy; however, the majority need not have used such broad language in reaching that holding.

### C. Federal law.

#### 1. Private party searches.

Under federal law, evidence discovered by private individuals and turned over to government authorities may be admissible. In United States v. Runyan, 275 F.3d 449 (5<sup>th</sup> Cir. 2002), the defendant lived on a ranch outside Santa Anna and operated a computer repair and service company. His wife left and he filed for divorce. Shortly thereafter, she made several trips with friends to the ranch when the defendant was not present to retrieve her personal property. He had secured the gated entrance to the ranch with a chain lock, locked the house, and installed surveillance cameras on the property. In order to gain access to her property, the wife and her friends had to cut the chain on the gate and enter the house and barn through windows. They found a black duffel bag and discovered that it contained pornography, compact disks and computer disks, a Polaroid camera with film, a vibrator, and Polaroid pictures of two people, one of whom appeared to be a minor. Under the bag were two boxes containing more pornography. They took a desktop computer the wife believed belonged to her and 3.5-inch floppy disks, CDs, and Zip disks located around the computer. After reassembling the computer at her house, the wife found that approximately twenty of the CDs and floppy disks contained child pornography. She could not access the ZIP disks with her computer.

The wife contacted the sheriff's department and turned over the computer material she recovered from the ranch. Later, federal agents became involved in the investigation. Agent Nuckles examined every piece of evidence received, including the ZIP disks that the wife could not access with her computer. He filed two applications for federal search warrants to search the desktop computer and all the disks for files containing illicit images, and to search the defendant's ranch house for all computers and related devices. A magistrate issued the warrants and the trial court denied the defendant's motion to suppress.

On appeal, the defendant contended that the agent's review of the material turned over by the wife constituted an illegal search under the Fourth Amendment. The Fifth Circuit noted that the Fourth Amendment does not apply to searches conducted by private parties, but may apply if material discovered by those parties is turned over to government officials and they exceed the scope of the initial search. The court noted that the Supreme Court has not set definite limits on police use of privately-acquired evidence, citing Walter v. United States, 447 U.S. 649 (1980), and United States v. Jacobsen, 466 U.S. 109 (1984). The court agreed with the Eleventh Circuit that police do not exceed the scope of a prior private search when they examine the same materials, but do so more thoroughly, citing United States v. Simpson, 904 U.S.

607 (11<sup>th</sup> Cir. 1990). In the instant case, the Court held that the agent did not exceed the scope of the private search by looking at more files on each disk than the wife had examined. The agent had, however, opened ZIP disks that the wife could not access and reviewed disks the wife did not examine. These facts showed that the agent exceeded the scope of the initial private search. Given such error, the court remanded the cases to the trial court to determine whether the independent source doctrine applied as an exception to the exclusionary rule.

2. Reasonable expectation of privacy in office computer.

a. Federal law.

The Fifth Circuit Court of Appeals considered a case in which authorities searched a defendant's office computer in United States v. Slanina, 283 F.3d 670 (5<sup>th</sup> Cir. 2002). The defendant worked as the Fire Marshall for Webster for nine years. Fire Chief Ure and Safety Director Keller were his supervisors. One evening in 1999, an information systems employee named Smith began working to install the city network on the fire station computers. He entered the defendant's office and tried to work on the computer, but found that the defendant had installed a password on the computer, which prevented access to the computer's hard drive. Smith called Ure and informed him of the problem. The defendant had not come to work that day because he had surgery to remove his wisdom teeth. Ure called the defendant and told him that Smith needed the password. The defendant initially balked at disclosing the password, but later agreed to call Smith. On the phone to Smith, the defendant sounded nervous and wanted to know exactly what Smith was going to do to the computer. He gave Smith the password and Smith began to work on the system.

Ten minutes later, Smith was surprised to see the defendant, his jaw still swollen from the surgery, in the office. As soon as Smith walked out of the office, he saw the defendant hurry back to work on the computer. When the defendant left, Smith noticed that he had left his e-mail running, with newsgroups attached. Smith knew that employees were not allowed to have newsgroups on their computers, but the policy had not been provided to the fire station employees. When Smith looked at the newsgroups in more detail, he saw three titles suggesting the presence of pornography. Employees were not permitted to have pornographic material on their office computers. Smith located an adult pornography file in the defendant's recycle bin, which Smith restored and printed to give to Ure and Keller. When Ure arrived at the office, Smith had found additional files, some containing child pornography. Ure told him to secure the office. He changed the locks on the door and turned the computer off. Later, Keller told Ure and Smith to take the

computer from the defendant's office and place it in Keller's office located in the police station.

At trial, the defendant argued that he had a reasonable expectation of privacy in the office and computer, so that evidence discovered through the warrantless search of this office computer should be suppressed. The trial court denied the motion to suppress, finding that the defendant did not have a reasonable expectation of privacy. On appeal, the defendant raised the same claim.

The appellate court first considered the defendant's privacy claims. The record clearly showed that the defendant demonstrated a subjective expectation of privacy: he closed and locked his office door and he installed passwords to limit access to his computer files. Next, the court considered whether the defendant's subjective expectation of privacy was objectively reasonable.

The record lacked evidence of a city policy placing the defendant on notice that his computer usage would be monitored. Also, there was no evidence that other employees had routine access to his computer. Overruling the trial court and citing O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987)(plurality decision), the appellate court concluded that the defendant had a reasonable expectation of privacy in his office and office computer equipment.

Next, the court considered whether the warrantless search of the office and computer violated the defendant's rights and held that the O'Connor standard applied: a search by a government employer must be justified at its inception and reasonably related to the circumstances justifying the interference in the first place. Under the facts presented, the search was reasonable. The court limited its holding to the situation in which the employer is both a supervisor and a law enforcement officer, and when the improper activity violates workplace regulations and criminal law.

b. Texas law.

In Voyles v. State, 133 S.W.3d 303 (Tex.App. – Fort Worth 2004, no pet.), the court considered a defendant's privacy interest in a work computer he used to exchange emails of a sexual nature. Arlington police received a tip that the defendant, a teacher at a junior high school, had exchanged emails of a sexual nature with a fifteen-year-old girl in London, England. An officer describing himself as a fifteen-year-old girl attending school in Fort Worth sent the defendant an email and saying that she was looking for a chat buddy. The defendant responded and, over three weeks, exchanged numerous emails with the undercover officer, several of which were sexual in nature. Officers obtained search warrants for the defendant's home and office computers based on the emails and

information in the case. At trial, the defendant filed a motion to suppress. The trial court granted the motion with respect to the home computer, but found that the defendant had no reasonable expectation of privacy in the work computer, so denied the motion on that basis. On appeal, the defendant argued that he had a reasonable expectation of privacy in his work computer because he had taken precautions to prevent others from accessing or viewing the information contained on the computer.

The Court of Appeals rejected the defendant's assertions of privacy interest. Citing five factors listed in Granados v. State, 85 S.W.3d 217 (Tex. Cr. App. 2002), cert. denied, 538 U.S. 927 (2003), to determine whether a defendant's subjective expectation is one that society is prepared to recognize as objectively reasonable, the court found no reasonable expectation. The School District owned the computer, other teachers could use the computer, the computer related to work purposes, not the defendant's private uses, and no historical notions of privacy supported the defendant's contentions. Under the totality of the circumstances, the defendant did not establish a reasonable expectation of privacy in the work computer.

**D. Texas law: passenger lacks standing to contest search of car, unless initial seizure violated passenger's rights.**

A passenger does not have standing to contest the legality of a search of a car in which he or she has no ownership interest. Moore v. State, 55 S.W.3d 652 (Tex. App. – San Antonio 2001, no pet.). Of course, a passenger does have standing to contest a seizure resulting in his or her detention. State v. Crisp, Uloth and Uloth, 74 S.W.3d 474 (Tex. App. – Waco No. 2002, no pet.).

Pennywell v. State, \_\_\_ S.W.3d \_\_\_ (Tex. Cr. App. No. 1182-02, delivered April 23, 2003): On appeal, the defendant contested his detention and the seizure of a bag he was carrying. The Court of Appeals held that the defendant lacked standing to contest the seizure of the bag, since it was stolen property. The defendant petitioned the Court of Criminal Appeals for discretionary review arguing, in part, that the Court of Appeals failed to consider all of the issues necessary to properly dispose of his appeal, since that court did not review his claim that the seizure of the bag was a fruit of his illegal detention. The Court of Criminal Appeals remanded the case to the lower appellate court with instructions to address this point of error as necessary to final disposition of the appeal.

**E. Defendant lacks standing if owner requests departure.**

A guest's standing to contest a search of a premises is dependent upon the owner's permission to stay. In Granados v. State, 85 S.W.3d 217 (Tex. Crim. App. 2002), the defendant had resided in an apartment with the victim and her son, but the victim had asked the defendant to gather his things and leave. A few days after the victim asked the defendant to leave, he entered the apartment, assaulted the victim and killed her son. After the assault and murder, officers entered the apartment without a warrant after the victim's family had contacted them when she did not arrive for work or leave her son with her mother at the usual time. They found the defendant in the apartment still holding a knife covered in blood. Also inside the apartment officers found the victim's son's body and the victim nearby. On appeal, the defendant contested the warrantless entry into the apartment.

The Court noted that Texas courts had never addressed the issue of privacy expectations of an overnight occupant of a premises, when the occupant's presence is wrongful or unwelcome. After reviewing several jurisdictions' holdings, the Court held that an overnight guest's expectation of privacy is determined by the host's ability to control the use of the premise for the period of time that a guest will be permitted to stay. When a person has been asked to leave the premises by one with authority to exclude him, and when that person has had a reasonable opportunity to gather his personal effects, any expectation of privacy he maintains in the premises would not be viewed by society as reasonable.

In the instant case, the victim had asked the defendant several times to leave the apartment and the defendant knew she did not want him to remain. The victim gave him several opportunities to gather his belongings and leave before he attacked her and her son. Thus, when the police entered the apartment, the defendant had no legitimate right to be there. As such, he had no standing to complain of the search.

**F. Dog sniffs not searches under federal and state law.**

In a case of first impression, United States v. Reyes, 349 F.3d 219 (5<sup>th</sup> Cir. 2003), the court held that an unintentional dog sniff from four to five feet away does not constitute a search under the Fourth Amendment. Border agents asked passengers to exit a bus while a drug detection dog stood with his handler outside the bus, about four to five feet away from the door. The dog alerted to two of the passengers, which ultimately led to agents' discovery of drugs taped to the defendant's stomach. At the time the dog alerted, agents had no reason to believe that the defendant possessed narcotics. The court considered dog sniff cases in general and held that the unintentional sniff

from that distance, when the officers had not focused on the defendant, did not constitute a search. Note, however, that a search does occur when a drug dog intentionally sniffs a student's person, according to Horton v. Goose Creek Independent School District, 690 F.2d 470 (5<sup>th</sup> Cir. 1982).

Porter v. State, 93 S.W.3d 342 (Tex. App. – Houston [14<sup>th</sup>] 2002, no pet.): Officers entered the defendant's property with a drug detection dog that alerted at the defendant's front porch. The court noted that under the Fourth Amendment, a search does not occur unless a reasonable expectation of privacy exists in the object of the challenged search, and cited Kyllo v. United States, 121 S.Ct. 2038 (2001). Since an individual has no expectation of privacy in possessing illegal drugs, a governmental investigative technique, such as a dog sniff, that discloses only the presence or absence of contraband is not a "search" for Fourth Amendment purposes. Given that the dog sniff in the instant case disclosed only the existence of illegal drugs, it did not constitute a search under Fourth Amendment law. The court also held no search occurred under Art. I, Sec. 9 of the Texas Constitution, citing Josey v. State, 981 S.W.2d 831 (Tex. App. – Houston [14<sup>th</sup>] 1998, pet. ref'd).

#### **G. Police may push open remote controlled gate.**

Porter v. State, 93 S.W.3d 342 (Tex. App. – Houston [14<sup>th</sup>] 2002, no pet.): Officers pushed open a motorized gate operated by remote control to reach the defendant's residence. On appeal, the defendant contended that officers illegally trespassed on the defendant's property. The Court of Appeals held that, although use of a remote control mechanism on the gate could support an inference that the gate was intended to exclude the public, such use could also support an inference that the mechanism was merely intended to keep the gate shut or to open it by remote control when convenient. Relying on this inference, the trial court did not abuse its discretion by finding that the police did not trespass and violate the defendant's expectation of privacy.

#### **H. Pen registers and trap and trace devices.**

Uresti v. State, 98 S.W.3d 321 (Tex. App. – Houston [1<sup>st</sup>] 2003, no pet.): Officers investigated the defendant's illegal bookmaking and gambling operations. They obtained orders authorizing installation of trap and trace devices and pen registers for telephone numbers at the defendant's residence. A trap and trace device records incoming electronic impulses that identify the originating phone number of an incoming call. A pen register identifies numbers dialed from a phone. At trial, the defendant argued that evidence acquired from use of the trap and trace devices and the pen register should have been suppressed because Art. 18.21, V.A.C.C.P., prohibits

the State from obtaining "caller identification" and "call forwarding" evidence, and because the State had no statutory basis for obtaining "call forwarding" evidence. The trial court denied the motion.

On appeal, the defendant reiterated his claims that the use of the devices rendered the evidence inadmissible. The appellate court held that Art. 18.21, Sec. 1 (7), V.A.C.C.P., did not preclude the State's use of caller identification technology to obtain caller identification information; rather, the statute simply prohibited the use of a device used in providing a caller identification service to a private subscriber to obtain this information. Moreover, the statute did not preclude the State from obtaining call forwarding information and, indeed, did not address call forwarding at all. Under 18 U.S.C. Secs. 2703 (c)(1)(B) and (d) (1993 & Supp. 2003), a governmental entity may require a communication provider to disclose information pertaining to a subscriber or customer if the entity obtains a court order based on specific and articulable facts showing reasonable grounds to believe that the contents of the record or other information is relevant to an ongoing criminal investigation. In this case, the State obtained court orders for the trap and trace devices and the pen register that covered the information sought regarding the call forwarding material. The court concluded that the State had statutory authority to support its request for the call forwarding information.

The defendant also argued that the State's use of the pen register constituted a search under the Texas Constitution. The appellate court held that the record did not establish that the defendant exhibited conduct showing an actual expectation of privacy in the numbers he dialed from his home phone. Thus, he failed to meet his burden to establish a reasonable expectation of privacy violated by the State's use of the pen register. No search under the Texas Constitution occurred under the facts of this case.

With regard to the State's use of the trap and trace device, the court held that such use did not constitute a search under the state constitution. Also, the defendant did not establish by his conduct an actual expectation of privacy in the telephone numbers of other individuals placing calls to his phone numbers.

#### **I. Privacy expectation lost when computer turned over to repairman.**

In Rogers v. State, 113 S.W.3d 452 (Tex. App. – San Antonio 2003, no pet.), the court considered a defendant's expectation of privacy in computer files discovered by a repair technician hired to repair the defendant's computer. When the defendant had problems with a computer virus in his system, he took his computer to a repair technician, who advised him to wipe and reload the hard drive. The defendant asked the technician to make backup copies of all the

defendant's files, including his photograph files. When the technician checked some of the photograph files to make sure the backup files copied correctly, he discovered child pornography and contacted the local police. They took possession of the computer, obtained a search warrant, and later charged the defendant with possession of child pornography.

On appeal, the defendant contended that the trial court improperly denied his motion to suppress. The Court of Appeals held that the defendant could not complain about the police's acquisition of the computer files. Generally, a person has no legitimate expectation of privacy in information voluntarily turned over to a third party. The defendant, therefore, waived his expectation of privacy in his computer files when he turned them over to the repair technician.

#### **J. Seizures implicate possessory interests.**

The Fifth Circuit consider the Fourth Amendment's application to possessory interests in United States v. Neely, 345 F.3d 366 (5<sup>th</sup> Cir. 2003). In this case, the record showed that a robber covered from head to toe walked into a bank in Mississippi, fired one shot into the ceiling, told everyone to get down, walked behind the counter to the teller drawer, and removed over \$17,000 in cash. After taking the money, he ran out of the bank and jumped into a waiting Mazda. A dye pack in the money exploded. Both the driver and the robber opened the car doors to let the smoke out and, as they did so, the Mazda hit a parked vehicle causing the robber to drop money to the ground. As he leaned down to pick up the money, eyewitnesses heard a pop and saw him grab his chest or stomach area. Both the driver and the robber then ran across the parking lot to a waiting SUV and left.

Officers recovered several thousand dollars with red stain from the parking lot and took samples from the inside of the Mazda. A few minutes later, a 911 call came in from an apartment about four and a half miles from the bank. The caller said that someone in the apartment had received a gunshot wound to the chest. An ambulance and police arrived to find the defendant wounded and lying in the kitchen of an apartment. They took him to a nearby hospital. At the foot of the rear stairs leading to the apartment, police found a banking bag and an empty plastic ice bag both stained with red dye.

At the hospital, emergency workers rushed the defendant to the shock unit, where they removed the defendant's clothing, placed it in a plastic bag, and stored it in a clothing storeroom. The hospital personnel considered the clothing as belonging to the patient even while in the hospital's possession. While the defendant was in surgery, an officer went to the hospital to retrieve the defendant's clothing. He had no warrant, although police were in the process of procuring an arrest warrant for the defendant's arrest.

The hospital gave the officer the defendant's clothing. Lab analysis of the seized clothes showed tear gas and red dye consistent with the same substances deployed in the dye pack set off in the stolen money.

On appeal, the defendant argued that officers improperly seized his clothing without a warrant. The Fifth Circuit agreed, noting that a patient does not forfeit his possessory rights to clothing simply by entering a hospital. Hospital employees have no authority to permit police to search or test clothes without the consent of the owner. The court noted the distinction between a search, in which an expectation of privacy is at issue, and a seizure, in which a constitutionally protected possessory interest is implicated. The court also rejected the government's arguments that the plain view and search incident to arrest doctrines applied.

#### **K. Abandonment waives privacy interests.**

A defendant loses standing to contest a search of a premises he or she abandons. In Mondragon-Garcia v. State, 129 S.W.3d 674 (Tex.App. – Eastland 2004, no pet.), federal agents were watching the defendant's motel room. One agent telephoned the room and told the defendant that he was with the FBI and asked him to come outside and talk. The defendant opened the door, dressed only in his bikini underwear, looked at the agents, and ran away, leaving the door to the hotel room open. When the agents caught the defendant, they took him back to the room, where he admitted he had drugs and a gun. One agent found drugs in plain view on the bathroom counter, then lifted up the mattress and found a gun between it and the box springs. The agents did not seize the gun at that time, but informed Dallas police officers about the gun and its location. Dallas authorities obtained a warrant and later seized the gun.

On appeal, the defendant contended that the trial court erred by not suppressing the gun found during the warrantless search of the hotel room. Despite first finding that the federal agent exceeded the scope of a protective room sweep by looking between the mattress and box springs, where a person could not be found, the appellate court ultimately held that the defendant abandoned the hotel room by running away. Citing McDuff v. State, 939 S.W.2d 607 (Tex.Cr.App. 1997), cert. denied, 522 U.S. 844 (1997), the court held that by voluntarily leaving behind and relinquishing his interest in the property, the defendant no longer had a reasonable expectation of privacy in the hotel room or the property located in that room.

## **II. PROBABLE CAUSE.**

### **A. Federal law: drugs in car implicate all passengers.**

In Maryland v. Pringle, 124 S.Ct. 795 (2003), the United States Supreme Court considered the propriety

of arresting everyone riding in a car when drugs are found hidden behind an armrest in the backseat. The defendant, sitting in the front passenger seat, and two other people were traveling in a car stopped for speeding. After the officer asked the driver for his registration, the driver reached into the glove compartment and the officer saw a large amount of rolled up money. The officer went to his car and ran a computer check on the driver's license number, and the check came back negative. The officer returned to the car, asked the driver to get out, and issued him an oral warning. A second police car arrived and the officer asked the driver if he had any weapons or drugs. The driver stated that he did not and consented to a search of the car. The officers found over \$700 in the glove compartment and five plastic glassine baggies containing cocaine from behind the back-seat armrest. The officers questioned the three people about the drugs and money, but no one admitted ownership. The officers arrested all three men and took them to the police station.

At trial, the defendant, the front-seat passenger, moved to suppress the evidence because the officer did not have probable cause to arrest him for possession of the drugs found in the back seat of the car. The trial court denied the motion and the intermediate Maryland appellate court affirmed. The Maryland Court of Appeals, however, reversed, holding that without specific facts tending to show the defendant had knowledge and dominion over the drugs, the officer's discovery of drugs in the back seat did not constitute probable cause to arrest the front seat passenger for possession. In a well-reasoned opinion with a large number of cited cases as precedent, the court held that the officer did not have sufficient information to connect the defendant in the front seat with the drugs found hidden in the back seat. The Supreme Court granted certiorari to consider the issue.

Initially, the Court noted how difficult it is to define "probable cause" or set numeric probabilities to the concept. "[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, ..., and that the belief of guilt must be particularized with respect to the person to be searched or seized." Maryland v. Pringle, 124 S.Ct. at 800, citing Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979). The Court distinguished the case from Ybarra because the defendant and his friends were in a small car, as opposed to a tavern. A car passenger, unlike the unwitting tavern patron, will often be engaged in a common enterprise with the driver, and have "the same interest in concealing the fruits or the evidence of their wrongdoing." Maryland v. Pringle, 124 S.Ct. at 810, citing Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297 (1999). The quantity of drugs in the car and the cash found in the glove compartment indicated the likelihood of drug dealing, an enterprise "to which a

dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." Maryland v. Pringle, 124 S.Ct. at 801. The Court concluded that the officers had sufficient information to constitute probable cause supporting the arrest of all three men. The Court reversed the judgment of the Maryland Court of Appeals and remanded the case.

The bench and bar must await the full impact of this decision. Time permitting, readers should read the decision of the Maryland Court of Appeals, Pringle v. State, 805 A.2d 1016, 2002 Md. LEXIS 563 (No. 129, delivered August 27, 2002). The court took time to study the facts and prior case law. Prior to the arrest, officers found drugs hidden in the backseat and money in the glove compartment. That is the sum total of the evidence they had against the defendant, a front seat passenger. The court held the evidence did not establish probable cause to support the defendant's arrest. The cases the court cites support its conclusion.

Prior case law indicates that a defendant must have knowledge of and exercise control over the contraband **before officers have probable cause** to believe the defendant guilty of possession. Such a standard does not confuse elements of the offense necessary for a conviction with proof necessary to support probable cause. [The only real difference between the two is the amount of proof necessary.] An officer must still have sufficient information to lead a person of reasonable caution to believe a criminal offense has taken place. To allow an officer to infer not only that a passenger knows what is in the glove compartment of a friend's car, but also that the front seat passenger has control over drugs hidden in the back seat, is going too far. Maryland v. Pringle boils down to mere presence: a person may be arrested for riding in a car in which drugs are found.

#### **B. Insufficient information to support probable cause.**

The Austin Court of Appeals reversed a case because an affidavit failed to establish probable cause in Serrano v. State \_\_\_S.W.3d \_\_\_(Tex. App.-Austin No. 03-02-813-CR, delivered September 25, 2003, pet. filed)(still pending as of June 16, 2004, under C.N. 1872-03). In this case, an officer prepared an affidavit for a search warrant that included information received from a confidential informant who had provided information in the past. The informant stated that a Daniel Serrano "was dealing cocaine" in the Austin area and had a 30-year old brother named Earnest. The officer checked computer records and located a Earnest Serrano at an address in Austin. Police records showed a Daniel Serrano with a family disturbance history and a different Austin address. The officer set up surveillance at Earnest Serrano's house and observed Daniel Serrano leaving the residence. The officer arranged a trash pick-up at the residence, went through

the trash, and found two plastic baggies: one had cocaine residue and the other had an end tied off in a manner consistent with cocaine distribution. The officer put all of this information in an affidavit and obtained a search warrant for the residence.

The Austin Court of Appeals held that the affidavit did not establish probable cause. Initially, the officer did not include the date when he received the information from the confidential informant. The court did not believe that the police investigation corroborated the tip because the officer did not explain the type of test he conducted on the residue to show it constituted cocaine and the court did not understand how something could be tied off in a "manner consistent with cocaine distribution." Since the facts did not amount to probable cause, the court reversed the conviction and remanded the case to the trial court.

The State filed a petition for discretionary review in this case, so the decision is not final.

A State's petition for review is likely in Cardona v. State, \_\_\_ S.W.3d \_\_\_ (Tex.App. – Amarillo No. 07-03-0096, delivered May 10, 2004, no pet.), in which the appellate court found that a search warrant affidavit lacked probable cause. In this case, officers sought to search a machine company owned by the defendant for evidence related to the manufacture of methamphetamine and amphetamine. In the affidavit, the deputy alleged that he and a drug enforcement agent interviewed an unnamed source who stated that: he spoke with the defendant and an Anglo male within the last 72 hours; he had been in the machine company within the last 72 hours; he saw a large container of anhydrous ammonia on a two-wheeled dolly hidden behind a machine press near the rear of the building; he saw one cardboard box containing psuedophed; he saw a large and small Igloo cooler in the office area; one cooler contained numerous baggies; the other cooler had a thermos with some type of chemical formula written on the exterior; and he saw a white canister that he thought contained starter fluid. Two days later, the source contacted the agent and said that the defendant and another person were "ready to cook," were in the process of obtaining lithium batteries, and were "going to cook today." The source also described the defendant's clothing and vehicle.

The deputy and the agent set up surveillance at the machine shop and saw the defendant and his vehicle, as described by the source. The defendant frequently went to the front door, looked around, looked up and down the street, and re-entered the business for about one and one-half hours. The officers heard a loud bang and saw the defendant come to the window and front door, and look out. They watched as the defendant and another man left the building carrying similar looking black nylon rectangular bags with shoulder straps, get into the car, and drive away. The deputy and the agent approached the building, detected a strong chemical

odor emanating from the large overhead bay door, and saw a garden hose extending from under the door. The defendant and the other man returned with the black nylon bags and went into the building. They saw the other man wearing white latex gloves carrying a jar containing a milky white liquid substance with a clear layer above it with a visible separation between the two, and watched as he poured the contents of the jar onto the ground.

In concluding the affidavit, the deputy stated that the source knew what amphetamine and methamphetamine looked like, and was familiar with the appearance, packaging, handling, use, and method by which the drugs were introduced into the human body. The source also knew how paraphernalia were used to manufacture the drugs. He concluded by saying that he believed the source to be credible and reliable.

At trial, the defendant moved the trial court to suppress the evidence acquired by virtue of the search warrant. The trial court denied the motion. On appeal, the defendant contended that the affidavit lacked probable cause. The Court of Appeals agreed. The court focused on what the affidavit lacked: what was the substance in the jar; what caused the loud bang; what was the nature of the machine business; how did the defendant's actions differ from those typical for someone in the machine business? Also, during the officers' surveillance, did they see the ammonia, coolers, baggies, thermos, psuedophed, or starter fluid mentioned by the source? Moreover, the affidavit lacked any reference as to whether these items or the defendant's conduct related to the manufacture of methamphetamine or amphetamine. Also, no one connected the odor to drug manufacture. The affidavit also failed to include information on how the source obtained his information, or the source's prior dealings with the officers. When the appellate court applied the law to the facts in this case, it concluded that the affidavit did not provide a substantial basis for concluding that a specific offense had been committed. [As stated earlier, a State's petition for discretionary review is likely in this case.]

Lowery v. State, 98 S.W.3d 398 (Tex. App.- Amarillo 2003, no pet.): Officers obtained a search warrant to search the defendant's residence. The following information contained in the affidavit is taken from the Court of Appeals' opinion:

The affiant believed that appellant had "possession of, and is concealing at said suspected place...[methamphetamine] kept, prepared or manufactured in violation of the laws of this state [and] other paraphernalia, implements, instruments, and packaging used in the commission of the offense of Manufacture, Possession and Delivery of"

that controlled substance. The affiant further said that:

On April 18, 2002, affiant received information from a [reliable] confidential informant . . . referred to as CI # 1 . . . that within the past twenty-four hours . . . CI #1 had personally been to the residence . . . at 104 Mistywood Street . . . and had spoken with a white male personally known by the CI # 1 to be Bryan Golden. Affiant personally knows that . . . Golden was present at a location in Angelina County when a methamphetamine laboratory was seized along with a quantity of methamphetamine. CI # 1 advised affiant that . . . Golden appeared to be under the influence of methamphetamine and that . . . Golden stated . . . that “we just cooked dope last night and I am ‘tweaking’ out”[sic]. From training and experience, I know that “tweaking” is slang. . . which indicates that they have ingested methamphetamine. Affiant further believes CI # 1 to be credible and reliable in that [appellant] and. . . Golden have been associated with the manufacture and/or use of methamphetamine in the past as detailed in the affidavit.

So too did the affiant 1) generally describe various methods by which the controlled substance could be manufactured, 2) opined that one method (the Nazi method) was an easy one to utilize and required “only ordinary beverage containers such as drip style coffee pots, buckets, mason jars, funnels and common kitchen glassware and utensil,” and 3) appellant allegedly was arrested once before for possessing a controlled substance over a year earlier.

Lowery, 98 S.W.3d at 400. The appellate court considered the material provided and what information was missing: the affidavit lacked information regarding where the “dope” was cooked the night before, whether there were chemicals or equipment in the residence that could be used to manufacture methamphetamine, whether there were any drugs in the residence, whether the residence exhibited the unique odor associated with the manufacture of methamphetamine, whether the defendant was at the residence the night the drugs were cooked, and the nature of the substance the defendant allegedly

possessed when previously arrested. When the court considered the totality of information given, it concluded that the affidavit did not indicate a fair probability that methamphetamine would be found in the residence, and therefore did not support a showing of probable cause.

### III. DEFINITION OF “ARREST.”

Kaupp v. State, 123 S.Ct. 1843 (2003): A fourteen-year-old girl disappeared on January 13, 1999, and, during the investigation, her half-brother became a suspect. He and the 17-year-old defendant were together on the day she disappeared. The half-brother failed three polygraph examinations and eventually admitted stabbing the victim and placing her body in a ditch. He implicated the defendant in the murder and hiding the victim’s body. The defendant went to the Sheriff’s department and passed a polygraph examination.

The next day, after officers obtained a written statement from the half-brother, they tried to get a warrant for the defendant’s arrest, but failed. Detective Pinkins testified that he nevertheless decided to “get [the defendant] in and confront him” with what the half-brother had said. He and five other officers went to the defendant’s home between 2:00 and 3:00 a.m. The defendant’s father let them inside and took them to the defendant’s bedroom, where Pinkins, using a flashlight, found the defendant lying on a mattress on the floor. Pinkins identified himself and said, “We need to go and talk,” to which the defendant responded, “Okay.” Two officers handcuffed the defendant, who was wearing only his boxer shorts, a T-shirt, and no shoes, and escorted him into a patrol car. The officers drove to the scene where other officers had just located the victim’s body, according to Pinkins, to let the defendant know that the half-brother had given them the location of the body. They remained there for five to ten minutes, and then drove to the sheriff’s department. There, officers took the defendant to an interview room, removed his handcuffs, and advised him of his Miranda rights. At first, the defendant denied involvement in the murder, but later gave a statement admitting participation in the crime.

At trial, the defendant moved to suppress the confession as the fruit of an illegal warrantless arrest. The trial court denied the motion. On appeal, the defendant again claimed that officers made an illegal arrest. The State conceded that Pinkins did not have probable cause to arrest the defendant. In an unpublished opinion, the Fourteenth Court of Appeals initially noted that custody determinations must be made on a case-by-case basis, and considered the facts of the instant case. Of importance to the court were facts in the record showing that the defendant met with Pinkins earlier in the investigation; the defendant

voluntarily went to the sheriff's department on at least two occasions; on both occasions, officers allowed the defendant to leave the sheriff's department and gave him no reason to believe that he was a suspect in the investigation; on one prior occasion, officers handcuffed the defendant before transporting him in the patrol car and removed the handcuffs when they arrived at the station; and officers never questioned the defendant at any location other than the sheriff's office. When officers went to the defendant's house, Pinkins' gun may have been visible, but none of the officers had their guns drawn. The court concluded that a reasonable person in the defendant's place would have been free to say "no," or otherwise disregard Pinkins, and by saying "Okay," the defendant indicated his consent to go to the sheriff's department voluntarily for questioning.

The court also addressed the defendant's claim that officers arrested him when they handcuffed him and placed him in the patrol car. Given that witnesses testified that individuals are routinely handcuffed for safety purposes before being transported in a patrol car, and given that officers handcuffed the defendant the day before when he went voluntarily to the sheriff's department for questioning, the court concluded that a reasonable person in the defendant's position would not believe that being put in handcuffs was a significant restriction on freedom of movement. Furthermore, the court took note that the defendant did not resist the use of the handcuffs or show anything but full cooperation with the officers. In response to the defendant's claim that he was taken wearing only boxer shorts and a T-shirt on a January night, the court responded that the record did not show that the defendant requested an opportunity to dress or otherwise complained about his attire during the time officers took him to the station. Given all the facts, and construing the case based only on the facts, the appellate court held that the trial court did not err in concluding that officers did not arrest the defendant before he gave his statement.

The Court of Criminal Appeals denied the defendant's petition for discretionary review, but the United States Supreme Court granted the petition for writ of certiorari. The Court began its per curiam opinion by reviewing the facts considered by the Court of Appeals. Initially, the Court noted that some seizures may be justified on something less than probable cause, such as Terry stops, but "[W]e have never sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization." Kaupp, 123 S.Ct. at 1848, citing Hayes v. Florida, 470 U.S. 811, 815 (1985). Given the facts, the Court held that application of federal law showed

"beyond cavil" that the defendant was arrested under the Fourth Amendment.

The Court also rejected the Houston Court of Appeals' analysis of the facts. The defendant's response to Pinkins' statement showed mere submission to a claim of lawful authority and:

It cannot seriously be suggested that when the detectives began to question Kaupp, a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed.

Kaupp, 123 S.Ct. at 1848. Since officers illegally arrested the defendant, and since the only intervening circumstance between the illegal arrest and the confession was the giving of Miranda warnings, the Court concluded that the illegal arrest tainted the confession. The Court vacated the judgment of the Court of Appeals and remanded the case.

#### IV. WARRANTS MUST DESCRIBE ITEMS TO BE SEIZED WITH PARTICULARITY.

The Fourth Amendment requires that a warrant describe the items to be taken with sufficient particularity. In Groh v. Ramirez, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), the Supreme Court considered a case in which a search warrant provided no description of the items to be seized. An ATF agent obtained a search warrant to search the respondents' ranch for weapons, explosives, and records. A detailed affidavit supported the application setting forth the basis for the agent's belief that the items he wanted were on the ranch property. The magistrate signed the warrant, even though the warrant form did not contain a description of the property to be taken, did not incorporate the application by reference, and described the respondents' house on the line where the description of the property to be taken should have been listed. The agent and other officers went to the ranch the next day, but found no weapons or explosives. Respondents sued the agent and the others for civil rights violations, claiming inter alia, violation of their Fourth Amendment rights. The District Court granted summary judgments to the agents, finding no constitutional violations. The Ninth Circuit affirmed, except with regard to the Fourth Amendment claim, and held that the lack of a description of the property to be taken rendered the warrant invalid.

The Supreme Court initially held that the warrant failed to meet the Fourth Amendment's requirement of a particular description of the property to be taken. Even though the application contained the required information, the warrant lacked an incorporation of the application by reference. The purpose of the requirement is not limited to the prevention of general

searches, but also assures that the individual whose property is searched of the lawful authority of the executing officer, his need to search, and the limits of his power to search. Moreover, since the warrant contained **no** description of the property to be taken, the Court held the warrant so obviously deficient that the search had to be regarded as warrantless and presumptively unreasonable. Since the particularity requirement is set forth in the Constitution, and since the instant warrant completely lacked the property description, no reasonable officer could have believed that the warrant complied with the law. As such, the agent lacked qualified immunity.

Justice Kennedy, joined by Chief Justice Rehnquist, dissented on the issue of qualified immunity, writing that the case presented a straightforward mistake of fact and unintended clerical error. Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, dissented, initially noting that the text of the Fourth Amendment does not mandate a warrant requirement. Despite the warrant's defects, Thomas maintained, the agent did not conduct an unreasonable search.

## V. WARRANTLESS ARRESTS.

### A. Warrantless arrest based upon scent of marijuana invalid.

The Court of Criminal Appeals held that the mere scent of marijuana does not provide probable cause to believe that a specific individual possessed marijuana in Steelman v. State, 93 S.W.3d 102 (Tex. Cr. App. 2002). Officers received an anonymous tip regarding drug dealing at the defendant's house. They went to the house, looked in the window, but saw no criminal activity. When they knocked on the door, the defendant answered. Officers smelled marijuana in the air, but not on the defendant. The defendant went inside the house to get identification, stepped out of the house a second time, and tried to shut the door. Officers burst through the doorway and arrested everyone in the living room, including the defendant, and searched the house.

The Court first held that the mere smell of marijuana in the air did not give officers probable cause to believe that the defendant possessed marijuana. Also, the anonymous tip coupled with the odor of burned marijuana did not provide probable cause to believe that the defendant and the others were committing an offense in the officer's presence that would have allowed officers to arrest them without a warrant. As such, officers could not enter the residence without a warrant and all evidence obtained as a result of improper police conduct had to be suppressed.

Whether Steelman remains viable after the Supreme Court's decision in Maryland v. Pringle, 124 S.Ct. 795 (2003), remains to be seen. In Pringle, the

Supreme Court held that an officer had probable cause to arrest the driver and two passengers based upon \$700 found in the glove compartment and five plastic glassine baggies containing cocaine found behind the back-seat armrest. The case may be limited to vehicles. The Court mentioned that car passengers could be engaged in a common enterprise with the driver, but distinguished the situation from tavern patrons, who may not be as closely associated with the tavern owner.

The El Paso Court of Appeals considered a similar case in Estrada v. State, 116 S.W.3d 9 (Tex.App. -El Paso 2003, no pet.). In this case, an officer responded to complaints of loud music. He went to the house, banged on the door, and got no response. When he saw two vehicles leave the house, he pulled them over and smelled alcohol and marijuana on both drivers, who were under 21, and who told him they had been drinking at the house. The officer again walked toward the house and met a woman at the gate who had a strong odor of alcohol on her breath and odor of marijuana on her clothes. She opened the gate and walked towards the house. The officer followed her. When she opened the door, he smelled the odor of marijuana. After he crossed the doorjamb, he saw "roaches." The appellate court held that under the facts, Steelman controlled the case and reversed the conviction. The court included the following quote from United States v. Johnson, 333 U.S. 10, 13-14, 68 S.Ct. 367 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences, which reasonable persons draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but also to a society that chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search

is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

**B. Arresting everyone in the investigation may not be appropriate.**

In Moore v. State, 55 S.W.3d 652 (Tex. App. - San Antonio 2001, no pet.), two employees saw a man steal two hams and flee, getting into a car with the defendant. The employees gave chase in a second car. A police officer saw the two cars run a top sign and stopped the car in which the defendant was a passenger. The employees told the officer the men had stolen a ham. The officer arrested both men and had them taken to the jail. On appeal, the defendant argued that the officer could not make a warrantless arrest because the employees did not accuse him of a felony and he did not drive the get-away car. The record reflects that the State tried to elicit testimony that the officer merely investigated the situation and did not actually effect an arrest, but the officer's testimony clearly showed that he arrested both men and expected the matter to be sorted out once they were transported to and booked into the jail.

**C. Insufficient probable cause for warrantless arrest.**

In Crisp, Uloth and Uloth v. State, 74 S.W.3d 474 (Tex. App. - Waco 2002, no pet.), the court considered whether officers had sufficient probable cause for a warrantless arrest. Officers obtained a search warrant for a possible drug lab occupied by an individual in Hamilton County. They elected to wait until dark to execute the warrant to prevent detection of their approach, but kept the premises under surveillance during the day. Later that afternoon, one officer saw a white car approach the gate. Occupants of the house came out, unlocked the gate, and let the white car drive onto the premises. Shortly thereafter, the officer saw the white vehicle leave the area. Another officer stopped the car one to two miles from the house. The driver had committed no traffic violations. Officers removed the two men, Crisp and Ray Uloth, from the car, placed them on the ground and immediately handcuffed them. The female occupant, Leslie Uloth, got out of the car, holding a crying, three-year-old child. Other officers arrived at the scene. All three defendants were given their Miranda rights and told they were being placed in "72-hour investigatory detention" at the jail until the search warrant could be served at the house. One officer talked to Leslie, who said they went to the house to get a bed. When the officer said he was investigating a drug lab on the site and did not believe her, however, Leslie admitted that they had obtained narcotics while at the house. A subsequent search of the car revealed a green bottle containing methamphetamine.

At trial, the defendants argued that the officers lacked probable cause for the arrest, tainting the search, the trial court agreed, and the State appealed. The Waco Court of Appeals first considered the State's claim that none of the defendants had standing to challenge the search.

The court noted that a passenger may challenge a car search if the search resulted from an illegal seizure violating the passenger's rights. If the initial seizure of the passenger's person violates the Fourth Amendment, that passenger has standing to challenge any search that results from the illegal seizure. Ray and Leslie Uloth had standing to challenge the search because the car's owner, Leslie's mother, authorized them to drive the car. Thus, the three defendants had standing to challenge the search.

Next, the court addressed whether the defendants were arrested or simply detained. The record showed that the officers arrested the defendants immediately after removing them from the car, without asking questions or investigating the circumstances. The officers took them to jail for a "72-hour investigatory detention," which quite surpassed the usual notion of detention for investigation purposes. Clearly, the trial court did not abuse its discretion in finding that officers arrested the defendants immediately.

Since the officers had arrested the defendants, their conduct had to be supported by facts raising probable cause. The Court reviewed the record and concluded that the trial court did not abuse its discretion in holding that probable cause did not support the officers' actions. Also, Leslie's statements and the evidence discovered in the car after the arrests were tainted by the illegal arrests. The Court of Appeals upheld the trial court's decision that the evidence should be suppressed.

**D. Belton allows search of car even when arrestee has left vehicle.**

In Thornton v. United States, \_\_\_ U.S. \_\_\_ (No. 03-5165, delivered May 24, 2004), 2004 U.S. LEXIS 3681, the United States Supreme Court expanded the rule relating to vehicle searches incident to arrest and held that such searches may be made even when an officer does not make contact with the arrestee until after the arrestee has left the vehicle. Officer Nichols, driving an unmarked police car, noticed the defendant when he slowed down so as to avoid driving next to the officer. After Nichols pulled off onto a side street and the defendant passed him, he ran a check on the defendant's plates and found the plates did not belong to the defendant's car. Before Nichols could stop the defendant, however, he pulled into a parking lot, parked, and got out of the car. Nichols saw the defendant leave his car as Nichols pulled behind him and parked his car. Nichols confronted the defendant, asked for his driver's license, and told him the license

plates did not match his car. The defendant appeared nervous and, concerned for his safety, Nichols asked the defendant if he had any narcotics or weapons on him or in his car. The defendant said, "No." Nichols asked if he could pat the defendant down, to which the defendant agreed. Nichols felt a bulge in the defendant's left front pocket and asked the defendant again whether he had any illegal narcotics on him. This time the defendant stated that he did, and reached into his pocket and pulled out a bag of marijuana and a bag of crack cocaine. Nichols handcuffed the defendant, informed him that he was under arrest, and placed him in the back of his patrol car. Nichols then searched the defendant's car and found a BryCo .9-millimeter handgun under the driver's seat.

At trial, the defendant argued that Nichols did not have the authority to search his car and seize the weapon because New York v. Belton, 453 U.S. 454 (1981), authorized a search of the car only if the police initiated contact with the defendant while still in the car. The trial court denied the motion to suppress. The United States Court of Appeals for the Fourth Circuit affirmed. 325 F.3d 189 (2003). The United States Supreme Court granted certiorari to determine whether Belton should be limited to situations in which police encounter a defendant in his or her car.

Initially, the Supreme Court discussed the basic search incident to lawful arrest rule established in Chimel v. California, 395 U.S. 752 (1969). Under that rule, officers may search an arrestee and the area within his or her immediate control in order to remove any weapon that might be used to resist arrest or to escape, or to prevent the concealment or destruction of evidence. Later, however, the area of immediate control was extended to include the passenger area of a vehicle if police made a lawful custodial arrest of the occupant of an automobile.

The Court noted that it placed no reliance on whether police ordered the occupants of a vehicle out of that vehicle, or initiated contact with them while they remained inside the vehicle. The Court stated that the area of an arrestee's immediate control was not determined by whether the arrestee gets out of the car at the officer's direction, or whether the officer initiates contact while the arrestee remains in the car.

While an arrestee's status as a "recent occupant" may turn on his or her temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he or she was inside or outside the car at the moment that the officer first initiated contact. Once an officer determines that there is probable cause to make an arrest, the officer may ensure his or her safety and preserve evidence by searching the entire passenger compartment. The Court affirmed the Fourth Circuit's judgment.

Justice Scalia, joined by Justice Ginsburg, filed a concurring opinion. He began by noting that Chimel v.

California, 395 U.S. 752 (1969), permitted an officer to make a search incident to arrest as a means to find weapons the arrestee might use or evidence he might conceal or destroy. The Court limited such a search to the suspect's area of "immediate control," and gave a bright-line rule for an arrest of an automobile occupant, allowing an officer to search the entire passenger compartment. When the officers searched the defendant's car in the instant case, they had handcuffed the defendant and placed him in a police car. The risk that he could grab a weapon or evidentiary item from his car while so situated was "remote in the extreme." Justice Scalia stated that the Court's effort to apply current doctrine to this search "stretches it beyond its breaking point."

He listed three reasons why the search might have been justified to protect the officer or prevent concealment or destruction of evidence, none of which persuaded him. First, the defendant could have escaped the handcuffs and obtained a weapon from his vehicle. Justice Scalia found this risk very low. Second, the Government argued that since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first. But, Scalia noted, this argument assumes that, one way or another, the search must take place. A Chimel search is not the Government's right; it is an exception to a rule that would otherwise render the search unlawful. Last, even though the arrestee posed no risk here, Belton searches are reasonable in general, and the benefits of a bright-line rule justify upholding that small minority of searches that, on their particular facts, are not reasonable.

Justice Scalia would limit Belton searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Since the officer arrested the defendant for a drug offense, the officer could have reasonably believed that further evidence relevant to the offense for which the defendant was arrested might be found in the car.

Justice Scalia's concurring opinion has the support of four other justices. Thus, with a majority of justices on the issue, Belton will probably be limited in the future.

[Note: Footnote 4 of the majority opinion states that this is the wrong opinion in which to address the concerns raised in Justice Scalia's concurring opinion. The defendant never argued that Belton should be limited to cases in which evidence relevant to the crime of arrest might be found in the vehicle. The question presented in the petition for writ of certiorari does not encompass Justice Scalia's analysis. Not all of the other justices joined in this footnote, however.]

Justice Stevens, joined by Justice Souter, dissented. He wrote that neither the rule in Chimel nor

Belton would support the search of the defendant's car in the instant case. The bright-line rule set forth in Belton is not needed in cases when the arrestee is first confronted by police when he is a pedestrian.

Justice O'Connor concurred, joining all but footnote 4 of the majority opinion.

## **VI. EXCEPTIONS TO THE ARREST WARRANT REQUIREMENT: OFFICER'S GEOGRAPHICAL JURISDICTION.**

### **A. Court of Criminal Appeals leaves issues open in Amendariz v. State.**

The Court of Criminal Appeals discussed officers' geographical jurisdiction but did not resolve major issues in Armendariz v. State, 123 S.W.3d 401 (Tex. Cr. App. 2003). An anonymous informant told Odessa police that the defendant would be in possession of cocaine and heading out of Odessa at a given location in Ector County. Odessa Officer Medrano radioed Ector County Deputy Sheriff Paquette, who joined the Odessa officers and set up surveillance outside the Odessa City limits. Officer Medrano saw the defendant and contact Deputy Paquette, who also then saw the defendant and watched as he committed a traffic violation by passing a vehicle on the right side of the road. Deputy Paquette radioed the traffic violation information to Odessa Officers Doporto and Aguilar, who located the defendant driving the described vehicle outside the Odessa City limits. They stopped and arrested the defendant solely because of the reported traffic violation.

The trial court denied the defendant's motion to suppress. On appeal, the Court of Appeals first noted that the Odessa police officers lacked jurisdiction to act outside of the city limits under Art. 14.03 (g), V.A.C.C.P. Also, since the offense did not occur in the officers' presence, Arts. 14.01 and 14.03 (d), V.A.C.C.P., did not apply to justify their actions as well. The Court of Appeals held that the trial court erred in denying the motion to suppress.

The Court of Criminal Appeals granted the State's petition for discretionary review and reversed the decision of the El Paso Court of Appeals. The Court observed that once the deputy sheriff saw the defendant commit a traffic violation and radioed that information to the Odessa police officers, that information gave those officers probable cause to stop the defendant's car. According to the Court, once they stopped the defendant's car and received his voluntary consent to search, they conducted a reasonable search and seizure under the Fourth Amendment.

With regard to the defendant's argument that Odessa police could not make the arrest because they were acting outside their geographical jurisdiction, the Court of Criminal Appeals noted that the sheriff's deputy observed the traffic offense and gave that information to the police officers. He directed them to

make the stop and stayed in continuous radio communication with those officers. Moreover, he arrived at the arrest scene just a few minutes after the officers stopped the defendant's car. The Court held that given these facts, the trial court could have concluded that the sheriff's deputy essentially made the arrest himself, within his jurisdiction. Since the record supported the trial court's decision to overrule the defendant's motion to suppress on some theory of law applicable to the case, the Court of Appeals erred by sustaining the defendant's point of error on appeal.

Judge Womack filed a concurring opinion discussing geographical jurisdiction of officers from different types of cities in Texas and the questionable use of Angel v. State, 740 S.W.2d 7272 (Tex. Cr. App. 1987), a plurality opinion in which the Court of Criminal Appeals held that city police had county-wide jurisdiction. The opinion was not supported by a majority of the Court and the laws used in its analysis have been changed. Judge Womack notes that Texas has five types of cities, each of which may provide geographic jurisdiction for its police.

Judge Meyers filed a dissenting opinion, disagreeing with the majority's failure to address the issue of whether home-rule police officers have countywide jurisdiction. He believes that city police officers, such as the Odessa officers in the instant case, have only city-wide jurisdiction. He objects to the majority's determination that Odessa police could stop the defendant based on the "collective knowledge" of the traffic violation observed by the sheriff's deputy. He argues that Odessa police stopped, searched, and arrested the defendant outside of the Odessa even though the defendant committed no crime within the Odessa city limits.

### **B. Conflicts between courts of appeals: petition for review granted.**

The Houston First, Fort Worth, and Dallas Courts of Appeals have issued conflicting opinions regarding a city officer's geographical jurisdiction to arrest for traffic offenses and petitions for discretionary review have been granted in two of those cases. In Dogay v. State, 101 S.W.3d 614 (Tex. App. – Houston [1<sup>st</sup>] 2003, no pet.) the court held that municipal and county officers have county-wide jurisdiction to arrest traffic offenders. They may arrest felony or misdemeanor offenders for violations committed in their presence anywhere in Texas. The court relied on amendments to Art. 14.03 (g) of the Code of Criminal Procedure and prior court opinions to reach its result. In Brother v. State, 85 S.W.3d 377 (Tex. App. – Fort Worth 2002, pet. granted), the Fort Worth Court of Appeals reached the same conclusion. Both courts could not understand how the legislature could increase officers' jurisdiction to arrest for other types of offenses, yet reduce their jurisdiction to arrest for traffic offenses.

By way of contrast, in State v. Kurtz, 111 S.W.3d 315 (Tex. App. –Dallas 2003, pet. granted), the Dallas Court of Appeals considered the legislative history of Art. 14.03 (g) and concluded that Legislature intended precisely what it enacted: traffic offenses were to be treated differently and a city officer's arrest jurisdiction for traffic offenses was limited to the city limits. This decision is consistent with that reached in Gerron v. State, 57 S.W.3d 568, 570 (Tex. App. – Waco 2001), rev'd on other grounds, 97 S.W.3d 597 (Tex. Crim. App. 2003).

Which of the two lines of cases the Court of Criminal Appeals will follow awaits disposition of the petitions for discretionary review. The Kurtz/Gerron analysis seems consistent with the law and the opinions expressed in the concurring and dissenting opinions in Armentariz v. State.

### C. Geographical jurisdiction and hot pursuit.

The Court of Criminal Appeals considered geographical jurisdiction with regard to the hot pursuit doctrine in Yeager v. State, 104 S.W.3d 103 (Tex.Cr.App. 2003). Two Pantego Village police officers suspected that the defendant was driving while intoxicated when they saw him nearly drive his car into a ditch while leaving a parking lot of a bar within the Pantego Village city limits. Although they believed they could stop the defendant at this time, they continued to follow him so they could observe the defendant and evaluate his driving. They followed the defendant into the city of Arlington and saw him almost hit another vehicle. The officers then stopped the defendant because they believed that he was dangerous to other drivers. He appeared intoxicated and failed the field sobriety test. They arrested him for driving while intoxicated and took him to the Arlington Police Department for intoxilyzer test and videotaping, since Arlington had the necessary equipment. After this testing, they took the defendant to the Pantego Village Police station for processing.

At trial, the defendant moved to suppress all evidence obtained as a result of the "illegal conduct" of the arresting officers. He claimed that they acted outside of their geographic boundary and had no authority to act. The trial court denied the motion. On appeal, the Court of Appeals held that the trial court should have granted the motion to suppress. Since Pantego Village is a Type B Municipality, the police officer's authority ended at the city limits. Once outside their geographic limits, the officers were authorized to arrest the defendant only based on probable cause for an offense committed in their presence. The court held that the officers did not have the authority to conduct an investigative detention based upon reasonable suspicion. The court declined to apply the hot pursuit doctrine because the officers followed the defendant out of their jurisdiction for the

purpose of observing him, not of detaining him. The Court of Criminal Appeals granted review to determine whether the hot pursuit doctrine applied.

The Court first rejected the appellate court's holding that the police did not initiate a chase or pursuit when they began to follow the defendant. Definitions of "follow," "pursue," and "chase" usually mean the same thing. The court concluded that under the hot pursuit doctrine, the relevant consideration is whether the initial pursuit was lawfully initiated on reasonable suspicion. Since the officers' initial pursuit of the defendant was based on reasonable suspicion gathered within their geographic boundaries, the hot pursuit doctrine applied to uphold the defendant's detention.

### D. Standing to challenge geographical jurisdiction.

The Court assumes that a defendant has standing to challenge an officer's authority to detain him outside the officer's geographic boundary, noting its decision in Chavez v. State, 9 S.W.3d 817 (Tex. Cr. App. 2000). In Chavez, an undercover narcotics officer participated in a task force agreement that permitted him to operate in several counties. The officer made an undercover drug buy of cocaine from the defendant in Erath County, a county not a party to the agreement. On appeal, the defendant contended that evidence of the buy should have been excluded under Art. 38.23, V.A.C.C.P., since the officer was acting outside his geographic boundaries of authority set out in the task force agreement. The Court of Criminal Appeals held that the defendant lacked standing to complain about violation of the task force agreement. Since the officer did not obtain the evidence in violation of the defendant's rights, the trial court did not have to exclude the evidence under Art. 38.23, V.A.C.C.P.

A defendant's standing to complain that an arresting officer had no authority to arrest is different than his or her standing to complain about violation of a task force agreement between counties. In the former, the defendant's rights were clearly and directly violated: if the officer had no authority to act, then his or her interference with the defendant directly resulted in acquisition of evidence and a violation of rights. In the latter situation, however, the violation of the task force agreement did not result in violation of the defendant's rights and no casual connection between the evidence and the violation, as required under Art. 38.23, V.A.C.C.P., could have been established.

## VII. WARRANTLESS SEARCHES.

### A. Consent.

#### 1. Consenter must have authority.

##### a. Ambiguous authority must be resolved

If an officer obtains consent to search, the person giving the consent must have authority over the

premises to give consent. In Corea v. State, 52 S.W.3d 311 (Tex. App. – Houston [1<sup>st</sup>] 2001, pet. ref'd), officers obtained written consent to search the home, including the defendant's bedroom, from the codefendant's brother-in-law. The brother-in-law told police that no one other than the defendant lived in the bedroom, although the bedroom door had no lock and was open when officers were present. On appeal, the Court of Appeals held that once the brother-in-law informed officers that only the defendant lived in the bedroom, his apparent authority to consent to search that room became ambiguous and officers were required to inquire further or obtain a warrant.

b. Mutual authority to use, not actual use, controls.

The Court of Criminal Appeals held that an owner of a premises occupied by the defendant had authority to consent to a police search in Balentine v. State, 71 S.W.3d 763 (Tex. Crim. App. 2002). In this case, an officer arrived at a building in which the defendant was residing with the consent of the building's owner. The owner told officers that he did not charge the defendant rent, but had given him permission to stay as a guest in exchange for cleaning the property. Both the owner and the defendant had keys to the building. The owner gave consent to search and officers found evidence connecting the defendant to a capital murder.

On appeal, the defendant argued that even though the owner had keys to the building, he could not give consent to search because he never entered the building when the defendant was not home. The Court noted that the focus of the inquiry regarding authority to consent is not on a third party's *actual* use of the premises; rather, the Court must determine whether the owner had actual *authority* to use the premises, citing Garcia v. State, 887 S.W.2d 846 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1005 (1995). Since the owner in the instant case had the authority to use the house under his agreement with the defendant, he had the authority to consent to its search.

c. Mutual use and access, not actual property interest, controls.

The Court of Criminal Appeals held that the driver of a tractor-trailer rig had the authority to consent to a search, over the later objection of the owner, even if the owner was present at the time of the search. In Maxwell v. State, 73 S.W.3d 278 (Tex. Crim. App. 2002), the officers stopped a rig owned by the defendant but driven by his employee for following too closely. Officers asked the driver if they could inspect the cargo and he consented to the search. The driver escorted the officers to the back of the truck and the defendant-owner remained in the cab of the truck. The driver opened the doors and ultimately officers found 500 pounds of marijuana hidden underneath other cargo. At trial, the defendant-owner contended

that the employee did not have the authority to give officers consent to search. The Court held that mutual use controlled, not simply property rights. Since the employee had control over the keys and access to the rig, he had the legal right to consent to search. The Court did not address possible outcomes had the employee not been driving the rig at the time, had the defendant-owner affirmatively withdrawn authority from the employee, or had the defendant-owner himself expressly refused consent to search.

d. Apparent authority when roommate reports burglary.

The First District Court of Appeals held that officers reasonably relied on a roommate's consent to enter a defendant's room when their trailer home had been burglarized in Whisehunt v. State, 122 S.W.3d 295 (Tex. App. – Houston [1<sup>st</sup>] 2003, no pet.). While the defendant was out of town on a hunting trip, the roommate called the police to report a burglary. When officers arrived, the roommate let them inside the trailer home and into the defendant's room. While investigating the burglary, officers entered the defendant's bedroom and saw that his computer table had been pulled away from the wall, the computer terminal was turned around, drawers had been pulled open, and boxes were pulled from inside the closet. One officer noticed a jewelry box on the defendant's nightstand with an open lid "as if someone had rummaged through the box" and dusted it for fingerprints. While lifting the upper tray of the jewelry box to determine whether the items in the box were still in place or had been stolen, the officer discovered marijuana in the bottom of the box. Beneath the marijuana was a document bearing the defendant's name. Officers seized the marijuana.

On appeal, the defendant contended that the officers erred in relying on the roommate's consent to enter his bedroom. The appellate court disagreed and held that since the roommate called the police to investigate a crime, ostensibly to benefit the defendant, the officers acted reasonably in relying on the roommate's consent to enter the defendant's bedroom.

Justice Terry Jennings wrote a detailed dissenting opinion arguing that the State did not establish consent to search, the implied consent doctrine did not apply, and the crime-scene exception did not apply.

e. Scope of consent exceeded by officer's re-entry into shed.

The Tyler Court of Appeals reversed a case in which an officer exceeded the scope of a defendant's initial consent to enter a shed in State v. Bagby, 119 S.W.3d 446 (Tex. App. – Tyler 2003, no pet.). In this case, officers received information regarding a disturbance. A person at the scene told them that someone shot out of a car window, he heard what

sounded like a .22 shot, and he saw the defendant “hunker down.” Officers approached the defendant, who said he had been working in his shed and also admitted having firearms in the shed. He gave officers consent to enter the shed to look at the firearms to determine whether they had been recently fired. He added that he did not want his property searched. The facts conflict, according to the record. One officer entered the shed and another officer followed. While the first officer inspected the firearms, the other officer saw a small quantity of marijuana in plain view. After one officer left the shed, the other remained inside, looking around, and ultimately finding methamphetamine. After additional officers arrived, the defendant gave written consent to search. The officer that stayed in the shed, Waters, testified that he did not find the methamphetamine until after the defendant consented to the second search. On appeal, the defendant argued that the officer’s discovery of the methamphetamine exceeded the initial scope of the consent, which only extended to the firearms.

The appellate court agreed. Once the officer completed his inspection of the firearms to determine whether they had been recently discharged, he no longer had consent to justify continued presence in the shed. Even though the officer saw the marijuana in plain view, the second warrantless entry into the shed could not be justified. Consent searches are limited strictly by the consent given. The court cited the six factors given in Brick v. State, 738 S.W.2d 676 (Tex.Cr.App. 1987), to find that the improper search tainted the defendant’s subsequent consent to search by which the officers found the methamphetamine.

## 2. Consent voluntary under federal law.

The Fifth Circuit Court of Appeals concluded that a defendant voluntarily consented to a luggage search at a bus station in United States v. Hernandez, 279 F.3d 302 (5<sup>th</sup> Cir. 2002). In this case, officers considered the defendant’s actions suspicious and manipulated her luggage, which did not have a tag bearing her name attached, and discovered that it contained “something solid or heavy.” The officers then approached the defendant, identified themselves, questioned her about her travel plans, learned that she had seven one-way tickets paid with cash from Houston to Washington, D.C., and was informed that she was transporting the luggage from someone in San Antonio and did not know the contents. One officer requested consent to open the luggage and the defendant agreed.

On appeal, the defendant argued that she did not voluntarily consent. The court referred to six factors relevant to federal claims of involuntary consent: voluntariness of the defendant’s custodial status; coercive police tactics; the level of the defendant’s cooperation; the defendant’s awareness of his or her right to refuse to consent; the defendant’s education

and intelligence; and the defendant’s belief that no incriminating evidence will be found. See United States v. Jones, 234 F.3d 234 (5<sup>th</sup> Cir. 2000) and United States v. Shabazz, 922 F.2d 431 (5<sup>th</sup> Cir. 1993). Applying these factors to the case at bar, the Court concluded that the defendant voluntarily consented to the officers’ search of the luggage. The court further held, however, that the defendant’s consent did not attenuate the taint of the initial illegal search, when the officer’s manipulated her baggage without probable cause or reasonable suspicion. Thus, the trial court should have suppressed the evidence.

## 3. Bus passengers’ consent to pat-down.

The Supreme Court recently reviewed a decision by the Eleventh Circuit Court of Appeals regarding bus passengers’ consent to be frisked. In United States v. Drayton, 536 U.S. 194 (2002), a bus carrying between 25 and 30 passengers stopped at a Greyhound bus station in Tallahassee, Florida. After passengers re-boarded the bus, the driver gave three Tallahassee police officers permission to board. The officers were dressed casually and their badges were either hanging around their necks or held in their hands. Their weapons were not visible. Once on the bus, two officers went to the back, while the third stayed at the front, facing the rear of the bus, where he could see the passengers and they could see him. The two officers worked their way back to the front of the bus asking passengers where they were going and matching passengers to their luggage in the overhead rack. The officers did not block the aisle, but stood beside or behind each passenger they questioned.

The defendant was seated near the back of the bus. Officer Lang approached him and leaned over his shoulder. He displayed his badge and stated he was a police officer conducting a drugs and weapons investigation, and asked him if he had any bags on the bus. The defendant pointed to a green bag in the overhead rack. The officer asked if he could “check it” and the defendant’s companion and co-defendant, Brown, responded, “Go ahead.” The officers searched the bag and found no drugs or weapons. Lang noticed that the defendant and Brown were wearing heavy jackets and baggy pants despite the warm weather and thought they were overly cooperative during the search. Lang asked for permission to frisk Brown, who consented, and Lang found bundles of cocaine taped to his thighs. Lang arrested Brown and the other officer escorted him off the bus. Lang asked if he could search the defendant, who responded by lifting his hands approximately eight inches off his legs. Lang frisked the defendant and found similar bundles of cocaine taped to the defendant’s thighs. He arrested the defendant and took him off the bus.

On appeal, the defendant argued the search violated his rights. The Eleventh Circuit overturned

the convictions, ruling that under the circumstances, the typical bus passenger would not feel free to refuse the request to search, citing its decision in United States v. Washington, 151 F.3d 1354 (11<sup>th</sup> Cir. 1998). United States v. Drayton, 231 F.3d 787 (11<sup>th</sup> Cir. 2000). The Supreme Court granted the government's petition for a writ of certiorari to consider more precisely when consent to search by a passenger in a confined space, such as a bus, is voluntary under the Fourth Amendment.

The Court noted that not all encounters between government officials and individuals amount to seizures under the Fourth Amendment. If an officer approaches an individual in a confined space, such as a bus, the proper inquiry focuses upon whether a reasonable person would feel free to decline the officer's request or terminate the encounter, according to Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382 (1991). The Court reviewed the Eleventh Circuit Court of Appeals' opinion and found that the lower court implicitly adopted a per se rule that evidence obtained during a suspicionless drug interdiction effort aboard a bus must be suppressed unless the officer advises the passengers that they are in fact free to decline the search request. Such a rule is not required under the Fourth Amendment.

Given the facts of the instant case, officers did not seize the defendant when they boarded the bus and began questioning him. Officers did not apply force, intimidate the passengers, show their weapons, block the exits, threaten or command the passengers, or use an authoritative tone of voice. Even after officers arrested the defendant's companion Brown, Lang gave the defendant no indication that he was required to answer Lang's questions or consent to a search.

The Supreme Court rejected a requirement that officers must always inform persons of their right to refuse to consent to search in Ohio v. Robinette, 519 U.S. 33 (1996), and Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Rather, the Court considers the totality of the circumstances. Although Lange did not inform the defendant of this right to refuse the search, he did ask for permission to search and the totality of the circumstances indicate that consent was given voluntarily. Thus, the Court held the search was reasonable.

4. Warrant for blood sample does not violate implied consent statute.

Beeman v. State, 86 S.W.3d 613 (Tex. Cr. App. 2002): An officer arrested the defendant for driving while intoxicated after the defendant was involved in an accident in which he was not at fault, and refused a breath test. The officer obtained a search warrant for the defendant's blood, and acquired the sample at a nearby hospital. At trial, the defendant moved to suppress the sample test results, arguing violation of

his rights under Chapter 724 of the Transportation Code. The trial court denied the motion, the defendant appealed, and the Court of Appeals affirmed.

In his petition for discretionary review, the defendant claimed that the officer violated his rights by obtaining the search warrant for the blood sample. Under the implied consent statute, the State is permitted to take a suspect's blood sample over the suspect's refusal if there is an accident and someone is injured. The defendant argued that the statute, by implication, excluded the taking of a blood sample after refusal under any other circumstances, even with a search warrant. By enacting a provision for action in obtaining a blood sample, the Legislature meant to exclude all other ways by which to obtain that sample, according to the defendant.

The Court of Criminal Appeals rejected the defendant's analysis. The implied consent law implies a suspect's consent to a search to obtain a blood sample in certain circumstances, such as when the State lacks a search warrant. If, however, the State has a search warrant for a suspect's blood, then the State does not need the suspect's consent to conduct the search. The implied consent law expands, not limits, the State's search capabilities by providing a mechanism for obtaining a blood sample when the suspect refuses consent. If the State already has a search warrant for the sample, the suspect's consent is moot.

5. Mutual access and control, even if the defendant is present and does not consent.

Welch v. State, 93 S.W.3d 50 (Tex. Cr. App. 2002): After officers pulled over the defendant's car for speeding, they discovered an outstanding warrant for her arrest. They asked to search the trunk of her car, but she never explicitly refused or consented. After her arrest, she asked that the truck be turned over to the passenger, who later consented to a search that lead to the discovery of drugs. The defendant moved to suppress the evidence and the trial court denied the motion. The Court of Criminal Appeals affirmed under federal law. As long as the third party has mutual access and control over the property searched, and if the defendant assumed the risk that the third party would consent to the search, then the third party's consent is valid. This rule applies even if the defendant is present at the time and does not consent to the search.

6. Consent to search car includes authority to search purse.

Lopes v. State, 85 S.W.3d 844 (Tex. App. – Waco 2002, no pet.): An officer stopped the defendant and asked if she had drugs or weapons in the car. She said no and told the officer he could look in the car. The officer conducted a quick search of the driver's area of

the car and saw the defendant's purse sitting on the floor beside the driver's seat. He looked inside the purse and found a gun underneath a wallet.

On appeal, the defendant argued that the officer exceeded the scope of the consensual search when he searched the purse. The Waco Court of Appeals held that the scope of consent is judged by an objective standard of what a reasonable person would have understood the scope of the consent to be, given the officer's request. "Absent an explicit limitation by the person, consent to search inside a vehicle includes consent to search containers in which might be found the searched-for items." Lopes, 85 S.W.3d at 849. The court concluded that since the purse could contain drugs or weapons, the scope of consent given included consent to search the purse.

#### 7. Submissive gesture indicates consent.

Kendrick v. State, 93 S.W.3d 230 (Tex. App. – Houston [14<sup>th</sup>] 2002, pet. ref'd): Officers working drug interdiction at an international airport saw the defendant behave suspiciously. They approached, introduced themselves, and asked to search his bags. Initially, the defendant refused, later agreed, and then changed his mind again because he did not want the officer "messing with his stuff." When one officer asked the defendant if he would permit a drug dog to sniff the baggage, the defendant first agreed, and then changed his mind again. At this time, officers decided to detain the defendant. One officer asked to pat the defendant down. The defendant stood up and raised his hands. The officer patted down the defendant and detected a large solid brick object on the inside of the defendant's leg. The officer believed the object contained drugs, so he arrested the defendant and took him to the officers' office. After obtaining a search warrant, officers searched the defendant's body and found a kilogram of cocaine taped to his leg.

On appeal, the defendant contended that the trial court erred in denying his motion to suppress. The appellate court found that the State established by clear and convincing evidence that the defendant consented to the pat-down search. The defendant stood up and raised his hands when the officers asked for consent, he had refused several previous requests to search, the officer was wearing plain clothes and drew no weapons, and officers did not threaten or coerce the defendant in any way.

#### **B. Federal law on examination of luggage.**

A passenger retains a reasonable expectation of privacy regarding luggage taken on public transportation, even if some handling is expected by transportation personnel. In United States v. Hernandez, 279 F.3d 302 (5<sup>th</sup> Cir. 2002), the court considered a case in which agents were watching passengers at a Greyhound bus station in Houston.

One agent noticed the defendant, whose luggage appeared heavy and did not bear nametags. The suitcase appeared to be heavy and the defendant seemed to have trouble moving it as she stood in the line for passengers bound for Washington, D.C., a known "drug demand city." She looked nervous and anxious for the bus to depart. One agent located the luggage bag in the bus and manipulated it. He detected something solid or heavy in the center of the luggage. He became suspicious and, with other officers, questioned the defendant, who later consented to a search disclosing drugs in the luggage.

The defendant contended, and the government did not dispute on appeal, that the agents lacked authority to manipulate the baggage. The Fifth Circuit Court of Appeals agreed that the search violated the Fourth Amendment, citing Bond v. United States, 529 U.S. 334, 120 S.Ct. 1462 (2000).

#### **C. Community Caretaking.**

##### 1. Emergency doctrine permits house search.

In Laney v. State, 117 S.W.3d 854 (Tex.Cr.App. 2003), the Court of Criminal Appeals discussed the emergency doctrine exception to the search warrant requirement, and the community caretaking exception in general. In this case, deputies were summoned to the mobile home park where the defendant lived because of a disturbance between the defendant and one of his neighbors. One officer placed the defendant in the back of a patrol car. Another deputy noticed two small boys standing on the porch of the defendant's trailer. One boy ran inside. The defendant stated that the boys were not his. When an officer asked whether the defendant had ever been arrested, he stated that he had been arrested for indecency with a child.

When one of the officers asked one child where the other child was, he stated that his brother Joey was in the back bedroom. The officer told the first child to stay on the porch, then went inside the trailer and called for Joey. He got no response. He looked for the child with his flashlight and eventually found him in the back bedroom. While sweeping the room with the flashlight, the officer saw a piece of paper lying on a low shelf that had photographic reproductions of what appeared to be eleven-to-twelve year-old boys engaged in deviant sexual contact. Officers then obtained consent from the defendant to search the premises. They seized the piece of paper and a computer floppy disk on which similar images were stored.

On appeal, the defendant contended that the officer violated his rights by entering without a warrant. The Court of Criminal Appeals discussed three doctrines developed under the traditional "community caretaking" functions associated with police activities not related to tracking down crime: 1) the car impoundment and inventory doctrine; 2) the emergency aid doctrine recognized under Mincy v.

Arizona, 487 U.S. 385 (1978); and 3) the community caretaking doctrine recognized in Wright v. State, 7 S.W.3d 148 (Tex. Cr. App. 2002), and Corbin v. State, 85 S.W.3d 272 (Tex. Cr. App. 2002). The emergency aid doctrine applies to house entries based on an officer's reasonable perception that action is necessary for the protection or preservation of life or to avoid serious injury. The community caretaking doctrine discussed in Wright and Corbin allows an officer to stop a car if the officer reasonable believes that the person is in need of assistance. Several factors are given for the officer's consideration. In the instant case, the court considered the facts and held that the officer reasonably perceived the child in the house to be in danger if left alone. Thus, the officer acted reasonably in entering the house under the emergency doctrine without a warrant, and the evidence he discovered in plain view could be used against the defendant at trial.

2. Stop for failure to stay within lane not within exception.

The Court of Criminal Appeals discussed the community caretaking exception with regard to a traffic stop in Corbin v. State, 85 S.W.3d 272 (Tex. Crim. App. 2002). In this case, an officer saw the defendant drive his car over the shoulder line for about 20 feet, and clocked the vehicle's speed at about fifty-two miles per hour in a sixty-five miles per hour zone. The officer believed that the defendant had committed the offense of failing to maintain a single lane. Also, because of the time of night, the defendant's speed and his crossing the lane marker line, the officer became concerned that the defendant could be drunk or falling asleep at the wheel. The officer followed the defendant's vehicle for a mile and did not observe any traffic violations. He turned on his overhead headlights and stopped the defendant. Dispatch informed the officer that the defendant had an extensive criminal history. The officer searched the defendant and found cocaine.

Before the Texarkana Court of Appeals, the defendant contended that the officer improperly stopped him. A stop for failure to drive within a single lane under Sec. 545.060 (a) of the Transportation Code must be based, in part, on evidence of an unsafe movement over the line. In this case, the officer did not present evidence that the defendant's movement of his car over the shoulder constituted an unsafe movement.

The Court of Appeals ruled that there was insufficient evidence to show that the defendant had failed to maintain his lane in an unsafe manner. The court further held, however, that the community caretaking exception, as discussed by the Court of Criminal Appeals in Wright v. State, 7 S.W.3d 148 (Tex. Crim. App. 1999), applied to uphold the officer's

actions. The defendant filed a petition with the Court of Criminal appeals, which it granted to determine whether the lower court misapplied the community caretaking exception.

The court noted that an officer's duties sometimes involve activities not related to gathering evidence in a criminal case. As part of an officer's duty to "serve and protect," an officer can stop and assist an individual whom a reasonable person, under the totality of the circumstances, would believe requires assistance. The court focused on the officer's subjective motivation and held that "a police officer may not properly invoke his community caretaking function if he is motivated by a non-community caretaking purpose." Corbin v. State, 85 S.W.3d 272, 274 (Tex. Crim. App. 2002).

The court noted that Professor LaFave, in discussing the pretext doctrine, wrote that a defendant would still be able to challenge an officer's motivation if the State invoked a special purpose exception to the Fourth Amendment warrant requirement, e.g., the community caretaking exception. See Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, Sec. 1.4 (3<sup>rd</sup> ed. 1996). In reviewing the record, the court held that the trial court could have concluded that the officer stopped the defendant's car primarily out of community caretaking concerns.

Once the officer's primary subjective motivation was determined, then the court considered whether the officer's belief that the defendant needed assistance was reasonable, using four factors set out in Wright: (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance other than that offered by the officer; and (4) the extent to which the unassisted individual presented a danger to himself or others. The court applied these factors and found that the distress level exhibited by the defendant was extremely low, the area of the stop was at best a neutral factor, since the record lacked information about the location, the defendant was alone, without access to assistance without the officer, and given the low distress level, the defendant did not present a danger to himself or other drivers. The court concluded that the officer's exercise of his community caretaking function was not reasonable and remanded the case to the appellate court for a harm analysis.

Judge Cochran wrote a concurring opinion in which she agreed with the majority's general statements of the law concerning the community caretaking doctrine. She disagreed with the majority's holding, however, that the officer's initial stop was not objectively reasonable. Community caretaking was not raised at trial and the trial judge made no findings that the officer's stop was to assist a motorist in distress. The record showed that the officer stopped the

defendant to investigate a possible traffic violation. Judge Cochran wrote that neither a trial court nor an appellate court could assign a subjective good faith purpose to a witness' conduct that the witness never said he had. As such, she concluded that the officer's conduct could not now be justified as appropriate community caretaking.

Two important rules arise from the Corbin decision. First, the subjective motivation of an officer is subject to examination when the community caretaking function is involved. We must look to the officer's primary motivation for making the stop: apprehending criminals or gathering evidence in a criminal investigation cannot be the primary motivation for the detention or stop. Rather, the officer's main concern must be for the safety or well being of the individual detained.

Second, once an officer's subjective primary motivation is determined to be caretaking in nature, the exception applies only if the officer's belief was objectively reasonable. To make this determination, we apply the four factors listed by the Court to determine whether the exception applies.

The Fourteenth Court of Appeals rejected a similar claim that a single instance of weaving provided an officer a reasonable basis to conclude that the driver needed assistance in Eichler v. State, 117 S.W.3d 897 (Tex. App. – Houston [14<sup>th</sup>] 2003, no pet). The court applied the factors in Corbin And Wright and concluded that the officer did not have sufficient information to conclude that the defendant needed assistance to justify the traffic stop.

#### **D. Protective sweep.**

##### **1. Federal law.**

In United States v. Gould, 364 F.3d 578 (5<sup>th</sup> Cir. 2004)(en banc), the Fifth Circuit Court of Appeals reversed a panel decision and held that police can conduct a protective sweep of a premises, even if they do not arrest someone, if the danger to police can be established by other circumstances. In this case, the Sheriff's Department received a telephone warning that the defendant, a convicted felon with a reputation for violence, was planning to kill two local judges. Officers went to the trailer where the defendant lived to talk to him, but not to arrest him. Another resident of the trailer allowed the officers inside and said the defendant was asleep in his bedroom. The officers entered the bedroom and conducted a brief protective sweep for him, looking under the bed and opening the doors to the closets. In one closet they saw three rifles in plain view, but did not seize them. The officers ran outside and found the defendant hiding in the woods. They arrested him. and the officers seized the rifles after the defendant consented to a search.

The district court granted the motion to suppress the rifles on the basis that the roommate had the

authority to allow officers inside the trailer, but lacked authority to permit the officers to search the defendant's bedroom. The Government invoked the protective sweep doctrine under Maryland v. Buie, 494 U.S. 325 (1990), but the trial court rejected application of that doctrine because the officers did not sweep the room as an incident to the defendant's arrest. A panel of the Fifth Circuit affirmed in United States v. Gould, 326 F.3d 651 (5<sup>th</sup> Cir. 2003), under a prior Fifth Circuit opinion in United States v. Wilson, 36 F.3d 1298 (5<sup>th</sup> Cir. 1994), in which the court held that the protective sweep doctrine could only be used as an incident to arrest. The Court then voted to rehear the case en banc to determine whether the protective sweep doctrine was always inapplicable if the sweep was not incident to an arrest.

The Court began its analysis with Buie, in which the Supreme Court noted that a protective sweep search constituted a quick and limited search of a premises, incident to an arrest and conducted to keep officers and others safe. Even though the arrest in Buie exposed the officers to danger, there was nothing about the situation that prevented other circumstances creating a danger for police to be resolved by a protective sweep. Also, the court judged the sweep under the usual Fourth Amendment standard of reasonableness, balancing the intrusion against the promotion of legitimate government interests. The Court concluded that an arrest is not always an indispensable element of an in-home protective sweep, and that although an arrest may be highly relevant, especially with regard to the danger facing the officers, that danger may be established by other circumstances. If a suspect is dangerous, he or she is no less dangerous simply because he or she is not arrested.

The court considered the decisions and analyses of other states. Other circuit courts of appeals agreed with the Fifth Circuit's analysis. See United States v. Patrick, 294 U.S. App. D.C. 393 (D.C.Cir. 1992)(consent entry protective sweep permitted). See also United States v. Taylor, 248 F.3d 506 (6<sup>th</sup> Cir. 2001 (consent entry protective sweep permitted), and United States v. Garcia, 997 F.2d 1273 (9<sup>th</sup> Cir. 1993)(consent entry protective sweep permitted).

The court noted that in cases in which courts rejected non-incident to arrest protective sweeps, the officers' initial entry into the house was illegal to begin with. See United States v. Davis, 290 F.3d 1239 (10<sup>th</sup> Cir. 2002)(illegal warrantless entry not justified by exigent circumstances, and protective sweep not confined to only places where a person could hide). See also United States v. Reid, 226 F.3d 1020 (9<sup>th</sup> Cir. 2000)(consent to enter coerced, no exigent circumstances supported warrantless entry, protective sweep not justified because no reasonable officer would have believed premises harbored someone who

could pose threat. Split decision of court, without reference to United States v. Garcia, supra).

The Fifth Circuit disapproved of the language in United States v. Wilson, 36 F.3d 1298, that would require a protective sweep to occur as an incident to arrest. The Court did not, however, disturb the ultimate holding in Wilson that the search of the wastebasket and checkbook could not be justified under the protective sweep doctrine.

The Court then turned to the other requirements for a protective sweep. Initially, officers must have entered the premises legally and their presence within must be for a legitimate law enforcement purpose. Also, a protective sweep must be supported by a reasonable, articulable suspicion that the area to be swept harbors an individual posing a danger to those on the scene. Third, the sweep may not be a full search, but may be no more than a cursory inspection of those spaces where a person may be found. Last, the sweep may last no longer than is necessary to dispel the reasonable suspicion of danger, and no longer than the police are justified in remaining on the premises to effect the arrest or whatever.

Applying the preceding rules to the instant case, the Court found that first, the officers were legally within the mobile home for a legitimate governmental purpose when they undertook the protective sweep. Also, officers had a reasonable suspicion of danger, given the defendant's background and the information they had regarding his plot to kill two judges. Moreover, the officers properly limited the protective sweep in scope and duration. In sum, officers did not violate the defendant's Fourth Amendment rights by conducting a protective sweep of his bedroom prior to arresting him.

## 2. Texas law.

The United States Supreme Court discussed the "protective sweep" doctrine in Maryland v. Buie, 494 U.S. 325 (1990), and held that officers may make a quick and limited search of a premises incident to the arrest of a suspect associated with the premises to protect the officers from harm. A full search of the premises is not allowed; rather, the sweep must be made only in those areas in which a person could hide and last only long enough to dispel any suspicion of danger. Officers must have a reasonable, articulable suspicion that someone posing a danger to them may be hiding. The Court of Criminal Appeals adopted this test in Reasor v. State, 12 S.W.3d 813 (Tex. Cr. App. 1999).

An officer may make a warrantless protective sweep of an area if he or she has specific and articulable facts indicating that a third person could be in the area that poses a danger to the officer. In Newhouse v. State, 53 S.W.3d 765 (Tex. App. – Houston [1<sup>st</sup>] 2001, no pet.), officers located the

defendant 10 to 15 feet away from the door of the hotel room in which he was living, and admitted that they had no belief that he was armed or dangerous. The record contained no evidence that would support a reasonable belief that a third person could be in the room that posed a danger to the officers. Thus, the appellate court held the protective sweep violated the defendant's rights.

In order for police to make a protective sweep of a premises, they must have objective evidence that the house may harbor someone posing a danger to those present during the arrest. In David v. State, 74 S.W.3d 90 (Tex. App. – Waco 2002, no pet.), officers went to a trailer house where the defendant lived, finding him and two women at home. One officer followed the defendant outside the trailer and arrested him after seeing a marijuana cigarette in an ashtray on the floor near one of the women, who claimed the marijuana belonged to her. The officers conducted a protective sweep of the house and found evidence of methamphetamine production in the kitchen.

On appeal, the defendant claimed that officers lacked authority to conduct a protective sweep of the premises because there were no facts supporting the existence of a threat to the officers during the arrest. The Court of Appeals agreed, noting that officers must have a reasonable, articulable suspicion that someone is in the house that could pose a threat to the officers or others involved in the arrest. Since the record lacked such evidence in this case, the officers' illegally performed a protective sweep of the house.

Officers exceeded the scope of a proper protective sweep in Beaver v. State, 106 S.W.3d 243 (Tex. App. – Houston [1<sup>st</sup>] 2003, no pet.). Officers set up surveillance of the defendant's apartment to investigate alleged marijuana sales. One officer went upstairs to the apartment door and knocked on the door, while other officers waited downstairs. The defendant answered the door. The officer testified that from the doorway, he could smell burnt marijuana and that he saw a hand-rolled cigarette on top of a coffee table. He told the defendant and another man present in the apartment to go downstairs, and the officer entered the apartment to make a protective sweep to determine whether anyone was present who could destroy the marijuana. The officer found marijuana in two potato chip cans. Later, the defendant gave the officer written consent to search.

On appeal, the Court of Appeals held that the officer exceeded the scope of a proper protective sweep search that is permitted without a warrant to search for persons who may be a danger to officers or who might destroy evidence. Such a search is limited to only those areas, however, in which a person may hide. The officer exceeded the scope of a valid protective sweep by looking in the potato chip can. The defendant's later consent, however, removed the

taint of the initial illegal search and the evidence discovered was admissible.

An appellate court upheld a protective sweep, however, in Cardenas v. State, 115 S.W.3d 54 (Tex. App. – San Antonio 2003, no pet.). In this case, neighbors found a woman's apartment on fire and called 911 for help. When firefighters arrived, they found the woman, who had suffered a gunshot wound to the head. She died in the hospital later that day. The neighbors told officers that they saw the defendant in the woman's apartment earlier in the day and that he had a gun at a party in his apartment the night before. Officers went to his apartment and knocked on the door. An overnight guest answered the door and let the officers inside. While the guest dressed, the officers made a protective sweep of the apartment. The guest told officers that he did not live in the apartment. The guest found a pair of boots with what appeared to be bloodstains on the soles. Officers also found a bullet casing a toilet bowl in the bathroom. Officers gathered the guest and another man found in the apartment, secured the apartment as a crime scene, took the men to the police department, and obtained a search warrant for the apartment. On appeal, the defendant argued that officers improperly entered the apartment without a warrant.

The appellate court held that the trial court erred by ruling officers could rely on the overnight guest's consent: an overnight guest does not have the authority to consent to an officer's request to search. The court further held, however, that the trial court's denial of the motion to suppress would be upheld if any legal theory existed to support the officers' entry into the apartment. The court considered the facts and held that exigent circumstances supported the officers' actions: they were told that "Gizmo" lived in the apartment; he had made the victim "feel uncomfortable"; he passed a gun around his apartment at a party the night before the victim's murder; his apartment had a clear line of sight to the victim's apartment; officers were told someone had looked out of the blinds of the defendant's apartment as they approached; officers knocked on the defendant's door in order to make contact with "Gizmo"; the overnight guest told officers that he was not "Gizmo"; and the officers made a minimal intrusion into the apartment. The Court of Appeals concluded that the legitimate government interest outweighed the minimal intrusion.

Readers may consider that certainly the facts support a protective sweep of the premises once the officers entered the apartment: the victim suffered a gunshot wound and the defendant had been seen with a handgun the night before. The defendant's argument, however, focuses on the officers' initial entry into the apartment. If the guest did not have the authority to consent to the search, then officers needed a warrant, or another exception to the warrant requirement to gain

entry into the apartment. That they conducted a valid protective sweep once inside is beside the point. Moreover, if the State were unable to justify the initial entry, then all evidence discovered as a consequence of that initial entry, including the evidence obtained pursuant to the search warrant, would be subject to suppression.

#### **E. Probation searches.**

The United States Supreme Court considered a case in which an officer searched a probationer's house in United States v. Knights, 534 U.S. 112, 122 S.Ct. 587 (2001). The defendant's probation order included a condition that he submit his residence to search anytime by any probation or law enforcement officer. He signed the order, agreeing to abide by its terms. Three days after Knights was placed on probation, someone caused an estimated \$1.5 million in damages to local utility offices; police suspected Knights was involved. One detective knew that Knights probation order contained a search condition, so he searched Knights' apartment without a warrant. After finding evidence connecting Knights to the offenses, officers arrested him and charged him with several offenses.

At trial, the defendant moved to suppress the evidence found in his apartment because officers did not obtain a warrant prior to search. The trial court granted the motion, holding that the officers searched for investigatory rather than probationary purposes. The Ninth Circuit Court of Appeals affirmed the suppression, holding that the search condition in the defendant's probation order must be limited to the terms of his probation: the condition did not authorize investigatory searches without a warrant. United States v. Knights, 219 F.3d 1138 (9<sup>th</sup> Cir. 2000). The United States Supreme Court granted the government's petition for writ of certiorari.

In its opinion, the Court first noted that California law did not limit probation order searches to only those conducted to make sure the defendant is obeying his or her terms of probation. The Court declined to consider whether Knights completely waived his rights under the Fourth Amendment by agreeing to the probation condition since the search was reasonable under the "totality of the circumstances." The touchstone of the Fourth Amendment is reasonableness, measured by weighing the individual's privacy against the government's legitimate interests, citing United States v. Knights, 526 U.S. 295, 119 S.Ct. 1297 (1999). As a probationer, Knights gave up some freedoms enjoyed by law-abiding citizens and the probation order reduced his reasonable expectation of privacy. The government has an interest in apprehending people who commit crimes, thereby protecting potential victims, and supervising defendants placed on probation. When these interests are considered together, the law requires only that officers have

reasonable suspicion to search a probationer's home. The Court wrote:

We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable . . . Those interests warrant a less than probable cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

[Citations omitted]. United States v. Knights, 122 S. Ct. at 592-3. Thus, if the officer had reasonable suspicion to connect Knights with criminal activity, he did not need to obtain a warrant. The parties agreed that reasonable suspicion existed, so the Supreme Court reversed the appellate court's decision and remanded the case.

#### **F. Immigration detentions and searches.**

##### 1. Multi-purpose checkpoint upheld.

United States v. Moreno-Vargas, 315 F.3d 489 (5<sup>th</sup> Cir. 2003): Checkpoint officials stopped the defendant's car at the Sarita immigration checkpoint station, a fixed checkpoint. While one agent questioned the defendant about his citizenship, a drug detection dog outside the car alerted to the possible presence of drugs. Officials searched the car, found drugs, leading to possession with the intent to deliver charges against the defendant. On appeal, he argued that officials illegally detained him because the checkpoint had a secondary purpose of drug investigation, given the drug detection dogs' permanent assignment at the checkpoint. The court held that the evidence supported the trial court's ruling that the checkpoint had as its primary purpose enforcement of immigration laws, regardless of whether drug interdiction could be found as a secondary purpose.

##### 2. Extended questioning exceeded scope of detention.

United States v. Portillo-Aguirre, 311 F.3d 647 (5<sup>th</sup> Cir. 2003): The defendant and his wife were passengers on a bus stopped at an immigration checkpoint. An officer questioned the defendant

regarding his citizenship status and determined that his presence in the United States was lawful. The officer noticed that the defendant seemed nervous. After the officer completed his immigration check of the passengers and as he walked toward the front of the bus, he noticed a small carry-on bag he had not seen before underneath the defendant's seat. The defendant appeared rigid and looked straight ahead, which further aroused the officer's suspicions. The officer began to question the defendant about his baggage. The defendant stated that he had a backpack in the overhead bin and acknowledged ownership of the carry-on bag beneath his seat. The officer asked about the contents of the carry-on bag and the defendant began to fidget nervously. When the officer asked to inspect the contents of the bag, the defendant attempted to show that the bag contained only clothes and books, but the officer believed that something was concealed in the bottom of the bag. The defendant consented to a search and the officer found cocaine in the bag in a brown tape-wrapped bundle.

On appeal, the defendant argued that the officer lacked sufficient facts to extend the immigration detention in order to investigate the defendant's possible possession of drugs. The court noted that the officer testified that he had determined the citizenship status of the bus passengers before he began to question the defendant about the bag underneath his seat. No facts developed during the immigration inspection that gave rise to reasonable suspicion that the defendant possessed drugs. Rather, after the officer finished the immigration inspection, he noticed the bag beneath the defendant's seat and the defendant's suspicious appearance. These facts did not support reasonable suspicion justifying further detention. Since the officer improperly detained the defendant, and since nothing broke the causal chain between the illegal detention and the defendant's consent to search, the trial court should have suppressed the evidence discovered as a result of the search.

##### 3. No suspicion needed to remove gas tank.

The United States Supreme Court recently held that officers do not need reasonable suspicion or probable cause to remove, disassemble, and reassemble a vehicle's fuel tank at an international border. In United States v. Flores-Montano, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004), the defendant, driving a station wagon, attempted to enter the United States in Southern California. After an initial search of the vehicle, a border agent directed the defendant's vehicle to a secondary inspection station, where an inspector raised the car on a hydraulic lift, disassembled and removed the gasoline tank, and found a little more than 81 pounds of marijuana hidden inside. The district court held that the agent needed reasonable suspicion to support going beyond a "routine" vehicle

search, and the Ninth Circuit Court of Appeals affirmed, citing United States v. Molina-Tarazon, 279 F.3d 709 (9<sup>th</sup> Cir. 2002). The Supreme Court granted certiorari to consider whether removing a gas tank constituted a routine border search that required no reasonable suspicion.

Initially, the Court noted that the Government's interest in preventing the entry of unwanted persons and effects is at its "zenith" at the international border, so routine searches and seizures may be conducted at the border without probable cause or a warrant. Since officers can search vehicles coming into this country under Carroll v. United States, 45 S.Ct. 280 (1925), the Court rejected the defendant's assertion of a privacy interest in his car's gas tank. The defendant also argued that disassembly and reassembly of his gas tank significantly deprived him of his property interest because agents could damage his car, but the Court rejected his evidence, noting the lack of accidents arising from gas tank disassemblies at the border. The Court concluded that the Government's authority to conduct suspicionless inspections at the border included the authority to remove, disassemble, and reassemble fuel tanks.

#### G. Searches incident to arrest.

##### 1. Fifth Circuit: scope excludes a car parked away from arrestee.

United States v. Green, 324 F.3d 375 (5<sup>th</sup> Cir. 2003): Officers obtained a parole violation arrest warrant for the defendant, located him driving his car, and followed him to his residence. When the officers pulled into his driveway, the defendant was on his front porch, about 25 feet away from his parked car. The officers got out of their car, identified themselves, called the defendant back to the driveway, and placed him on another car in a frisk position. Initially, the defendant cooperated, until the officers said he was under arrest for the parole violation, when the defendant broke away and ran. Officers quickly tackled the defendant six to ten feet from his car and handcuffed him. As he lay on the ground, one officer searched his car and found a gun under the driver's seat.

On appeal, the defendant argued that the trial court erred in denying his motion to suppress because officers exceeded the scope of a search incident to arrest when they searched his car, citing Chimel v. California, 395 U.S. 752 (1969). The government argued that officers properly searched the car because the defendant had been in his car immediately before the officers confronted him, citing New York v. Belton, 453 U.S. 454 (1981). The Fifth Circuit Court of Appeals noted that it had not specifically addressed the issue of whether officers may search a suspect's car as an incident to arrest when they come upon the suspect outside of his or her car. The court considered

the opinions of other circuits and wrote, 324 F.3d at 325-6:

The Sixth and D.C. Circuits do not apply Belton where the police come upon the arrestee outside of his vehicle. See United States v. Strahan, 984 F.2d 155, 159 (6<sup>th</sup> Cir. 1993) (declining to apply Belton where the officer first made contact with the defendant after he had exited his automobile and was thirty feet away from his vehicle when arrested); United States v. Fafowora, 275 U.S. App. D.C. 141, 865 F.2d 360, 362-63 (D.C. Cir. 1989) (declining to apply Belton to a search of a defendant's automobile where the defendant had parked and was walking in the opposite direction, approximately one car length away, at the time of the arrest). The Seventh Circuit, however, applies Belton where the defendant exited the automobile immediately prior to his arrest. See United States v. Willis, 37 F.3d 313, 317-18 (7<sup>th</sup> Cir. 1994).

The Seventh and Tenth Circuits apply Belton in cases where the defendant exercises control over the automobile at the time of the arrest despite the fact that he was not in the automobile at that time. See United States v. Sholola, 124 F.3d 803, 817 (7<sup>th</sup> Cir. 1997) (applying Belton where the defendant's words and conduct linked him to the car and conveyed that the vehicle was his, or at least under his dominion and control despite the fact that the "defendant was not technically an occupant of the vehicle immediately prior to the search"); United States v. Franco, 981 F.2d 470, 472-73 (10<sup>th</sup> Cir. 1992) (applying Belton where the defendant was arrested in an undercover agent's car near his automobile based on the fact that he accessed his automobile during the transaction which established that he was in control of the automobile at the time of his arrest).

Relying on the Seventh Circuit's reasoning, the Government asserts that Belton is applicable because the search of Green's vehicle occurred shortly after Greene exited his vehicle. Given the undisputed facts of this case regarding Green's actions, we do not find the Seventh Circuit's reasoning dispositive. The principle behind Belton and Chimel is to protect police officers and citizens who may be standing nearby from the actions of an arrestee who might gain access to a weapon or destructible evidence.

In this case, the officers approached Green after he exited his vehicle and was at his front door steps, around twenty-five feet away from his vehicle. Although Green attempted to flee from the officers, the Government admits that at the time the search occurred, Green was handcuffed and lying face down on the ground surrounded by four police officers, approximately six to ten feet away from his vehicle. The record contains testimony from the officer who searched Green's vehicle that, at the time of the search, Green was "pretty secure" and that he and the other officers did not fear that their life or safety was in danger. Because none of the concerns articulated in Chimel and Belton regarding law enforcement safety and the destruction of evidence are present in this case, the Government cannot justify the search of Green's vehicle under Belton or Chimel. Accordingly, we conclude that the district court erred in denying Green's motion to suppress the weapon obtained from his vehicle.

324 F.3d at 325-6. Thus, the Fifth Circuit concluded that the concerns justifying an extended search incident to arrest were not raised by the facts, the officers exceed the scope of such a search and the trial court should have suppressed the evidence discovered pursuant to that search. Given that this is a question of first impression, similar issues arising in the future will likely be resolved in the same way.

2. Texas law: insufficient information for probable cause

McCraw v. State, 117 S.W.3d 47 (Tex. App. – Fort Worth 2003, no pet.). An officer received a dispatch regarding a domestic disturbance and, while driving to the residence, encountered the defendant, driving a minivan, who signaled the officer to stop. The officer asked the defendant if he were carrying any weapons and performed a quick plain view search of the minivan. The officer then asked the defendant to follow the officer back to the residence. On the way to the residence, the dispatcher informed the officer that the defendant's wife had stated that the defendant might have a gun. When they arrived at the residence, two police vehicles blocked the defendant's minivan in the driveway. The officer with whom the defendant had been dealing ordered the defendant out of the vehicle at gunpoint, while other officers search the minivan, where they found a gun. On appeal from his conviction for unlawfully carrying a firearm, the defendant contended that police improperly searched his minivan.

The Fort Worth Court of Appeals agreed. The first encounter between the defendant and the officer did not constitute an arrest because the defendant asked the officer to stop. The second encounter, however, amounted to an arrest because the officers blocked the defendant's car and ordered him out at gunpoint. Since an arrest took place, officers needed probable cause to believe that he was unlawfully carrying a weapon in order to justify their actions.

At the time of the arrest, officers knew that the defendant might have been involved in a domestic disturbance. The dispatcher received information from the wife that the defendant had a weapon. The officer made a quick, plain view search of the minivan and did not find a weapon. The appellate court concluded that these facts did not amount to probable cause. Thus, the officers did not have enough information to make a warrantless arrest for an offense committed in their presence, nor to justify a search incident to that arrest.

**H. Emergency doctrine.**

State v. Cantwell, 85 S.W.3d 849 (Tex. App. – Waco 2002, pet. ref'd): An officer received a dispatch regarding a domestic disturbance and drove to the residence. When he arrived, he saw a door off its hinges lying on the deck. He entered the residence without a warrant, drew his revolver, and found the defendant and his girlfriend in a back bedroom. He identified himself, pointed his gun at the defendant, and ordered the defendant to stand and face a wall. He asked the girlfriend if she were injured, and she said, "No." The officer holstered his weapon, searched the defendant, felt something large and plastic in the defendant's front pocket, and recognized the feel of the object as a bag of marijuana. After determining that the item was a small bag of marijuana, he handcuffed the defendant and told him to sit in the living room. Other officers arrived and they searched the residence, finding other bags of marijuana, scales, and \$1600 in the defendant's wallet.

At trial, the defendant moved to suppress the evidence discovered subsequent to officers' entry into the residence. The trial court granted the motion and stated:

I don't for a minute believe that Mr. Cantwell and Ms. Langley weren't raising hell at the time [Turner] got there, and that there wasn't still some disturbance going on, and I wouldn't have wanted the officer to stop at the door and wait until he could get a search warrant. I don't think that's the law. . . . But

once he gets in there and he determines that nobody's hurt and that there's nothing that's in danger at that point I think he's got to back out.

Cantwell, 85 S.W.3d at 852-3.

On appeal, the Court of Appeals considered the preceding facts and held that Officer Turner had probable cause to believe that an emergency existed and that he did not have time to obtain a search warrant. Thus, the court agreed with the trial court that Officer Turner legally entered the residence without a warrant under the emergency doctrine.

The appellate court then considered whether Officer Turner conducted a proper Terry pat-down search for weapons. Citing Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136, 124 L. Ed. 2d 334 (1993), the court referred to the rule that an officer may conduct a brief pat-down of a suspect's outer clothing if the officer has specific articulable facts indicating that the suspect may be armed. Since Turner could not provide such articulable facts in the instant case, he could not justify the pat-down search. The appellate court concluded that the trial court did not abuse its discretion in ruling inadmissible the evidence discovered as a consequence of the illegal pat-down search.

### I. Roadblocks.

The United States Supreme Court considered a roadblock set up to gather information regarding a hit-and-run incident in Illinois v. Lidster, \_\_\_ U.S. \_\_\_, 124 S.Ct. 885 (2004). Police set up a highway checkpoint to obtain information from motorists about a hit-and-run accident that had occurred one week earlier at the same location and time of night. Officers stopped each car for about 10 to 15 seconds, asked the occupants whether they had seen anything, and handed out a flyer requesting information about the accident. As the defendant approached the roadblock, his minivan swerved, nearly hitting an officer. The officers made a traffic stop, noted the smell of alcohol on the defendant's breath, and later arrested him for driving while intoxicated. On appeal, the defendant contended that the roadblock violated his rights under Indianapolis v. Edmond, 531 U.S. 32 (2000).

The trial court rejected the defendant's challenge, but the Illinois appellate court and the Illinois Supreme Court held that Edmond required reversal. The United States Supreme Court granted certiorari to consider the lower courts' decisions.

Justice Breyer wrote for the majority. He noted that the instant checkpoint differed greatly from that in Edmond. In the instant case, police set up the checkpoint to ask vehicle occupants for their help in providing information about a crime, rather than

determining whether any given motorist had committed some crime. The Fourth Amendment does not treat a motorist's "car as his castle." Special law enforcement concerns will sometimes justify highway stops "without individualized suspicion," as with sobriety or border patrol checkpoints. The stops in the instant case are less likely to provoke anxiety and citizens will often react positively when police simply ask for their help. Officers do not violate the Fourth Amendment by approaching persons on the street and asking if they are willing to answer some questions. Judging the degree to which the seizure advanced the public interest and the severity of the interference, the Court ruled the checkpoint reasonable.

### J. Plain view.

An officer may seize a computer containing child pornography located at a repair company if the officer has probable cause to believe the computer contains evidence of a crime. In Williford v. State, 127 S.W.3d 309, 313 (Tex. App. - Eastland, 2004, no pet.), a computer repair technician reported finding a picture of two naked boys on the defendant's computer taken to the store for repair. The appellate court wrote:

Appellant asserts that Detective Owings's seizure of his computer without a warrant was illegal. In the absence of consent or a warrant, a police officer must have probable cause to effect a seizure. Arizona v. Hicks, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987). A police officer has probable cause to seize an item if "the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime." Texas v. Brown, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983)(Citation and internal quotations omitted); Waugh v. State, 51 S.W.3d 714, 717 (Tex.App. -Eastland 2001, no pet'n). Terrill told Detective Owings about the thumbnail image of the two naked boys on appellant's computer. Detective Owings testified that, based upon his discussion with Terrill, he believed that the image constituted child pornography and, therefore, contraband. Detective Owings testified that he believed that he had probable cause to seize the computer and told appellant that he was going to seize it. The facts available to Detective Owings at the time that he seized the computer "would warrant a man of reasonable caution in the belief" that the computer contained contraband or contained evidence of a crime. Thus, the seizure of

appellant's computer was proper. *Texas v. Brown*, supra.

Thus, if the computer is located in plain view, and the officer has probable cause to believe it contains pornography, the officer may seize the computer without a warrant.

### VIII. WARRANTLESS ARRESTS.

#### A. Article 14.01 (b), V.A.C.C.P.: Offense in view and subsequent visual body cavity search.

Plurality Opinion: *McGee v. State*, 105 S.W.3d 609 (Tex. Cr. App. 2003). An officer received a tip from a concerned citizen that the defendant and two other men were selling crack cocaine at a specific location. The citizen named the defendant and one other man, described what the men were wearing, and stated that the defendant was hiding the cocaine between his buttocks. The officer went to the given location and found three men meeting the citizen's descriptions. When he approached them, he smelled the odor of marijuana and saw blue smoke surrounding the men. He asked the men for identification and verified the two names given by the concerned citizen. The officer checked them for weapons, searched the area in which they were standing, and found a cigar containing marijuana on the ground. The defendant denied smoking marijuana, but stated that at least one of them had been smoking it when the officer approached them.

The officer handcuffed the three men, placed them in his squad car, and drove to a nearby fire station. He took the defendant to a secluded area of the station and told the defendant to drop his pants, bend over a table, and spread his buttocks. The officer performed a visual inspection and saw several rocks of crack cocaine wrapped in red plastic lodged between the defendant's buttocks. When the cocaine was exposed, the officer stated that the defendant attempted to push it into his anus. The officer was able to retrieve the drugs without digitally probing the defendant's anus. After the officer retrieved the contraband, the defendant was charged with possession of cocaine.

At a motion to suppress hearing, the trial court denied the defendant's motion. On appeal, the appellate court held that officer improperly seized the evidence without a warrant, and that he conducted an improper body cavity search. The Court of Criminal Appeals granted the State's petition for discretionary review.

The Court of Criminal Appeals turned to Article 14.01 9(b), V.A.C.C.P., which permits an officer to arrest a suspect without a warrant for any offense committed in the officer's view. After reviewing the facts regarding the concerned citizen's tip, the observations the officer made corroborating the tip, and the marijuana smoke, odor, and cigar found at the

scene, a majority of the Court concluded that the officer had probable cause to make a warrantless arrest under Art. 14.01 (b).

Once the officer made a legal arrest, the law authorized the officer to search the defendant without a warrant as an incident to that arrest. The Court next considered whether an arrest justifies a body cavity search as an incident to the arrest. The Court delivered a plurality response. Judge Keasler wrote the majority opinion with regard to the warrantless arrest issue, and was joined by Judges Keller Womack and Hervey in disposition of the visual body cavity search. Judge Keasler wrote that the touchstone of any search examination under the Fourth Amendment is reasonableness: courts must consider the scope of the intrusion, the manner in which the search is conducted, the justification for the search, and the place in which it is conducted. Visual body cavity searches are among the most intrusive, and the Court described such searches as "demeaning, dehumanizing, undignified, humiliating, and terrifying." *McGee*, Slip op. at 6, citing *Swain v. Spinney*, 117 F3d 1, 6 (1<sup>st</sup> Cir. 1997).

Reviewing the manner in which the search was conducted, the plurality noted that, while the search was an uncomfortable experience for the defendant, the manner in which the officer conducted the search was reasonable, given the officer's training and experience. Since the officer had probable cause in this case, he had justification for the search. Judge Keasler limited the justification to the facts of this particular case. Last, the location of the search militated in favor of reasonableness, since the officer took the defendant to a secluded area of the fire station. In sum, the facts indicated that the body cavity search made by the officer was reasonable as an incident to the defendant's arrest.

Judge Price filed a concurring and dissenting opinion. He agreed that the officer had probable cause to arrest the defendant without a warrant under Art. 14.01 (b), V.A.C.C.P., but disagreed that the officer could conduct a body cavity search without a warrant or exigent circumstances.

Judge Cochran filed a concurring opinion, joined by Judges Johnson and Holcomb, in which she joined all of the majority opinion except that part upholding the body cavity search. She believed that the officer had reasonable suspicion to believe that the defendant had cocaine hidden between his buttocks. Thus, the officer targeted the search to the location described by the concerned citizen. Since the officer had confirmed other information provided by the citizen, his search of the defendant was not unreasonable under the Fourth Amendment.

#### B. Article 14.03 (a)(1): Suspicious places.

*Dyar v. State*, 125 S.W.3d 460 (Tex. Cr. App. 2003). Around midnight on New Year's Eve, 2000,

the defendant had a one-car accident and went to the hospital. An officer observed the scene of the accident and then went to the hospital to speak to the defendant. The defendant stated that he had been driving back to Houston from a party in Austin and admitted to drinking and driving. The officer noted that the defendant had slurred speech, red glassy eyes, a strong smell of alcohol, and that many of the defendant's answers were unintelligible. The officer believed that he had probable cause at this time to arrest the defendant for driving while intoxicated. The defendant consented to a blood sample. At a motion to suppress hearing, the defendant moved to suppress the blood specimen, arguing that the officer obtained the evidence after an illegal warrantless arrest. The trial court denied the motion. On appeal, the defendant claimed that Article 14.03 (a)(1), V.A.C.C.P., permits the warrantless arrest only of persons found in suspicious places, and the hospital in which the officer found the defendant was not a "suspicious place" under the statute. The appellate court considered the totality of the circumstances and held that the accident scene coupled with the officer's observations at the hospital constituted the "suspicious place" leading to the defendant's lawful arrest. The Court of Criminal Appeals granted the defendant's petition for discretionary review to consider the lower court's holding.

Initially, the Court noted the lack of a warrant requirement for arrests under federal law, and the Texas Constitution's lack of a warrant requirement for either a search or arrest under Hulit v. State, 982 S.W. 2d 431 (Tex. Cr. App. 1998). Texas arrest warrant law is governed by statute. The Court considered several cases in which Art. 14.03 (a)(1) suspicious places were discussed. The Court referred to a "test" set forth in Lara v. State, 469 S.W.2d 177 (Tex. Cr. App. 1971): the officer has probable cause and the defendant's arrest is justified under Article 14.03 (a)(1), V.A.C.C.P. One factor important to a determination of whether a place could be deemed "suspicious" is the time frame between the crime and the apprehension of the suspect. The Court concluded that in determining whether an arrest under Art. 14.03 9 (a)(1) is proper, the facts are viewed under a totality of the circumstances test to determine first, the existence of probable cause that the defendant committed a crime, and second, that the defendant must be found in a suspicious place. Reviewing the facts of the instant case, the Court concluded that the officer had probable cause and the hospital in which the defendant was found constituted a "suspicious place" under the statute. The Court affirmed the lower appellate court's holding.

Judge Cochran filed a concurring opinion, joined by Judges Meyers and Johnson, basically arguing that the "suspicious places" exception is best treated as an

exigent circumstances exception to the warrant requirement.

The Dyar opinion does not give a substantive definition of "suspicious place." Moreover, Professor Dix suggests that Texas due process law, and perhaps the Fourth Amendment, require some minimum level of clarity on statutes authorizing arrests. Given the difficulty that the Court has in determining the meaning of "suspicious place" under Art. 14.03 (a)(1), a due process analysis on lack of notice may have merit.

## **IX. TERRY DETENTIONS.**

### **A. Detentions."**

#### **1. Defendant's subjective belief a factor.**

The Austin Court of Appeals considered what conduct constitutes a "detention" in Hayes v. State, 132 S.W.3d 147 (Tex.App. – Austin 2004, no pet.). An officer saw the defendant, whom he knew, walking across the street. The officer thought an arrest warrant may have been issued for the defendant's arrest based upon another officer's arrest of two juvenile girls, two weeks earlier, when the defendant had been seen exiting the same car from which the girls had emerged. The officer went up to the defendant, obtained his identification, and went back to his vehicle to check the name through the computer. Another officer arrived on the scene as backup. The first officer, while still seated in the police car, looked up at the defendant and noticed a plastic baggie sticking out from the defendant's waistband. He got out of the car and saw what appeared to be residue crack cocaine in the baggie, which he seized and which contained additional crack cocaine. He then arrested the defendant. At trial, the defendant moved to suppress the evidence because the officer had no reasonable suspicion to support the defendant's detention. For the first time on appeal, the State argued that the officers did not detain the defendant; rather, the encounter was purely consensual.

The Court of Appeals acknowledged that even though both officers indicated that the defendant was not free to leave, officers' subjective belief are not determinative of whether a detention has occurred, citing Whren v. United States, 517 U.S. 806 (1996). Nevertheless, the retention of the defendant's identification supported a finding that the defendant was not free to leave. In addition, the officer's actions in checking the computer while the backup officer watched the defendant supported a finding that the defendant would not feel free to break off the encounter. Under the facts, the court concluded that the officers detained the defendant and rejected the State's claim that the encounter was purely consensual.

## 2 Officer knocking on door does not require reasonable suspicion.

The Court of Criminal Appeals held that a police officer does not need reasonable suspicion to contact a person in public or knock on the door of a person's residence. State v. Perez, 85 S.W.3d 817 (Tex.Cr.App. 2002). In this case, a suspect in a purse snatching case eluded police and ran into an apartment unit. When one officer reached the apartment, he knocked on the door. The defendant opened the door just a "crack," and the officer smelled marijuana. Eventually, police searched the unit and found a large bag of marijuana. At the hearing on the motion to suppress, the defendant argued that the officer lacked reasonable suspicion to stop the defendant and ask him questions. The trial court found that the officer must have at least reasonable suspicion to knock on the door to ask questions relating to a criminal investigation. The State appealed, and the appellate court implicitly held that the officer required reasonable suspicion to contact the defendant. The Court of Criminal Appeals granted the State's petition for discretionary review. In determining that the officer did not need reasonable suspicion, the Court held that the contact between the defendant and the officer was at most an encounter, not a detention. Therefore, the officer did not need reasonable suspicion. An officer does not violate the Fourth Amendment by approaching an individual or knocking politely on a door.

## **B. Terry stop includes authority for police to request suspect's name.**

In Hiibel v. Sixth Judicial District Court of Nevada, \_\_\_ U.S. \_\_\_ (No. 03-5554, delivered June 21, 2004), 2004 U.S. LEXIS 4385, the Supreme Court held that a Nevada "stop and identify" statute that required a defendant to disclose his name during the course of a Terry investigative detention did not violate the Fourth Amendment. The Sheriff's Department in Humboldt County, Nevada, received a call reporting that a man had been seen assaulting a woman in a red and silver truck on Grass Valley Road. A deputy dispatched to the area found a truck parked on the side of the road, a man standing by the truck, and a young woman sitting inside. The deputy saw skid marks in the gravel behind the truck, indicating that it had come to a sudden stop. The deputy approached the defendant, who appeared intoxicated, and said he was investigating a report of a fight. When the deputy asked the defendant for identification, he refused, and asked why the deputy wanted to see identification. The deputy repeated that he was investigating a fight and needed to see identification. The defendant became agitated and insisted that he had done nothing wrong. After the defendant continued to refuse the deputy's request for identification, he began to taunt the deputy by placing his hands behind his back and

telling the deputy to arrest him and take him to jail. After the defendant refused eleven requests for identification, the deputy arrested him and took him to jail. The State charged the defendant with failure to identify himself to a peace officer. The Justice Court found him guilty and fined him \$250, and the appellate court affirmed the conviction. The Nevada Supreme Court rejected the defendant's Fourth Amendment claim, and the Supreme Court granted certiorari to review the "stop and identify" statute vis-à-vis the constitution.

The Nevada statute requires only that a suspect disclose his name, not a driver's license, any other documents, or any private details, to a peace officer engaged in an investigative detention. The Supreme Court rejected the defendant's claim that the statute violated his Fourth Amendment rights. The legal obligation to respond to police arises in the instant case from state law, and does not extend beyond disclosing identity to police. Since the request for identity is related to the purpose, rationale, and practical demands of a Terry stop, and since the Nevada statute does not alter the nature of the stop, nor change its duration, the Nevada statute is reasonable when balanced against the intrusion on an individual's Fourth Amendment interests.

Justice Stevens dissented, writing that the broad constitutional right to remain silent that derives from the Fifth Amendment does not admit even the narrow exception defined by the Nevada statute. He drew from Justice White's concurring opinion in Terry v. Ohio, 392 U.S. 1, 34 (1968) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation."). He believes that disclosure of identity is clearly testimonial, made in response to police interrogation.

Justice Breyer also dissented, joined by Justices Souter and Ginsburg. He wrote that the Court's Fourth Amendment precedents made clear that police may conduct a Terry stop only within certain limits, and one of those limits proscribes compelled responses to police questioning. He also referred to Justice White's concurring opinion in Terry stating that suspects do not have to answer police questions during a Terry stop. In addition, he pointed to the Court's decisions in Brown v. Texas, 443 U.S. 47 (1979), in which police lacked reasonable suspicion to detain and question a suspect, and Berkemer v. McCarty, 468 U.S. 420 (1984), when the Court wrote that an officer may ask questions during an investigative detention, but the detainee is not obligated to respond. He saw no reason to erode a clear rule with special exceptions.

### C. Detention took too long.

#### 1. Federal law.

The Fifth Circuit issued an opinion reversing a trial court's decision denying a motion to suppress because the officer exceeded the scope of a stop in United States v. Brigham, 343 F.3d 490 (5<sup>th</sup> Cir. 2003), rehearing granted en banc, November 6, 2003. The court has granted rehearing en banc, however, so the decision is not final. In Brigham, an officer stopped a car because he believed the driver was following the car in front too closely. The rental agreement covering the vehicle showed a 50-year-old woman had rented the car, but the officer saw that none of the passengers or driver matched that description. The defendant told the officer his mother had rented the car. After questioning the driver and three passengers for about eight minutes about their trip and where in Houston they had stayed, the officer finally ran a computer check. Later, the defendant gave consent to search the car and the officer found codeine. On appeal, the two-judge majority on the panel found that the officer exceeded the limits of Terry and his questions served drug interdiction purposes unrelated to the scope of the original basis for the stop. Thus, the officer impermissibly prolonged the detention. The defendant's consent given as a consequence of the extended detention was not an independent act of free will. We will have to wait for the decision after rehearing to know whether the panel's decision and analysis will stand.

The court reached a similar result with regard to immigration checks in United States v. Ellis, 330 F.3d 677 (5<sup>th</sup> Cir. 2003). A Greyhound bus stopped at the Sierra Blanca checkpoint and Agent Marquez boarded to make an immigration check of the passengers. By the time he reached the back of the bus, he had assured himself that all of the passengers were legally in the United States. As he returned to the front of the bus, he searched the luggage in the upper bins by removing each piece of luggage and squeezing it to check for soft spots. At one point, he felt a hard, brick-type item in one bag that he believed could be narcotics. He asked the passengers to whom the bag belonged, but no one claimed it. He removed the bag and a drug-detection dog alerted to the piece of luggage. Marquez re-boarded the bus, discovered two more brick-type items, and arrested the defendant. On appeal, the defendant contended that Marquez exceeded the scope of an immigration checkpoint by searching the luggage.

The court held that based upon its decision in United States v. Portillo-Aguirre, 311 F.3d 647 (5<sup>th</sup> Cir. 2002), "when the purpose of a stop switches from enforcement of immigration laws to drug interdiction, a Fourth Amendment violation occurs unless the Border Patrol agent has individualized suspicion of wrongdoing." 311 F.3d at 655. In the instant case, Marquez searched the luggage after the immigration

check solely to look for drugs, without individualized suspicion. The court reversed the case because of the improper extension of the detention occasioned by the agent's luggage search.

The Fifth Circuit Court of Appeals held that a Terry detention lasted too long in United States v. Santiago, 310 F.3d 336 (5<sup>th</sup> Cir. 2002). An officer noticed a flashing light in the defendant's car as he drove by. The officer stopped the defendant's car and asked the defendant to get out of the car. The defendant appeared very nervous. The officer asked the defendant for his license and told him the reason he stopped him was to identify the flashing light. The officer saw a beaded chain hanging from the rear-view mirror with two golf-ball sized crystal balls hanging from either end, and told the defendant that it was illegal in Louisiana to have objects hanging from a car's rear-view mirror. The defendant had a driver's license and license plates from California. The officer asked about the defendant's travel plans and he said he was traveling to Atlanta.

The officer then questioned the passenger, the defendant's wife. After the officer received the registration, he returned to his car to run checks on the driver's license and the registration. Those checks and a criminal history on the defendant came back negative and the officer returned to talk to the defendant. He told the defendant to remove the object from the mirror, and mentioned that a lot of illegal contraband was smuggled down the interstate highways. He asked the defendant whether he had an illegal contraband on his person or in the car and the defendant said that he did not. The defendant consented to a search. Officers noticed the floor seemed too high in the rear hatch area of the car, so they called for a drug-detection dog to come to the location. The dog alerted to the presence of drugs in the car and officers found 21 pounds of cocaine. On appeal, the defendant argued that the detention extended beyond the valid reason for the stop.

The Fifth Circuit Court of Appeals agreed. Initially, the court noted that the officer had a valid reason for stopping the car: Louisiana law prohibits flashing lights on non-emergency vehicles, so the officer legally stopped the defendant's car to investigate the flashing lights. Once he stopped the car, the officer legally investigated the possible violation of the Louisiana statute prohibiting hanging objects from a car's rear-view mirror. Also, the computer checks the officer ran attendant to his investigation were also permissible as part of a legal detention under the facts. Once the computer checks came back negative, however, the officer's justification for the continued detention ended. At this time, the officer did not have reasonable suspicion to believe that the defendant had drugs in the car. As such, facts did not develop that would have justified further

detention to investigate possible drug activity. Because the defendant consented to the search contemporaneously with the illegal continued detention, the taint of the detention rendered the consent invalid.

## 2. Texas law.

An officer may detain an individual if he or she has reasonable suspicion to believe that the person is engaged in criminal activity. Davis v. State, 947 S.W.2d 240 (Tex.Cr.App. 1997). Once the officer finishes the investigation and resolves the issues raising the suspicions, a continued detention is not permitted. Davis, supra at 245. With regard to traffic stops, the officer may detain the individual long enough to resolve the initial suspicions. For instance, if the officer stops a vehicle, he or she may request information regarding driver's license, vehicle ownership and insurance, the driver's destination and the purpose of the trip, as well as inquiring about any traffic violation. See Mohmed v. State, 977 S.W.2d 624 (Tex. App. – Fort Worth 1998, pet. ref'd).

In Wolf v. State, \_\_\_ S.W.3d \_\_\_ (Tex.App. – Waco No. 10-02-00147, delivered May 12, 2004, no pet.), the appellate court held that officers exceeded the length of a proper traffic stop when they held the defendant an additional three minutes in order for another officer to bring a drug-detection dog to the scene.

The San Antonio Court of Appeals held that an officer exceeded the scope of a traffic stop in State v. Kothe, \_\_\_ S.W.3d \_\_\_ (Tex. App. - San Antonio No. 04-02-0199-CR, delivered September 17, 2003, no pet.) (on motion for rehearing, prior opinion of January 29, 2003 withdrawn), 2003 LEXIS 8060. An officer received information about a vehicle being driven erratically. He stopped the car that the defendant drove and in which the defendant's girlfriend rode as a passenger. The officer ran a computer check on the defendant's driver's license number and conducted sobriety tests. He determined that the defendant was not intoxicated and the license check came back negative. The officer was prepared to let the defendant go, but another teletype reported that the defendant's vehicle contained a blue bank bag with antique coins from a home safe. The officer asked the defendant about the coins and the defendant said he had changed them to paper currency. The officer received oral and written consent to search the car and discovered drug paraphernalia in the front seats. The defendant moved to suppress the evidence because the officer exceeded the scope of the initial stop, based on erratic driving and suspicion of driving while intoxicated.

The appellate court agreed, upholding the trial court's decision to suppress the evidence:

Although we agree that a warrant check in the context of a traffic stop is generally viewed as a reasonable law enforcement exercise, it may not be used as a means of extending a detention once the reasonable suspicion forming the basis for the stop has been dispelled. Davis, 947 S.W.2d at 245. . . . The record shows that Deputy Forslund initiated the warrant check after he determined Kothe was not intoxicated. At that point, the reason for detaining Kothe no longer existed, and the record contains no articulable facts demonstrating reasonable suspicion of criminal activity necessary for his continued detention. *Id.* Continued detention must be "based upon articulable facts which, taken together with rational inferences from those facts, would warrant a man of reasonable caution in the belief that continued detention was justified." The teletype alert received by Deputy Forslund, which would have justified Kothe's continued detention, was nonetheless received ten to twelve minutes after the basis for Kothe's detention was resolved.

State v. Kothe, 2003 Tex. App. LEXIS 8060, 9-10 (Tex. App., 2003). Since the officer exceeded the scope of the initial detention, the trial court properly suppressed all evidence discovered subsequent to the detention, including the drugs found on the girlfriend and in the car.

If during a traffic stop an officer develops a reasonable suspicion that narcotics may be inside the vehicle, a temporary detention to allow a drug detection dog to inspect the vehicle does not violate the Constitution. Crockett v. State, 803 S.W.2d 308 (Tex. Cr. App. 1991).

In McQuarters v. State, 58 S.W.3d 250 (Tex. App. – Fort Worth 2001, no pet.), the appellate court considered an officer's extended detention of a defendant after a traffic stop. The officer saw the defendant drive at a slow speed in the passing lane of a highway and cross the center median twice. The officer believed the defendant could be intoxicated or falling asleep at the wheel, so he stopped the car. After getting the defendant to exit the car and explaining the basis for the stop, the officer concluded that the defendant was not intoxicated. The defendant did, however, appear nervous. The defendant and the passenger gave different accounts of where they were going. The vehicle was a rental car and neither the defendant nor the passengers were listed as authorized drivers on the agreement. The officer told the driver he would issue a warning and let them depart. He checked the driver's license and found that it had been revoked. The officer filled out the warning tickets,

returned to the defendant, and told him that since his license had been revoked, the passenger would have to drive. The officer then asked if there were any illegal items in the car and the defendant said, "No." The defendant refused consent to search. The officer retrieved a drug dog from his police car, walked the dog around the defendant's car, and the dog alerted to drugs in the passenger door jam. The officer searched the car and found ten pounds of marijuana.

On appeal, the defendant contended that the marijuana should have been suppressed because the officer had no legal basis to continue the detention. The appellate court agreed that the record did not support a reasonable suspicion that a narcotics violation could be occurring. The officer resolved his suspicion regarding the basis for the stop, possible driver intoxication or fatigue, very soon after obtaining information from the defendant, and had decided to issue a warning. He had informed the defendant and passenger that they would be free to go. There were simply no facts to indicate any criminal activity associated with narcotic offenses. Therefore, the continued detention to investigate possible drug violations violated the law and the evidence should have been suppressed.

#### **D. Insufficient evidence to justify a Terry stop.**

##### **1. Hayes v. State, 132 S.W.3d 147 (Tex.App. – Austin 2004, no pet.).**

In this case, an officer saw the defendant, whom he recognized from prior drug stops, walking down the street, not doing anything in particular. The officer believed that a warrant might have been issued for the defendant's arrest based upon another officer's arrest of two juvenile girls a week earlier for drug possession, where the defendant had been seen exiting the same car as the girls prior to their arrest. The officer approached the defendant, obtained his identification, took it back to the officer's car, and ran the name through the computer to check for warrants. At trial and on appeal, the defendant contended that the officer did not have sufficient facts to support a Terry stop.

The Court of Appeals noted that the officer testified that he had never been told that there was an active warrant for the defendant's arrest, but that he merely relied on another officer's account of the juvenile girls' arrests. This situation differed from that in United States v. Hensley, 105 S.Ct. 675 (1985). In that case, the Supreme Court held that an officer validly relied upon a "wanted flyer" that described the suspect, the offense, and requested other departments to hold the suspect for the police if he were located. The information in the instant case also fell short of that held sufficient in Whiteley v. Warden, 91 S.Ct. 1031 (1971), in which police relied on a radio message issued through a statewide law-enforcement radio network describing the suspect, his car, the property

taken, and stating at least once that an arrest warrant had been issued. In sum, the officer in the instant case did not have sufficient information regarding the possibility of an arrest warrant to support an investigative detention.

##### **2. State v. Losoya, 128 S.W.3d 413 (Tex.App. – Austin 2004, no pet.).**

The Austin Court of Appeals found insufficient information to support a Terry stop in a case involving an anonymous tip. The following facts are taken from the opinion:

Around 2:00 p.m. on October 28, 2002, Killeen Police Officers Amanda Locklear and Keith Drozd were dispatched to 3407 Victoria Circle, apartment D, in response to an anonymous telephone call reporting "narcotics activities" at that address. Drozd testified that the unknown tipster mentioned the names "Vino" and "Terry," and also referred to "a black male" and "a fat white boy." There was no mention of an Hispanic male or of a red Chevrolet S-10 pickup truck. Both officers testified that the Victoria Circle area was known for drug trafficking.

The officers arrived at the scene a few minutes after being dispatched and parked some distance away from the suspect address. A red Chevrolet S-10 and another vehicle were parked outside the apartment. The officers saw two males, one Hispanic and one black, walk out of the apartment. The men briefly conversed, then noticed the two officers walking toward them. The Hispanic male walked over to the S-10, got in, and drove away. The black male entered the apartment and closed the door. The two officers described the men's movements as "hasty" and "quick." The officers testified that they considered the men's actions to be suspicious under the circumstances, but acknowledged that they did not witness any apparent narcotics activity.

Drozd radioed the red pickup truck's description and license plate number. He and Locklear then knocked on the door of the apartment. No one responded, even after the officers identified themselves. As the officers began to return to their patrol vehicles, they heard a radioed report that the red pickup had been spotted nearby on Rancier Street. They drove to the 2900 block of Rancier, where they saw the red pickup being followed by Officer Philip Grey's patrol car. Drozd

testified that he noticed that the pickup did not have a license plate mounted on the front bumper. Instead, the plate was wedged between the dashboard and windshield. Drozd radioed this fact to Grey and instructed him to stop the pickup. At the hearing below, Drozd added that while he could see the license plate in the truck's window, he could not read it because of the glare of the sun on the windshield.

Losoya was the Hispanic man seen leaving apartment D and the driver of the red Chevrolet S-10. After being stopped, he gave the officers written permission to search the pickup. They found a marihuana "blunt" in the glove compartment. Losoya told the officers that the marihuana belonged to him and that he had forgotten it was there. He said that he had gone to the apartment to pick up a video game he had loaned to a person he knew only as "B." He testified that he had removed the license plate from the front bumper while working on the pickup and had temporarily wedged it against the windshield.

State v. Losoya, 128 S.W.3d 413, 413-414 (Tex.App. - Austin 2004, no pet.). The trial court ruled that officers lacked reasonable suspicion to stop the defendant for drug or traffic offenses, and suppressed the evidence. The State appealed.

The Court of Appeals first noted that the anonymous tip provided officers little information. The defendant's presence in a high-crime area would not give officers sufficient information to justify a stop. Absent information corroborating the tip, the officers lacked sufficient information to suspect that the defendant engaged in drug trafficking. Thus, the court affirmed the trial court's decision to suppress the evidence.

3. In re A.T.H., 106 S.W.3d 338 (Tex.App. - Austin 2003, no pet.).

The Austin Court of Appeals found insufficient information to justify an officer's stop of a juvenile based in part on an anonymous tip. The following facts are taken from the opinion:

Austin Police Officer Joe Chavez testified that he was stationed at Travis High School in January 2002. At about 9:40 a.m., he received a phone call from a caller who refused to give his name and told Chavez that he "was near a business or at the business" located about twenty-five feet from the school's eastern fence line. The unidentified caller complained that four juveniles who he

assumed were Travis High School students were smoking marihuana behind the business. Chavez testified that the caller said, "As we're speaking they're walking off and the only person I could really identify for you is a black male wearing a Dion Sanders football jersey." Chavez walked into the eastern parking lot to see if he could intercept the students, and "the only person I saw was, you know, a black man wearing a . . . Dion Sanders football Jersey walking onto the parking lot which is our campus." When Chavez approached, the man, identified at the hearing as A.T.H., was cooperative and told Chavez his name and birth date. Chavez was wearing his uniform, badge, and gun at the time. Chavez did not know A.T.H., so, "For my safety and his safety I asked him--I told him that I was going to, you know, do a pat-down for officer's safety and for his safety." Chavez told A.T.H., "I'm just going to need you to put your hands on top of your head or behind your head," and "right before he did, I hadn't even touched him yet, he reached in his front left pocket and retrieved a clear plastic baggie which contained a green leafy substance." Chavez said, "I was directly behind him - so when he did he had the clear plastic baggie cuffed inside of his hand right here behind his head where it was actually right in front of my eyes at that time." The baggie contained marihuana. On cross-examination, Chavez testified, "It wasn't a search, it's what we call a pat-down just for weapons." He said, "As soon as I, you know, identified him, I told him I was going to do a pat-down, to put his hands back behind his head." Chavez arrested A.T.H., who attended high school elsewhere, and issued a criminal trespass warning.

In re A.T.H., 106 S.W.3d 338, 341-342 (Tex.App. - Austin 2003, no pet.). The trial court overruled the defendant's motion to suppress, finding that Chavez acted reasonably in stopping the defendant based on the tip because the defendant looked similar to the individual described in the tip, and because an officer acting in the same place as a school administrator can search a student based on an "anonymous tip of illegality." *Id.*, 106 S.W.3d at 342.

On appeal, the first issue the appellate court considered regarded the lower standard of proof required for school officials when investigating disruptive or criminal activity on campuses. In New Jersey v. T.R.O., 469 U.S. 325 (1985), the Supreme Court held that school officials need only reasonable suspicion to search a student. The court stated that it

did not need to determine what standard applied to police officers staffed on school campuses because under any standard, Chavez did not have sufficient information to justify the defendant's search. Reasonable suspicion is required to support a brief, investigative detention, and requires less information than that necessary to constitute probable cause. An anonymous tip, by itself, may suffice to initiate an investigation, but will rarely provide sufficient information to justify a full Terry stop. Generally, officers will need to corroborate certain aspects of an anonymous tip before generating enough information to reach reasonable suspicion. Corroboration of details that are easily obtainable at the time the tip is made, however, will not suffice. Rather, officers must corroborate aspects of the tip to confirm its assertion of criminality, not just its tendency to identify a specific person. Corroborating information that can give rise to reasonable suspicion includes details that accurately predict the subject's future behavior not known to the general public, that link the subject to the alleged criminal activity, or that give a particularized and objective reason to suspect the subject.

In the instant case, Chavez did not have sufficient information to support reasonable suspicion. The tipster, who refused to give his name or how he knew what he was reporting, stated that several high school-aged students, one wearing a Dion Sanders jersey, were smoking marijuana on the east side of campus. Chavez saw only one person wearing a Dion Sanders jersey, and did not testify that the defendant exhibited any signs of marijuana intoxication. The defendant did not act suspiciously. The only two facts Chavez corroborated, the defendant's location and attire, did not constitute corroboration at all. As such, Chavez illegally detained the defendant and the evidence discovered as a result of that detention should have been suppressed.

4. Sims v. State, 84 S.W.3d 805 (Tex. App. – Houston [1<sup>st</sup>] 2002, no pet.).

The First Houston Court of Appeals found insufficient evidence to support a Terry stop in this case involving a domestic disturbance: The court summarized the facts of the case:

Around midnight on June 23, 2000, Harris County Deputy Sheriff Ron Rooth responded to a domestic disturbance at the Polly Apartments. Three officers were at the apartment when he arrived, and the officers told Rooth that a black male, "younger in age" had left the scene before they arrived. While walking to his patrol car, Deputy Rooth saw appellant walking in the apartment complex's courtyard, heading in the general direction where the disturbance

occurred. Appellant, who matched the suspect's description, appeared to be intoxicated and was carrying a 40-ounce can of Schlitz malt liquor. Officer Rooth admitted his offense report did not mention appellant's alleged intoxication. Deputy Rooth testified appellant denied being involved in the disturbance and said he was on his way to his "baby's mother's house." When Rooth asked for appellant's identification, he said he had none, but stated his name was "Jason Simms" and provided his date of birth. Deputy Rooth asked appellant to come to the patrol car so he could determine if appellant was involved in the disturbance. He patted appellant down, and placed him in the back of the patrol car where the back doors were locked. Rooth ran a computer check on the name "Jason Simms," but was unable to obtain any information. Leaving appellant in the locked patrol car, Deputy Rooth walked to the apartment appellant said he was visiting. The woman inside denied knowing appellant. Rooth returned and again asked appellant his name, but appellant told Rooth to call his girlfriend. Another officer, who had a cellular phone, called the woman, and she admitted knowing appellant, but said that his last name was spelled with one "m" and gave a different date of birth than appellant earlier reported. With the new spelling of the last name and the new date of birth, a computer check revealed that appellant had an outstanding arrest warrant from Mississippi. An hour after the initial stop, Deputy Rooth arrested appellant and drove him to the police station. When he removed appellant from the back of the patrol car, Rooth discovered a bag of marijuana under the back seat. Rooth testified that he had searched the patrol car before he began his shift, there were no narcotics in it, and appellant was the first person in the back seat of the patrol car since the beginning of Rooth's shift.

Sims, 84 S.W.3d at 807. On appeal, the defendant argued that the trial court improperly overruled his motion to suppress.

The appellate court cited the rule that an officer may stop an individual if the officer has specific and articulable facts that create a reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime. In the instant case, the only facts the officer had were that the

defendant fit the description of the suspect. The court concluded that the officer did not have sufficient information to justify an investigative detention. The appellate court further held, however, that discovery of the arrest warrant attenuated the taint of the illegal detention, so that the trial court did not abuse its discretion in overruling the defendant's motion to suppress.

5. Bass v. State, 64 S.W.3d 646 (Tex. App. – Texarkana 2001, no pet.).

The Texarkana Court of Appeals found insufficient evidence to support a traffic stop in this case. The record showed that the officer noticed the defendant's vehicle swerving outside his marked lane and followed the car for about two to three miles. The officer stopped the vehicle to determine whether the defendant was fatigued, intoxicated, or having a problem that caused the vehicle to swerve. The officer did not observe the defendant's vehicle make any unsafe movements.

On appeal, the defendant argued the evidence did not provide sufficient grounds for the officer to make a traffic stop. The State responded on two bases: the officer believed the defendant could be intoxicated and observed what he believed constituted commission of a traffic offense. With regard to the intoxication argument, the Court of Appeals held that the evidence could not support a reasonable belief that the defendant was intoxicated since the officer testified only that he observed the defendant swerve from his lane into the adjacent lane. The Court of Appeals also rejected the State's argument that the officer reasonably believed the defendant illegally failed to drive within a single lane since the State presented no evidence of unsafe movement. See Hernandez v. State, 983 S.W.2d 867 (Tex. App. – Austin 1998, pet. ref'd). The court concluded that the trial court erred by overruling the defendant's motion to suppress.

6. David v. State, 61 S.W.3d 94 (Tex. App. – Amarillo 2001, no pet.).

The Amarillo Court of Appeals held that officers lacked sufficient information to justify a Terry. Officers were patrolling around midnight in a high drug crime area and noticed several people standing around the sidewalk in front of a house. They stopped at the scene and approached the group. The people, including the defendant, became nervous. The officer had prior dealings with the defendant during "some domestic calls," when the defendant "climbed in the window to the next door before that house burned." [The opinion lacks further explanation of this information, and the court takes the officer's lack of elaboration into account.] The defendant walked to the scene. The officers confronted the defendant, asked for identification, and the defendant gave them his

wallet. For their "safety concerns," the officers patted down the defendant and found a crack pipe. After arresting him, they searched the defendant again and found cocaine.

The trial court overruled the defendant's motion to suppress and the defendant appealed, arguing that the officers lacked specific, articulable facts to support the initial stop. Although the Court of Appeals noted that deference must be accorded the trial court's decisions with regard to credibility, the court reviewed application of the law to the facts *de novo*, citing Guzman v. State, 955 S.W.2d 85 (Tex. Cr. App. 1997). In the case at bar, the evidence showed only that the officers saw four to five people gathered in front of a house in a high crime area and saw the defendant appear nervous and walk back and forth between the house and the yard. The record did not contain evidence that anyone made furtive gestures or attempted to flee, that anyone had engaged in an illegal activity, or that the officers had been summoned to the scene in response to reported crime. The Court of Appeals concluded that the facts did not raise reasonable suspicion to justify a Terry stop.

7. Smith v. State, 58 S.W.3d 784 (Tex. App. – Houston [1<sup>st</sup>] 2001, no pet.).

The court considered a traffic stop based upon information provided by an informer and a narcotics task force officer. The Brazos Valley Narcotics Trafficking Task Force received information from an informer that the defendant would be carrying heroin in his car. She described the car and passengers and gave the general route the defendant would take. One officer gave this information to Officer Bachmann and they established surveillance. Bachmann received a dispatch that the vehicle was in his area. Once he spotted and confirmed the description of the vehicle, he made a traffic stop immediately.

On appeal, the defendant contended that the officer lacked sufficient information to justify the stop. Initially, the Court of Appeals examined the information provided by the informer. The court held that her information did not provide support for an investigative stop because the record did not show she had provided credible information to the officers in the past, or that the information given in this instance would not be known to other persons not connected to the offense. The evidence she gave regarding heroin possession seemed based more on assumption than actual observation. Since Bachmann had no other information upon which to base the stop, he lacked reasonable suspicion.

8. Miscellaneous Terry issues.

If officers have a description of a suspect who has committed a crime and they encounter someone they determine does not match the description, then

continued detention of the person violates the law. State v. Perez, 56 S.W.3d 796 (Tex. App. – Eastland 2001, no pet.), distinguishing Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673 (2000)(Unprovoked flight may be considered in context of the surrounding circumstances with regard to whether reasonable suspicion exists.).

The Houston Fourteenth Court of Appeals held that an officer lacked sufficient information to justify a stop in Klare v. State, 76 S.W.3d 68 (Tex. App. – Houston [14<sup>th</sup>] 2002, pet. ref'd). In this case, the officer first saw the defendant's vehicle at 2:30 a.m., parked behind a shopping center, facing a 24-hour convenience store. The officer could not initially determine the make or model of the defendant's truck, or whether it was occupied. The officer drove off the highway and circled back to investigate the parked truck. He lost sight of the truck for about 15 seconds. When the officer turned into the parking lot, the truck was gone. He went to the adjoining road and found what he thought to be the same truck he had seen earlier. He activated his lights, pulled the defendant over, and ultimately arrested the defendant for driving while intoxicated. At the motion to suppress hearing, the officer testified that burglaries had occurred at the location in the past, but admitted that he had not seen the defendant commit any traffic violations and had not received information regarding any crimes in the area. The court concluded that the officer did not have sufficient information to justify the stop.

In Hall v. State, 74 S.W.3d 521 (Tex. App. – Amarillo 2002, no pet.), two officers received a dispatch regarding an anonymous caller who stated that he or she had seen a red pickup truck traveling the wrong way on a highway. About five minutes after receiving the dispatch, the officers saw a red truck turning around in the parking lot of a closed car dealership located along the side of the highway. They stopped the driver and later arrested him for driving while intoxicated. Neither officer saw the driver commit any traffic violation. The appellate court held that the police did not have sufficient information to justify the stop. An anonymous tip, without more, will rarely provide sufficient information to support a Terry stop. Officers need to corroborate the information or observe additional behavior that would give rise to a reasonable suspicion of criminal activity.

#### **E. Sufficient information.**

In United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744 (2002), the Supreme Court reversed a decision from the Ninth Circuit Court of Appeals and held that the facts supported an investigative detention. Border Agent Stoddard noticed road sensors indicating that a car was traveling on a road not taken by many vehicles. The Court summarized the facts as follows:

Stoddard drove eastbound on Rucker Canyon Road to investigate. As he did so, he received another radio report of sensor activity. Id. at 29. It indicated that the vehicle that had triggered the first sensor was heading westbound on Rucker Canyon Road. He continued east, passing Kuykendall Cutoff Road. He saw the dust trail of an approaching vehicle about a half mile away. Id. at 31. Stoddard had not seen any other vehicles and, based on the timing, believed that this was the one that had tripped the sensors. Id. at 31-32. He pulled off to the side of the road at a slight slant so he could get a good look at the oncoming vehicle as it passed by. Id. at 32.

It was a minivan, a type of automobile that Stoddard knew smugglers used. Id. at 33. As it approached, it slowed dramatically, from about 50-55 to 25-30 miles per hour. Id. at 32, 57. He saw five occupants inside. An adult man was driving, an adult woman sat in the front passenger seat, and three children were in the back. Id. at 33-34. The driver appeared stiff and his posture very rigid. He did not look at Stoddard and seemed to be trying to pretend that Stoddard was not there. Id. at 33. Stoddard thought this suspicious because in his experience on patrol most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave. Id. at 59. Stoddard noticed that the knees of the two children sitting in the very back seat were unusually high, as if their feet were propped up on some cargo on the floor. Id. at 34.

At that point, Stoddard decided to get a closer look, so he began to follow the vehicle as it continued westbound on Rucker Canyon Road toward Kuykendall Cutoff Road. Id. at 34-35. Shortly thereafter, all of the children, though still facing forward, put their hands up at the same time and began to wave at Stoddard in an abnormal pattern. Id. at 35, 61. It looked to Stoddard as if the children were being instructed. Their odd waving continued on and off for about four to five minutes. Id. at 35, 73.

Several hundred feet before the Kuykendall Cutoff Road intersection, the driver signaled that he would turn. Id. at 36. At one point, the driver turned the signal off, but just as he approached the intersection he put it back on and abruptly turned north onto Kuykendall.

The turn was significant to Stoddard because it was made at the last place that would have allowed the minivan to avoid the checkpoint. *Id.* at 37. Also, Kuykendall, though passable by a sedan or van, is rougher than either Rucker Canyon or Leslie Canyon roads, and the normal traffic is four-wheel-drive vehicles. *Id.* at 36, 63-64. Stoddard did not recognize the minivan as part of the local traffic agents encounter on patrol, *id.* at 37, and he did not think it likely that the minivan was going to or coming from a picnic outing. He was not aware of any picnic grounds on Turkey Creek, which could be reached by following Kuykendall Cutoff all the way up. *Id.* at 54. He knew of picnic grounds and a Boy Scout camp east of the intersection of Rucker Canyon and Leslie Canyon roads, *id.* at 31, 53, 54, but the minivan had turned west at that intersection. And he had never seen anyone picnicking or sightseeing near where the first sensor went off. *Id.* at 53, 75.

Stoddard radioed for a registration check and learned that the minivan was registered to an address in Douglas that was four blocks north of the border in an area notorious for alien and narcotics smuggling. *Id.* at 37-38, 66-67. After receiving the information, Stoddard decided to make a vehicle stop. *Id.* at 38. He approached the driver and learned that his name was Ralph Arvizu. Stoddard asked if respondent would mind if he looked inside and searched the vehicle. *Id.* at 43. Respondent agreed, and Stoddard discovered marijuana in a black duffel bag under the feet of the two children in the back seat. *Id.* at 45-46. Another bag containing marijuana was behind the rear seat. *Id.* at 46. In all, the van contained 128.85 pounds of marijuana, worth an estimated \$ 99,080.

United States v. Arvizu, 534 U.S. 266, 270-272 (U.S., 2002). The Ninth Circuit Court of Appeals had considered the facts separately to conclude that the agent did not have reasonable suspicion to stop the vehicle. The Supreme Court reversed its holding, however, and emphasized that when examining such situations, the facts cannot be viewed separately. Rather, the facts must be considered together. Even innocent facts may, when taken together with an officer's experience and reasonable inferences arising from the facts, give rise to a legal basis for an investigative detention.

#### F. Federal law: circuits divided on questions unrelated to stop.

In Florida v. Bostick, 501 U.S. 429 (1991), the United States Supreme Court held that a police officer may question a person without reasonable suspicion or probable cause, as long as a reasonable person would feel free to disregard the request or terminate the encounter. If a person is under arrest or is being detained, officers may question that person about another matter without violating that person's Fourth Amendment rights as long as a reasonable person would be able to disregard the specific request.

When a person is stopped for a traffic violation, questioning unrelated to the stop that prolongs the detention may render the continued seizure unreasonable: if officers want to maintain the detention, they must have reasonable suspicion to support continued seizure. See United States v. Sharpe, 470 U.S. 675 (1985). Federal circuit courts have disagreed on how to evaluate the constitutionality of police questioning that is not connected to the purpose of the traffic stop.

The Fifth Circuit Court of Appeals ruled that the proper focus is simply whether the questioning prolonged the duration of the stop. In United States v. Shabazz, 993 F.2d 431 (5<sup>th</sup> Cir. 1993), officers requested and received consent to search a car while they were waiting for the results of a computer license check after a traffic stop. The court held that since the questioning did not extend the duration of the initial seizure, the detention did not exceed the scope permitted under Terry.

Other federal courts take a different approach. The Seventh Circuit Court of Appeals has ruled that an officer who stops a person for a traffic violation may question that person about matters unrelated to the stop and briefly extend the duration of the stop, as long as the overall stop remains reasonable. United States v. Childs, 277 F.3d 947 (7<sup>th</sup> Cir. 2002), cert. denied, 2000.

The Tenth Circuit Court of Appeals has held that all traffic stops should be treated as Terry stops. In United States v. Holt, 265 F.3d 1215 (10<sup>th</sup> Cir. 2001)(en banc), the court held that in order to determine whether an officer's questioning unrelated to the stop violated the Fourth Amendment, a court should consider how the questioning impacted both the duration and scope of the stop.

Given the division in the circuits regarding the proper analysis to apply when an officer asks questions not related to the basis for the detention during a traffic stop, the Supreme Court will likely have to settle the conflict.

#### X. TERRY SEARCHES.

An officer may conduct a pat-down search if the facts give rise to an objective belief that the suspect

could be armed. In O'Hara v. State, 27 S.W.3d 548 (Tex. Cr. App. 2000), an officer conducted a safety inspection of the defendant's commercial truck. The defendant had a "belt knife" that he gave to the officer. The officer stated that he would allow the defendant to sit in the police car, but the officer would have to frisk the defendant first. At trial, the officer did not testify that he was afraid of the defendant. The Court of Appeals reversed the conviction because of the lack of evidence regarding the officer's fear.

On petition for review, the Court of Criminal Appeals reversed the appellate decision and stated that the facts in the case must give rise to an objective conclusion that the suspect could be armed and dangerous. Specific evidence of the officer's actual fear, however, is not required. Also, according to the Court, even though the defendant had given the officer the knife, other weapons could have been hidden in his clothing.

In Tucker v. State, \_\_\_ S.W.3d \_\_\_ (Tex.App. – Amarillo No. 07-03-0400, delivered May 19, 2004, no pet.), the appellate court held that an officer who stopped the defendant for a traffic violation lacked justification to frisk the outside of a fanny pack the defendant wore at the time of the stop. The officer did not give testimony, nor did testimony come from any other source, indicating that weapons or firearms could be carried in a fanny pack, or that people committing traffic violations or riding motorcycles in the early morning hours were more likely to be dangerous or to be carrying weapons. The only facts used by the officer to justify the frisk were that the officer stopped the defendant for a traffic violation and the officer noticed a large bulge in the defendant's fanny pack. Absent specific, articulable facts that the defendant posed a danger to the officers, a frisk for weapons could not be justified.

The Austin Court of Appeals held that an officer did not have sufficient facts to justify a Terry pat-down for weapons with regard to a juvenile in In re A.T.H., 106 S.W.3d 338 (Tex.App. – Austin 2003, no pet.) (Also discussed supra, with regard to insufficient information to justify Terry stops). In this case, an officer stopped a juvenile based on an anonymous tip. The officer testified that he conducted a frisk only for routine safety concerns. He did not present specific, articulable facts showing the juvenile was armed or possibly dangerous. The juvenile did not act suspiciously or present any danger to the officer before or during the stop. The court held that absent such facts, the officer illegally frisked the juvenile for weapons. The Terry weapons search exception is narrowly drawn and applies only to frisks for weapons conducted for the safety of the officers or others nearby. Even though a "routine" Terry search may not always be invalid, absent specific facts showing the officer's reasonable belief that the juvenile presented a

danger, the routine frisk in the instant case violated the juvenile's Fourth Amendment rights.

The Amarillo Court of Appeals also held that the facts did not raise a reasonable suspicion that the suspect might be armed, thus justifying a Terry pat-down search for weapons. In Davis v. State, 61 S.W.3d 94 (Tex. App. – Amarillo 2001, no pet.), officers were patrolling around midnight in a high drug crime area and noticed several people standing around the sidewalk in front of a house. They stopped at the scene and approached. The people, including the defendant, became nervous. Officers had prior dealings with the defendant during "some domestic calls" when the defendant "climbed in the window to the next door before that house burned." The defendant walked to the house and back to the group several times, but made no attempt to leave the scene. After two officers confronted the defendant, and asked for identification, the defendant gave them his wallet. For their "safety concerns," the officers conducted a pat-down search for weapons and found a crack pipe. After arresting the defendant, the officers searched the defendant again and found cocaine.

After the trial court denied the motion to suppress, the defendant argued on appeal that officers lacked sufficient information to justify the search for weapons. The Court of Appeals noted that a pat-down search for weapons may be made if an officer reasonably believes that a suspect may be armed or dangerous: the record must contain specific and articulable facts that would warrant a reasonable person in the officer's position in the belief that his or her safety, or the safety of others is in danger, citing Terry v. Ohio, 392 U.S. 1 (1968), and Worthey v. State, 805 S.W.2d 435 (Tex. Cr. App. 1991). After reviewing the facts, the court held that officers had no reason to believe that the defendant had a propensity for violence or posed a danger to them. Absent such evidence in the record, the trial court erred in overruling the motion and the Court of Appeals reversed the case.

## XI. RACIAL PROFILING

### A. In general.

After the Supreme Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), officers began to discern patterns regarding reasonable suspicion during criminal investigations. Later, drug courier profiles and other noted patterns of criminal behavior were used to assist officers in translating "officer instinct" into legal methods supported under the Fourth Amendment. Many profiles specifically applied to Hispanics or African Americans as typical drug couriers or persons engaged in the buying or selling of illegal drugs.

About the same time, civil libertarians and defense lawyers became concerned about officers' motives in making stops or investigatory detention.

The Supreme Court ruled in Whren v. United States, 116 S.Ct. 1769 (1996), that an officer's subjective motivation in making a stop or detention is irrelevant under the Fourth Amendment: as long as the officer has a legal basis for taking an action, his or her "improper motive" had no bearing on the case. The Supreme Court did not completely eliminate the pretext doctrine: intentional discriminatory application of the laws can violate the Equal Protection Clause of the Fourteenth Amendment. With regard to simple traffic or Terry stops, however, an objective test applies without regard to the officer's actual subjective, ulterior motive.

Evidence of racial profiling, or interfering with a person's freedom of movement based solely on that person's race or national origin continues to mount. The anecdotal evidence is consistent from state to state. Even though Hispanics or African Americans constitute a minority of drivers, they are stopped, searched, and arrested on a much higher statistical basis than other drivers.

#### **B. Federal profiling issues.**

When the Supreme Court decided Whren v. United States, 116 S.Ct. 1769 (1996), it noted, almost as an aside, the intentional discriminatory application of the laws could violate the Equal Protection Clause of the Fourteenth Amendment. Proof of discriminatory purpose is a necessary element of an equal protection violation. See Washington v. Davis, 426 U.S.229, 96 S.Ct. 2040 (1976). Neither the Supreme Court nor the Fifth Circuit Court of Appeals has held, however, that evidence acquired as a result of a violation of the Fourteenth Amendment' Equal Protection Clause should result in suppression of that evidence at trial.

#### **C. Texas law provides more protection than federal law.**

Racial profiling is one area in which a defendant has greater protection under state law than that provided by federal law. The 77<sup>th</sup> Legislature enacted several laws relating to racial profiling. Article 2.131 of the Code of Criminal Procedure prohibits racial profiling. Article 3.05, V.A.C.C.P., defines racial profiling as a law enforcement-initiated action based on an individual's race, ethnicity, or national origin, rather than on that individual's behavior or on information identifying the individual as having engaged in criminal activity.

Article 2.132 requires each law enforcement agency to adopt a detailed written policy on profiling that includes acts defining racial profiling, prohibits racial profiling, establishes a process by which a person may file a complaint if he or she believes that the agency has engaged in racial profiling with respect to that individual, provides public education, requires corrective action against officers who violate the

policies, require collection of information relating to profiling, and requires the agency to report information collected under the article. The statute provides for video camera and transmitter-activated equipment used on agency vehicles. Article 2.133 requires a peace officer who stops a motor-vehicle for an alleged violation of the law or ordinance, or a pedestrian for any suspected offense, to report information including physical description, gender, ethnicity, traffic law or ordinance violated, whether the officer searched the suspect, whether the officer discovered contraband, whether probable cause existed, whether the officer arrested the suspect because of the stop or search, the location of the stop, and whether the officer issued a citation or warning.

Article 2.134 contains compilation and analysis requirements for the information collected. Article 2.135 provides an exemption from the reporting requirements under Arts. 2.133 and 2.134 if video camera and transmitter-activated equipment are used to document events during each stop. Agencies must retain the videos for at least 90 days after the date of the stop. Article 2.137 provides for funding for video and audio equipment to agencies that cannot afford such equipment.

The general concept is that better record keeping and statistical information regarding stops and detentions will disclose improper racial profiling. The statutes enacted by the Legislature are designed to define, prohibit, and hold agencies responsible for racial profiling.

There are at least two remedies for racial profiling violations under the Texas legislative scheme. First, Art. 2.132 (C)(5), V.A.C.C.P. requires an agency to take appropriate corrective action against an officer shown to have engaged in racial profiling. Thus, if a person believes he or she has been improperly stopped, a complaint may be filed directly with the agency for action against the specific officer involved.

Second, since Art. 2.131 specifically prohibits racial profiling, acquisition of evidence in violation of this law should be subject to suppression under Art. 38.23, V.A.C.C.P. The Texas exclusionary rule applies to exclude any evidence obtained in violation of the law. There must be a causal connection between the acquisition of the evidence and the violation of the law. The discussion later in this paper with regard to juvenile confessions, failure to notify parents of a child's arrest, and causation requirements between violation of a law and acquisition of evidence obtained against an accused should apply to this issue as well. Once a defendant shows that police obtained evidence by racial profiling, that evidence should be subject to exclusion by pretrial hearing on a motion to suppress or by proper objection at trial.

In sum, Texas law now forbids racial profiling. The issue will likely be raised to bar admission of

evidence, as would any other allegation of illegal search or seizure.

## **XII. CONFIDENTIAL INFORMER PRIVILEGE: TEX.RULE EVID. 508.**

### **A. Privilege must be invoked.**

In State v. Sustaita, \_\_\_ S.W.3d \_\_\_ (Tex.App. – Houston [1<sup>st</sup>] Nos. 01-03-00180, 181-CR, delivered April 29, 2004, no pet.), 2004 Tex. App. LEXIS 3994, the trial court initially ordered the State to disclose its confidential informer’s identity. The morning of trial, the State filed a motion for continuance, alleging that it intended to call the confidential informer as a witness in the case, but the informer had been involved in a car accident and had suffered severe head trauma. The State also indicated in the motion that the informer was the officer that had performed the field sobriety tests on the defendant. The defendant did not respond to the motion for continuance, but moved to dismiss the indictments with prejudice under Tex.Rule Evid. 508 (c)(2) because the State had failed to disclose the informer’s identity. The State responded that until three days before trial, the State believed that the defendant planned to plead guilty under a plea agreement, so the State did not need to reveal the informer’s identity yet. The trial court denied the State’s motion for continuance and granted the defendant’s motions to dismiss the indictments with prejudice. On appeal, the State argued that since it had decided to call the informer as a witness, the Tex.Rule Evid. 508 privilege did not apply; thus, the trial court did not have the authority to dismiss the indictments under that rule for the State’s failure to disclose.

The Court of Appeals agreed with the State that it had not invoked the privilege. The State’s motion for continuance contained information regarding the informer’s identity. If the defendant needed more time to prepare for trial with the informer as a witness, the defendant could have joined the State in requesting a motion for continuance. In short, the record did not show that the State invoked the privilege under Rule 508 by refusing to disclose the informer’s identity.

### **B. Informer supplies information upon which the State relies for conviction.**

In Long v. State, \_\_\_ S.W.3d \_\_\_ (Tex.App. – Waco No. 10-00-00305-CR, delivered April 28, 2004, no pet.), 2004 Tex.App. LEXIS 3940, a detective spoke with a confidential informer who said he or she had witnessed the defendant and others manufacturing methamphetamine within the last forty-eight hours from the time of the conversation. The detective obtained a search warrant based in part on the confidential informer’s information. After police executed the warrant, a grand jury indicted the defendant for manufacturing methamphetamine. During the pretrial hearing, the defendant testified that

no one had been at his residence during the two- and-one- half days prior to the search warrant execution. The defendant contended that the informer might have been able to give testimony necessary to a fair determination of guilt.

The Court of Appeals disagreed, noting first that the defendant bears the initial burden of showing that the confidential informer may be able to give testimony necessary to a fair determination of the defendant’s guilt or innocence. See Bodin v. State, 807 S.W.2d 313 (Tex.Cr.App. 1991). Once this preliminary showing is met, then the judge holds an in-camera hearing to allow the State an opportunity to rebut the defendant’s preliminary showing. In the instant case, the detective spoke with the confidential informer on April 8, 1999. He executed the search warrant the next day, on April 9, 1999. The evidence found that day formed the basis of the manufacturing charge. Given the timeline, the confidential informer only supplied information leading to probable cause necessary for the issuance of a search warrant. The informer did not supply information the State needed for a conviction. Thus, the defendant did not sustain his burden of establishing that the informer could provide testimony necessary to a fair determination of guilt or innocence, so the appellate court overruled his point of error.

## **XIII. FRANKS V. DELAWARE ISSUES.**

In Cates v. State, 120 S.W.3d 352 (Tex. Cr. App. 2003), the Court of Criminal Appeals discussed the evidence required to establish a prima facie case of deliberate falsehood in an affidavit supporting a search warrant that will entitle a defendant to a Franks v. Delaware, 438 U.S. 154 (1978), hearing. In this case, police obtained a search warrant for the defendant’s residence based upon information from a confidential informant, who said that he had been inside the defendant’s residence within the past 72 hours and had seen methamphetamine inside. In the affidavit, the officer described the informant as an employed adult who had given reliable information in the past, and who had admitted his own prior drug use but now did not condone the use of drugs. Before trial, the defendant’s attorney filed a motion to suppress alleging that the affidavit contained deliberate falsehoods because the defendant voluntarily went to the police department to file a complaint that Donnie Hope (whom the defendant believed to be the informant) was unlawfully occupying his residence. At no time did he see Hope take possession of a white powdery substance. The police refused to take the criminal trespass complaint from the defendant, and used it instead as a pretext to gain entry to the defendant’s residence. The trial court held a brief pre-trial hearing on the motion to suppress. The State called the officer to the stand, and he testified to the facts in the affidavit.

The defendant called the defendant's wife to the stand, but the State objected on the basis that her testimony would go outside the "four corners" of the affidavit. The trial court heard argument, then overruled the motion to suppress without allowing defense counsel to question the wife or call other witnesses to substantiate his Franks v. Delaware claim.

The Court of Criminal Appeals reviewed the law relative to deliberate falsehoods in an affidavit and noted that in order to obtain a hearing, a defendant must establish three elements:

1. Specifically point out the portions of the affidavit the defendant alleges contain deliberate falsehoods or statements in reckless disregard of the truth;
2. Accompany these allegations with an offer of proof or an affidavit supporting the reasons the statements are falsehoods or statements made in reckless disregard of the truth; and
3. Show that when the portions of the affidavit alleged to be false or made in reckless disregard of the truth are excised from the rest of the affidavit, the remaining information is insufficient to establish probable cause.

In the instant case, the defendant specifically directed the trial court to the portions of the affidavit he believed constituted deliberate falsehoods. Trial counsel also made an offer of proof by informing the trial court of the testimony he intended to offer from the defendant's wife to verify that the statements in the affidavit constituted deliberate falsehoods. Last, the court found that if the portions of the affidavit the defendant contested were removed from the affidavit, the rest of the affidavit did not establish probable cause. The court reversed the conviction and remanded the case to the trial court to conduct a Franks v. Delaware hearing.

Although the Texas Court of Criminal Appeals has not yet ruled on the issue, Franks v. Delaware also applies to material omissions. In Blake v. State, 125 S.W.3d 717 (Tex. App. – Houston [1<sup>st</sup>] 2003, no pet.), the Court considered a Franks v. Delaware issue on appeal. The defendant argued that the trial court erred in denying his motion to suppress because the affiant failed to include information in the affidavit that an informer, a former deputy constable, was a narcotics user. If an affirmative misrepresentation is knowingly include din a probable cause affidavit, and the misrepresentation is material and necessary to establish probable cause, then the warrant is invalid under the Fourth Amendment. Franks v. Delaware, 438 U.S. at 155-6, 98 S.Ct. at 2676. The Houston Court of Appeals recognized that the Court of Criminal Appeals has not ruled directly on material omissions, but the

Fifth Circuit Court of Appeals and other courts of appeals have considered the issue. Blake v. State, Slip op. at 13, citing United States v. Martin, 615 F.2d 318 (5<sup>th</sup> Cir. 1980); Melton v. State, 750 S.W.2d 281 (Tex. App. – Houston [14<sup>th</sup>] 1998, no pet.); and Heitman v. State, 789 S.W.2d 607 (Tex. App. – Dallas 1990, pet. ref'd). In the instant case, the record did not contain evidence supporting the defendant's claim that the affiant intentionally or knowingly, or with reckless disregard for the truth, left important information out of the affidavit. Thus, the appellate court overruled the defendant's point of error.

#### **XIV.KNOCK AND ANNOUNCE REQUIREMENT: EXCLUSION OF EVIDENCE IS REMEDY.**

##### **A. Federal law.**

The United States Supreme Court considered at fifteen to twenty second pause before officers broke a defendant's door down to execute a search warrant in United States v. Banks, \_\_\_U.S.\_\_\_, 124 S.Ct. 521 (2003). In this case, officers knocked and announced their presence at the defendant's apartment, and officers at the back door heard the announcement. They waited 15 to 20 seconds, then broke down the front door and entered. The defendant contended that he did not hear the officers because he was taking a shower at the time of their entry. The Ninth Circuit Court of Appeals devised a four-part test for no-knock entries depending on whether officers damaged property, and held that the officers in the instant case did not wait long enough. The United States Supreme Court granted certiorari to consider whether the officers' entry violated the defendant's constitutional rights.

Although the Fourth Amendment contains no specific language regarding knock and announce, the Court has held that knock and announce requirements are part of the reasonableness inquiry. Thus, officers are required to announce their presence, unless doing so would put them in danger, or inhibit the investigation. In the instant case, the Court held that officers reasonably believed that the defendant could have destroyed drug evidence after they waited 15 to 20 seconds after knocking and announcing their presence. The issue is the officer's reasonable belief that the defendant could destroy evidence in the time period, not whether he could get to the door to let them inside, or could not hear them because he was in the shower at the time they knocked. The Court also focuses on the totality of the circumstances.

##### **B. Texas law.**

Ballard v. State, 104 S.W.3d 372 (Tex. App. – Beaumont No. 2003, no pet.). Officers received information that the defendant was about to manufacture methamphetamine inside his residence.

They obtained a search warrant and entered the residence without announcing their presence. Testimony in support of the “no knock” entry included generalized concerns about methamphetamine labs, and the possibility that the defendant owned a handgun. The appellate court held that the facts did not support the officers’ failure to knock and announce prior to entering the residence.

Price v. State, 93 S.W.3d 358 (Tex. App. – Houston [14<sup>th</sup>] 2002, pet. filed): Opinion on original submission: Police obtained a controlled substances search warrant for the defendant’s residence. The affidavit included a statement that the affiant believed, in his experience, that individuals who were in possession of controlled substances were normally also in possession of firearms and were dangerous. Officers forced their way into the residence without knocking or announcing their entry. The defendant filed a motion to suppress based upon the officers’ failure to adhere to federal knock and announce law. The trial court denied the motion to suppress.

On original submission, the appellate court held that in order for officers to dispense with the knock and announce requirement, specific facts relative to the case under investigation must exist showing reasonable suspicion that announcing their presence would be dangerous or futile, or would inhibit the investigation, such as by allowing destruction of evidence. In the case at bar, the warrant affidavit alleged that persons in possession of illegal drugs usually also possess weapons. The appellate court rejected a per se rule that all drug cases would involve potential weapons and held the State did not present sufficient facts to support the officers’ decision not to announce their entry prior to executing the warrant. Thus, the court reversed the trial court’s judgment and remanded the case.

The State filed a motion for rehearing and the Court of Appeals issued another written opinion. The court addressed preservation of error and rejected the State’s claim that the facts supported a finding that the defendant would destroy evidence if officers announced their presence prior to entry. The State also claimed in its motion for rehearing that the Court of Appeals erred by applying the exclusionary rule to suppress the evidence because there was no causal connection between officers’ violation of the knock and announce rule and acquisition of the evidence. The Court of Appeals considered other jurisdictions and opinions and noted that the vast majority use exclusion of evidence as the remedy when government agents violate knock and announce rules.

The State also argued that even if the officers should have announced their presence, the court should not exclude the evidence because the officers had a search warrant and would have obtained the evidence independently with the warrant, or under the inevitable discovery doctrine. The appellate court rejected

application of these two exceptions to the exclusionary rule. The search warrant was executed in violation of the Fourth Amendment and its execution was directly connected to the officers’ illegal entry into the residence. There was no subsequent search pursuant to a valid warrant truly independent of the illegal entry, so neither the independent source nor the inevitable discovery doctrines applied to justify admission of the evidence.

## **XV. EXCLUSIONARY RULE.**

### **A. Causal connection required.**

Article 38.23, V.A.C.C.P., applies only if there is a causal connection between the illegality and obtaining the evidence. In Gonzales v. State, 67 S.W.3d 910 (Tex. Crim. App. 2002), the Court considered a juvenile’s statement taken before his parents were notified of his arrest. The lower appellate court had assumed that the confession was automatically inadmissible because the officers failed to notify the juvenile’s parents of his arrest. The Court remanded the case to the Court of Appeals to determine whether there was a causal connection between the obtaining the statement and officers’ failure to notify the parents of the juvenile’s arrest. The Court wrote:

Our decisions have established that evidence is not “obtained . . . in violation” of a provision of law if there is no causal connection between the illegal conduct and the acquisition of the evidence. Roquemore v. State, 60 S.W.3d 862 (Tex. Crim. App. 2001); Chavez v. State, 9 S.W.3d 817 (Tex. Crim. App. 2000); State v. Daugherty, 931 S.W.2d 268 (Tex. Crim. App. 1996); Johnson v. State, 871 S.W.2d 744 (Tex. Crim. App. 1994). G. Dix & R. Dawson, 40 *Texas Criminal Practice and Procedure* Sec. 4.57 (2d ed. 2001)(“Article 38.23(a)”s requirement that the challenged evidence have been obtained in violation of the law can be fairly read as imposing some sort of requirement of a causal relationship between the violation of the legal requirement and the “obtaining” or *acquisition* of the evidence at issue.”)(emphasis in original).

Gonzales, 67 S.W.3d at 911. Several cases have been remanded for causality determinations under the Gonzales holding. See Pham v. State, 72 S.W.3d 346 (Tex. Crim. App. 2002); and State v. Simpson, 74 S.W.3d 408 (Tex. Crim. App. 2002).

This analysis should prove useful in considering other types of improperly obtained evidence, such as evidence acquired after a stop based upon racial profiling.

The Austin Court of Appeals required a causal connection between violation of the law and acquisition of the evidence in State v. Molegraaf, 86 S.W.3d 311 (Tex. App. – Austin 2002, no pet.). The defendant drove his car around a temporary barricade erected to control traffic near Sixth Street in Austin. Officers effected a traffic stop and arrested the defendant for driving while intoxicated. At trial, the defendant contended that the City of Austin improperly erected the barricades in contravention of provisions in the Transportation Code, so the officers obtained evidence of the defendant's guilt in violation of the law, citing Art. 38.23, V.A.C.C.P. The trial court suppressed the evidence and the State appealed.

On appeal, the Austin Court of Appeals took note of several opinions, including Chavez v. State, 9 S.W.3d 817 (Tex. Cr. App. 2000), in which an officer violated the defendant's rights in obtaining evidence, thereby rendering Article 38.23 inapplicable. In the instant case, the court found that the Transportation Code rules promote uniform traffic regulations on state highways, and are wholly unrelated to the purpose of the Texas exclusionary rule. That the local authorities did not obtain permission from the Transportation Department prior to erecting the barricade did not affect the defendant's rights when the officers stopped him. Thus, the "violation of the law," i.e., Austin police officers' failure to obtain permission from the State to erect the barricade, did not result in the officers' acquisition of the evidence against the defendant. The appellate court concluded that the trial court erred by excluding the evidence.

#### **B. Jury instruction required.**

In Vrba v. State, 69 S.W.3d 713 (Tex. App. – Waco 2002, no pet.), the defendant testified that he did not cross into the on-coming lane of traffic, contrary to the testimony of the officer. The trial court refused an instruction under Art. 38.23. The Court of Appeals reversed, since an instruction is required when conflicting evidence regarding the right to stop is presented.

The Court of Criminal Appeals held that an instruction was not required in Balentine v. State, 71 S.W.3d 763 (Tex. Crim. App. 2002). In this case, a property owner consented to a search of a building in which he had allowed the defendant to reside. The facts at trial were uncontroverted: the owner testified regarding his control over the building and his authority to consent to search. On appeal, the defendant claimed that the owner did not have the legal right to consent and that the trial court should have given a jury instruction regarding illegally obtained evidence. The Court ruled that since the facts at trial regarding ownership and right to consent to search were not controverted, the trial court was not required to submit a jury instruction under Art. 38.23.

#### **C. No definition of probable cause now (or ever?).**

Middleton v. State, 125 S.W.3d 450 (Tex. Cr. App. 2003): A police officer testified that he saw the defendant run a stop sign, and the defendant testified that he came to a complete stop before proceeding. The officer stopped the defendant, who later consented to a search of his truck, and the officer found drugs behind the ashtray. Defense counsel requested that the trial court instruct the jury pursuant to Art. 38.23 (a). The court refused the defendant's requested charge, but included a paragraph instructing the jury to disregard any testimony and evidence if it had a reasonable doubt whether the officer had probable cause to believe that the defendant did not bring the vehicle he was operating to a stop. On appeal, the defendant argued that the trial court erred by failing to define "probable cause" for the jury. The Court of Appeals held that the definition was not required because the term is not defined by statute. The Court of Criminal Appeals granted review to determine whether the trial court should have defined the term in an Art. 38.23 instruction.

Since the defendant did not object to the trial court's failure to define probable cause at trial, the Court of Criminal Appeals applied the Almanza standard of review: all claimed jury charge error must be considered on appeal, regardless of preservation of error, which becomes relevant only with regard to harm. As a general rule, terms need not be defined in the charge if they are not statutorily defined. Terms that have acquired a technical meaning, however, may need to be defined, especially if there is a risk that the jurors may arbitrarily apply their own personal definitions of the term. Even though the term "probable cause" has acquired a technical legal meaning, in the instant case, there was no risk that the jurors would arbitrarily apply their own meaning. The case involved a single fact question: whether the defendant stopped at the stop sign. Since there was no ambiguity as to the meaning of "probable cause," the trial court did not err by failing to define the term for the jury. The Court affirmed the lower court's judgment, but limited its holding to the facts of the case.

The Court's decision leaves open whether probable cause is ever a jury issue, although Judge Womack's concurring opinion seems to indicate that the term would sometimes need to be defined. Professor Dix suggests, however, that the term would never need to be defined: whether probable cause, reasonable suspicion, or the like exists is a legal question concerning evidence admissibility. Judges decide legal issues, and juries decide factual disputes. Thus, a charge under Art. 38.23 would permit the jury to resolve factual disputes when they arise, but whether those facts add up to probable cause or reasonable suspicion would remain a legal determination for the

judge. Moreover, the charge would properly be worded in Middleton to focus on what the officer observed with regard whether the defendant stopped at the stop sign, not simply whether the defendant stopped or not.

**D. Evidence acquired through commission of crime: admissible if taken by private citizen for crime investigation.**

If a private citizen acquires evidence without the defendant-owner's consent, but does so in order to assist in a criminal investigation, rather than to deprive the defendant-owner of the property, then no theft occurs, and the evidence may be admissible under Art. 38.23 (a). In Cobb v. State, 85 S.W3d 258 (Tex.Cr.App. 2002), officials charged the defendant with the capital murder of two persons. They recovered eighteen knives from his apartment pursuant to a search warrant. The defendant's father gave them five more knives he obtained by entering the defendant's apartment. Although he had authority to be in the apartment, he did not have the defendant's consent to take the knives and give them to officers. On appeal, the defendant argued that the father had, in effect, obtained the knives by theft, rendering them inadmissible under Article 38.23 (a).

The Court of Criminal Appeals noted that the record contained no evidence that the objects were taken from the defendant's residence for the purpose of depriving their owner of them, but rather for the purpose of criminal investigation. The Court referred to Stone v. State, 574 S.W.2d 85 (Tex.Cr.App. 1978), in which a babysitter, who had permission to enter a house to pick up supplies for the children she cared for in her own home, found a stack of photographs depicting the defendant engaging in sexual actions with his own children. She gave the pictures to the police and identified the owner of pictures. The Court held in that case that her action in giving the pictures to the police negated any inference that she wanted to deprive the owner of his property. Based upon this rationale, the Court concluded that the facts in Cobb also indicated that the father did not intend to deprive his son of property. As such, no theft occurred and Article 38.23 (a) did not bar admission.

The San Antonio Court of Appeals used the same analysis to uphold admission of evidence acquired for a criminal investigation by a victim's parents. In this case, the court considered whether the victim's parents committed theft when they took items from the defendant's truck and gave them to the police in Jenschke v. State, 116 S.W.3d 173 (Tex. App. – San Antonio 2003, no pet.). The defendant contended that the parents committed theft, so the trial court should have excluded the evidence under Art. 38.23 (a). The appellate court held that although the record showed that the parents entered the truck without the

defendant's effective consent, the record did not establish that the parents took the property with the intent to deprive the defendant of his property. Rather, they only wanted to obtain the evidence to give it to police to use as evidence in the criminal case. As such, the record did not establish theft and the trial court did not err by failing to exclude the evidence.

**E. Independent source.**

1. General rule.

In United States v. Grosenheider, 200 F.3d 321 (5<sup>th</sup> Cir. 2000), the court discussed application of the independent source rule as an exception to the exclusionary rule. Under this exception, evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality will not be suppressible. In Grosenheider, employees at a computer repair shop viewed child pornography on the defendant's computer. He arrived to pick the computer up, and they contacted local police officer Steven Meaux. He went to the repair shop the next day to speak with employees who had seen the images. When he arrived, they told him that the defendant had returned with the computer because the hard drive was still not working. Meaux later directed one employee to "stall" the defendant, who left the computer at the shop. Meaux completed his interviews of the employees about the images they saw depicting ten year-old girls engaged in sexual contact. When Meaux attempted to view the images, the files on the defendant's computer were "locked" with a password from the day before. Another employee at the shop was able to override the password lock, and show Meaux the images of child pornography.

Meaux took the computer to his office at the Austin Police Department and contacted a United States Customs Service Agent Theodore Siggins to ask if he was interested in pursuing a federal investigation. Siggins agreed to take over the case and began preparing a search warrant affidavit. He included information about what the employees had viewed at the computer repair shop, the defendant's actions in bringing the computer back, and the employee's call to Meaux. Siggins did not mention Meaux's viewing of the images or his seizure of the computer. A magistrate signed the search warrant, Siggins took the computer from Meaux, returned it to the computer shop, and told the employees that he had a warrant and would return the computer after he finished searching it. Siggins then took the computer to his office and made a backup image of the computer's entire hard drive. He found a large amount of child pornography that led to the defendant's conviction under federal law. On appeal, the defendant agreed that the computer search by the shop employees constituted a private party search not subject to suppression. He

argued, however, that when Meaux had the shop employee break the password lock and when he viewed more images than the employees had seen, he exceeded the scope of the search authorized by the initial private party search and violated the defendant's Fourth Amendment rights.

The Fifth Circuit Court of Appeals declined to rule on whether Meaux committed an illegal search because the independent source doctrine permitted admission of the evidence. The Fourth Amendment prohibits introduction of evidence obtained as a result of an illegal search or seizure, and any evidence discovered as a derivative of the initial illegality under the "fruit of the poisonous tree" doctrine. If, however, the connection between the taint of the initial illegality and acquisition of the evidence is sufficiently attenuated, evidence may still be admitted under an exception to the exclusionary rule. One such exception is the independent source doctrine. If unlawfully discovered evidence has an independent and legal source, unconnected with the previous illegality, the evidence may be admitted.

In the instant case, since Siggins obtained a search warrant for the computer based upon information that was totally independent from Meaux's assisted breaking of the password lock. No causal connection existed between Siggins search and seizure of the computer with the warrant, and Meaux's viewing of the images at the shop. Siggins relied solely on information from the employees regarding what they had observed on the computer when he obtained his search warrant. Thus, the independent source rule supported admission of the evidence.

## 2. Applies to seizures, as well.

In United States v. Grosenheider, 200 F.3d 321 (5<sup>th</sup> Cir. 2000), the court considered a possession of child pornography case in which the defendant took his computer to a repair shop for repairs. The employees viewed images of 10 year-old girls engaged in sexual conduct, but returned the computer to the defendant when he claimed it later that day. The next morning, one employee called a local police officer, Meaux, who drove to the shop to interview the employees. When he arrived, the employees told him that the defendant had returned because the hard drive was still not working properly. When Meaux tried to view the images, the files had been password "locked," but another employee bypassed the locks and Meaux confirmed the existence of child pornography images on the computer. He took the computer to his office at the Austin Police Department and called Agent Theodore Siggins, with the United States Customs Service, to determine whether federal agents wanted to pursue a federal investigation. Siggins agreed to take the case and immediately began preparing a search warrant affidavit. After he obtained the warrant, he got

the computer from Meaux, took it to the computer shop, told them he had a search warrant to examine the computer, and would return the computer once he completed the search. Siggins then took the computer back to his office and made a backup image of the computer's entire hard drive, where he found a large amount of child pornography.

On appeal, the defendant argued that Meaux illegally seized the computer from the shop when he held it for four or five hours until Siggins obtained the search warrant. The defendant initially argued that Meaux violated his Fourth Amendment rights by viewing the images after the employee overrode the password lock, but the Fifth Circuit ruled that Siggins' search warrant constituted an independent source for admission of the evidence: in the affidavit, Siggins used only information from the employees regarding the images they saw and nothing regarding Meaux's inspection. With regard to the seizure issue, the court held that the Supreme Court's decision in Murray v. United States, 487 U.S. 533 (1988), specifically found that an independent "re-seizure" can cure an earlier illegal seizure in the same way a valid later search can cure a prior illegal search. The Court rejected the "metaphysical" distinction between searches and seizures, and indicated that so long as the later, lawful seizure is genuinely independent of the earlier, illegal seizure, the independent source rule should apply. This would appear difficult when the item has been in police custody the entire time.

In the instant case, neither Siggins nor Meaux used the computer in any way during the five hours Meaux held it. Siggins conducted his analysis of the hard drive's contents after he obtained the search warrant and seized the computer completely independent of Meaux's viewing of the material after the employee unlocked the files. The court concluded that regardless of the propriety of Meaux's seizure, Siggins' legally re-seized the computer independent from Meaux's actions.

## XVI. MOTIONS TO SUPPRESS.

### A. Evidence Rules do not apply to motions to suppress.

In Granados v. State, 85 S.W.3d 217 (Tex. Crim. App. 2002), the court of Criminal Appeals held that under the Rules of Evidence do not apply to hearings on motions to suppress evidence since the changes to the rules in 1997. In this case, the State charged the defendant with capital murder. The defendant argued that the trial court erred in admitting testimony from one officer concerning what another officer had told him after a phone conversation with another person prior to police entry into the apartment in which the defendant was staying, citing McVickers v. State, 874 S.W.2d 662 (Tex. Crim. App. 1993).

The Court noted that McVickers was decided under former Texas Rule of Evidence 1101(d)(4), which provided that the evidence rules applied to hearings on motions to suppress evidence. The former rule, however, was not incorporated into the current rules. Texas Evidence Rule 101(d)(1)(A) provides that the rules do not apply to questions of fact preliminary to admissibility of evidence when the issue is to be decided by the court under Rule 104. Also, Texas Evidence Rule 104(a) provides that the court is not bound by the rules of evidence, except privilege rules, when making rulings on the admissibility of evidence, except privilege rules. This interpretation of the rules is consistent with that given to the Federal Rules of Evidence. Thus, the Court holds that the rules of evidence do not apply to suppression hearings.

**B. Trial court not required to make findings of fact or conclusions of law on pre-trial motions to suppress issues.**

The trial court is not required to make findings of fact or conclusions of law or to specify the basis of its ruling. In State v. Guo, 64 S.W.3d 662 (Tex. App. – Houston [1<sup>st</sup>] 2001, no pet.), the State argued that the trial court should have made findings of fact and conclusions of law. The appellate court acknowledged that a trial court’s refusal to do so might thwart the State’s ability to appeal adverse rulings under Art. 44.01 (a)(5), V.A.C.C.P. No similar problem exists for the defendant because of the right to appeal after conviction. The State’s right to appeal, however, is limited. Despite expressing sympathy for the State’s plight, the appellate court overruled the State’s points of error. For anyone interested in this case, consider the dissent filed by Justice Nuchia.

**C. If no findings or conclusions are entered, appellate court assumes record supports trial court’s decision.**

If a trial court fails to enter findings of fact or conclusions of law after a hearing on a motion to suppress, the appellate court will assume that the trial court made implicit findings of fact that support the ruling, as long as such a finding is supported by evidence in the record. Bass v. State, 64 S.W.3d 646 (Tex. App. – Texarkana 2001, no pet.), citing Ross v. State, 32 S.W.3d 853, 856 Tex.Cr.App. 2000). The appellate court reviews the trial court’s application of the law to the facts *de novo*, and the decision must be sustained if supported by any theory of law. *Id.*

**D. Trial court may disbelieve State’s witnesses, even if evidence is not controverted.**

The appellate court must do so even if the facts support a reasonable suspicion and the only reasonable conclusion to draw from the trial court’s decision is that the judge disbelieved the State’s witnesses. In

Nash v. State, 55 S.W.3d 110 (Tex. App. – Austin 2001, no pet.), officers testified that they pulled the defendant’s vehicle over because of a possible violation of the window-tinting statute. See Tex. Trans. Code Ann. Sec. 547.613(a)(2)(West 1999). During the stop, one of the officers tested the windows with a tint meter, which indicated a violation. The defendant did not present controverting evidence regarding the window tinting. Although the record contained evidence that could have supported a reasonable belief that the defendant committed a traffic offense justifying a traffic stop, the Court of appeals had to uphold the trial court’s suppression decision if supported by any theory possible from the record. The court concluded that the trial court simply did not believe the officers’ testimony that they initiated the stop to check the window tinting; rather, the officers may have wanted to question the passenger, whom they recognized from prior drug arrests. The Court of Appeals affirmed the trial court’s decision to suppress the evidence discovered subsequent to the stop.

**E. State may appeal trial court suppression of evidence.**

In Medrano v. State, 67 S.W.3d 892 (Tex. Crim. App. 2002), the court overruled Roberts v. State, 940 S.W.2d 655 (Tex. Crim. App. 1996), and held that under Art. 44.01 (a)(5), V.A.C.C.P., the State may appeal any adverse ruling on a pretrial motion to suppress evidence, regardless of whether the defendant alleges the evidence was “illegally obtained,” as long as the other requirements of the statute are met. After Roberts, the State could appeal only those suppression orders based on findings that evidence was illegally acquired. Now, the State may appeal any evidence suppression rulings, such as witness identification, in accordance with the full provisions of Art. 44.01.

**XVII. APPEAL RULES.**

**A. Review of Magistrate’s Determination of Probable Cause.**

In Swearingen (Rodney) v. State, \_\_\_ S.W.3d \_\_\_ (Tex.Cr.App. No. 110-03, delivered June 23, 2004), the Court of Criminal Appeals resolved a conflict between the courts of appeals regarding the appropriate standard of review for a magistrate’s determination of probable cause supporting a search warrant. The Austin Court of Appeals held that the magistrate’s determination is entitled to great deference. State v. Bradley, 966 S.W.2d 871 (Tex.App. – Austin 1999, no pet.). The Fourteenth District Court of Appeals in Houston held that the magistrate’s determination of probable cause may be reviewed *de novo*. Daniels v. State, 999 S.W.2d 52 (Tex.App. – Houston [14<sup>th</sup>] 1999, no pet.).

In Swearingen, a justice of the peace signed a search warrant authorizing a search of a house. A

sergeant with the San Angelo Police Department prepared the affidavit, and alleged that the defendant controlled the house. He also alleged that a confidential informant told him that he was inside the house within the previous 52 hours, and had personally seen the defendant in possession of “a quantity” of methamphetamine. The sergeant stated that the informant had given him reliable information on three prior occasions, and could recognize methamphetamine. When officers executed the search warrant later that day, they found a bag with over forty grams of methamphetamine in plain view two feet from a desk where the defendant was sitting when the officers entered the house.

At trial and on appeal, the defendant argued that the affidavit lacked sufficient information to establish probable cause, in part because the informant did not give a specific quantity of methamphetamine observed. The defendant recognized the split between the courts of appeal regarding the standard to apply to the magistrate’s determination, and argued that the court should apply the de novo standard of review without deference to the magistrate’s determination. The Court of Appeals applied a deferential standard of review and held that the lack of an allegation about the specific amount of methamphetamine observed did not foreclose the possibility that some methamphetamine would be found in the house. Also, the magistrate had a substantial basis for concluding that the defendant possessed methamphetamine, so the trial court did not err in overruling his motion to suppress. The Court of Criminal Appeals granted the defendant’s petition for discretionary review to consider whether the Court of Appeals applied the correct standard of review to the magistrate’s determination of probable cause.

Initially, the Court referred to Illinois v. Gates, 462 U.S. 213, 234-7 (1983), for the traditional standard of review for a magistrate’s determination of probable cause in a warrant: “so long as the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.” In Ornelas v. United States, 517 U.S. 690 (1996), the Supreme Court held that a de novo standard of review applies to probable cause assessments in warrantless searches and reasonable suspicion detentions. In contrast, the Supreme Court noted the distinction between the standards of review applied to the determination of probable cause in warrant and warrantless searches is based on the Fourth Amendment’s strong preference for searches conducted with a warrant and the need for an incentive to encourage police to use the warrant process.

In Swearingen, the Court of Criminal Appeals accepted the federal rationale for state standard of review issues related to probable cause. When a magistrate determines that a search warrant is

supported by probable cause, an appellate court defers to that finding as long as the magistrate had a substantial basis for concluding that probable cause existed. Moreover, when a search is conducted without a warrant, the appellate court reviews the existence vel non of probable cause de novo. Since the appellate court used the correct standard of review in this case, the Court of Criminal Appeals affirmed its judgment.

Judge Cochran filed a dissent, joined by Judges Meyers, Price and Johnson, agreeing with the majority regarding the standard of review applicable to a magistrate’s determination of probable cause, but disagreeing that the affidavit in the instant case reflected probable cause. Without more information regarding the amount of methamphetamine the informant observed, the information in the affidavit could be considered stale. Judge Cochran notes that methamphetamine is a consumable substance and, simply because the informant saw some methamphetamine in the defendant’s house on one day does not support the conclusion that methamphetamine would be present over two days later. The likelihood that evidence sought is still in place is a function of time and the character of the evidence involved. Since the only fact of importance in the affidavit concerned the informant’s observation of “some quantity” of methamphetamine, and since nothing in the affidavit suggested that the methamphetamine would still be present in the house over 52 hours later, Judge Cochran would have found the information stale and insufficient to support probable cause.

#### **B. Defendant not entitled to review of legal sufficiency of jury’s finding pursuant to Art. 38.23 (a) instruction.**

In Hanks v. State, \_\_\_ S.W.3d \_\_\_ (Tex.Cr.App. No. 769-03, delivered June 23, 2004), the Court considered a challenge to an appellate court holding that the defendant was not entitled to a factual sufficiency review of a jury’s implied rejection of his Art. 38.23 (a) issue. Police observed the defendant and an informant in the defendant’s car visit a known drug dealer and make a drug purchase. As they prepared to stop the defendant’s car for a traffic violation, the defendant pulled over on his own. The officers approached the car and arrested the defendant. One officer testified that when he approached the car, he saw the defendant holding a clear bag that contained a white substance later found to be cocaine. Several blue baggies containing cocaine were later recovered from the driver’s seat, and officers found a cocaine rock and drug paraphernalia in the car’s trunk. The defendant testified at trial and denied possessing any cocaine, suggesting instead that the contraband belonged to the informant. The trial court submitted the issue of probable cause to the jury under Article 38.23 (a), and

the jury found that the officers legally seized the cocaine and paraphernalia. On appeal, the defendant argued that the evidence was factually insufficient to support the jury's finding, since the officer "could not truly have seen [the defendant] in possession of cocaine" when he approached the car. The appellate court held that the defendant was not entitled to a legal or factual sufficiency review because the jury's implied finding concerns evidence admissibility, and not an element of the offense. The Court of Criminal Appeals granted review to consider the issue.

Initially, the Court noted that Art. V, Sec. 6, of the Texas Constitution, which provides that courts of appeals shall be conclusive on all questions of fact, does not delineate how appellate courts must review factual sufficiency of every dispute fact issue that arises during trial. Also, the decision in Clewis v. State, 922 S.W.2d 126 (Tex.Cr.App. 1996), requires factual review, not of all disputed factual issues, but of the elements of the offense. The Court rejected the defendant's assertion, and held that factual sufficiency review is appropriate only as to the sufficiency of the State's proof as to elements of the offense. Thus, a defendant may not contest the sufficiency of the evidence to support a jury's implied finding when an Art. 38.23 (a) jury instruction is submitted contesting the legality of evidence obtained and sought to be admitted against the defendant at trial.



## Heitman Tally

- A. Texas Constitution is coextensive with the Fourth Amendment so the same rules apply:
1. Definition of "search." Richardson v. State, 865 S.W.2d 944 (Tex.Cr.App. 1993)(Use the same two-part test to determine whether a search occurred: did the defendant have an expectation of privacy in the area searched and was that expectation reasonable).
  2. Probable cause. Amores v. State, 816 S.W.2d 407 (Tex.Cr.App. 1991), Imo v. State, 816 S.W.2d 474 (Tex. App. - Texarkana 1991, pet. ref'd).
  3. Terry stops and frisks. Davis v. State, 829 S.W.2d 218 (Tex.Cr.App. 1992), Brown v. State, 830 S.W.2d 171 (Tex.App. - Dallas 1992, pet. ref'd), Cook v. State, 832 S.W.2d 62 (Tex.App. - Dallas 1992, no pet.).
  4. Administrative searches. Santikos v. State, 836 S.W.2d 631 (Tex.Cr.App. 1992)(Opinion on appellant's motion for rehearing).
  5. Silver platter doctrine. State v. Toone, 823 S.W.2d 744 (Tex.App. - Dallas, 1992), aff'd on other grounds, 872 S.W.2d 750 (Tex.Cr.App. 1994).
  6. Definition of "seizure." Johnson v. State, 912 S.W.2d 227 (Tex.Cr.App. 1995), appellant's motion for rehearing denied, prior opinion issued June 28, 1995, withdrawn (Plurality opinion), lower court opinion at 864 S.W.2d 708 (Tex.App. - Dallas 1993): Definition of "seizure" under the Texas Constitution is the same as that set forth in California v. Hodari D., 111 S.Ct. 1547 (1991), so that a person is seized if he or she is physically restrained by police, or if he or she yields to a show of police authority. See also Davis v. State, 905 S.W.2d 655 (Tex.App. - Texarkana 1995, pet. ref'd): Johnson's adoption of the Hodari definition of "seizure" applied when the defendant did not respond to the officer's order to stop.
  7. Border searches. Aycock v. State, 863 S.W.2d 183 (Tex.App. - Houston [14th] 1993, pet. ref'd)(opinion on remand).
  8. Attenuation of taint doctrine. Johnson v. State, 871 S.W.2d 744 (Tex.Cr.App. 1994). Attenuation of taint doctrine applies under Art. 38.23, V.A.C.C.P., because the doctrine requires a determination of whether the State obtained evidence in violation of the law.
  9. Pretext doctrine. Crittenden v. State, 899 S.W.2d 668 (Tex.Cr.App. 1995): Objective test applies to stops and arrests, so the officer's actual motive is irrelevant as long as he or she had legal authority to make the stop or arrest.
  10. Use of force in Terry stops. Texas courts follow the federal rule that officers are allowed to use whatever force is reasonably necessary to effect a detention, without converting the detention into an arrest requiring probable cause. Rhodes v. State, 945 S.W.2d 115 (Tex.Cr.App. 1997).
  11. Automobile searches. Texas and federal law are co-extensive with regard to the requirements for a valid automobile search: officers only need probable cause to believe that contraband is located somewhere in the car. There is no additional requirement of exigent circumstances to support an automobile search when the vehicle has been placed in police custody. State v. Guzman and Guzman, 959 S.W.2d 631 (Tex.Cr.App. 1998). The Court overruled prior cases to the contrary, such as Gauldin v. State, 683 S.W.2d 411 (Tex.Cr.App. 1984).
  12. Community caretaking: Texas and federal constitutional law supports recognition of an officer's obligation to help members of society and attendant right to use any evidence acquired during the caretaking actions. Hulit v. State, 982 S.W.2d 431 (Tex.Cr.App. 1998). See also Wright v. State 7 S.W.3d 151 (Tex.Cr.App. 1999).

- B. Texas Constitution provides greater protection than that afforded under the Fourth Amendment:
1. Definition of arrest and warrantless arrest provisions. Chapter 14 of the Code of Criminal Procedure establishes the situations in which an officer may make a warrantless arrest, so federal arrest warrant exceptions have generally have little application in Texas. Of course, under Hulit v. State, 982 S.W.2d 431 (Tex.Cr.App. 1998), the Texas Constitution has no warrant requirement. Chapter 14 is unchanged by Hulit.
  2. No apparent authority doctrine under state consent law. McNairy v. State, 835 S.W.2d 101 (Tex.Cr.App. 1991).
  3. Roadblocks for other than drivers' license checks. State v. Wagner, 810 S.W.2d 207 (Tex.Cr.App. 1991), Miller, J., concurring.
  4. Exclusionary rule. Art. 38.23, V.A.C.C.P.; Johnson v. State, 938 S.W.2d 65 (Tex.Cr.App. 1996). Texas law provides greater protection to citizens because the Texas exclusionary rule applies to violations of the law by government agents and private citizens. State v. Johnson, 939 S.W.2d 586 (Tex.Cr.App. 1996); State v. Tyson, 919 S.W.2d 200 (Tex.App. - Eastland 1996, pet. ref'd). Acquisition of evidence by violation of the law by private parties will not render evidence inadmissible under the federal exclusionary rule.
  5. Inevitable discovery. Garcia v. State, 829 S.W.2d 796 (Tex.Cr.App. 1992), plurality.
  6. Good faith exception to the exclusionary rule. Art. 38.23(b), V.A.C.C.P., Gordon v. State, 801 S.W.2d 899 (Tex.Cr.App. 1990).
  7. Burdens of proof for motions to suppress when no warrant has issued: Guzman v. State, 955 S.W.2d 85 (Tex.Cr.App. 1997)(Almost total deference to historic facts, abuse of discretion for mixed questions of law and fact turning on credibility or demeanor assessments, de novo review of mixed law questions of fact not turning on credibility or demeanor assessments.).
  8. Expectation of privacy in phone numbers dialed. Richardson v. State, 865 S.W.2d 944 (Tex.Cr.App. 1993). Texas citizens have a reasonable expectation of privacy in the numbers dialed from their phones. But see the Amarillo Court of Appeals' decision after remand, Richardson v. State, 902 S.W.2d 689 (Tex.App. - Amarillo 1995, no pet.)(Pen register information did not contribute to probable cause and the defendant had no standing to challenge installation of the pen register, since the pen register did not record the origin of the defendant's calls.).
  9. State must prove consent by clear and convincing evidence. State v. Ibarra, 953 S.W.2d 242 (Tex.Cr.App. 1997)(Court rejects federal standard of proof by a preponderance because prior Texas cases used the higher standard and the State could present no compelling reason to change the law lowering the burden of proof.).
- C. Texas Constitution provides fewer protections than the Fourth Amendment:
1. No warrant requirement. Hulit v. State, 982 S.W.2d 431 (Tex.Cr.App. 1998).
- D. Texas courts' interpretation of United States Constitution:
1. D.W.I. roadblocks. The federal constitution requires that any d.w.i. roadblock must be authorized by a statewide policy emanating from a politically accountable governing body. State v. Holt, 887 S.W.2d 16 (Tex.Cr.App. 1994). This opinion was decided on federal law only.
- E. Grey areas:

1. Plain view and plain touch doctrines. Joseph v. State, 807 S.W.2d 303 (Tex.Cr.App. 1991), State v. Haley, 811 S.W.2d 600 (Tex.Cr.App. 1991).
2. Duration of Terry stop and scope of questioning after the stop.
3. Open fields doctrine. Texas appellate courts disagree on whether the open fields doctrine, which allows search of property beyond the curtilage and premises, should be the same as federal law. In State v. Hobbs, 824 S.W.2d 317 (Tex. App. - San Antonio 1992, pet. ref'd), the court held that the federal open fields doctrine does not apply under federal law.

Cases in which appellate courts have held that Texas and federal law are the same with regard to the open fields doctrine included Barton v. State, 962 S.W.2d 132 (Tex.App. - Beaumont 1998, pet. ref'd); Beasley v. State, 683 S.W.2d 132 (Tex.App. - Eastland 1984, pet. ref'd)(a person does not have a legitimate expectation of privacy in areas extending beyond the premises and curtilage of an area covered by a search warrant) and Rosalez v. State, 875 S.W.2d 705 (Tex.App. - Dallas 1993, pet. ref'd)(Defendant has no expectation of privacy under the Fourth Amendment in open fields surrounding house.).

4. Inventory searches. Gords v. State, 824 S.W.2d 785 (Tex.App. - Dallas, 1992, no pet.), Mayberry v. State, 830 S.W.2d 176 (Tex.App. - Dallas 1992, pet. ref'd). [Note: a plurality of the Court of Criminal Appeals reversed an inventory search in Autran v. State, 887 S.W.2d 31 (Tex.Crim.App. 1994). A majority has yet to rule.].

Courts holding Autran plurality is not precedent: Trujillo v. State, 952 S.W.2d 879 (Tex.App. - Dallas 1997, no pet.)(discussed below); Madison v. State, 922 S.W.2d 612 (Tex.App. - Texarkana 1996, pet. ref'd); and Hatcher v. State, 916 S.W.2d 643 (Tex.App. - Texarkana 1996, pet. ref'd). The only case following Autran is State v. Lawson, 886 S.W.2d 554 (Tex.App. - Fort Worth 1994, pet. ref'd), which the Fort Worth Court of Appeals overruled in Jurdi v. State, 980 S.W.2d 904 (Tex.App. - Fort Worth 1998, no pet.).

F. Predictions (actually, just shots in the dark):

1. Searches incident to arrests. Texas law will probably continue to be consistent with the federal law, although the state courts may narrow the areas in which the officer may search as an incident to arrest. (Belton bright-line test may not be completely followed.)
2. Emergency searches. State courts will likely follow the federal law. (Effect of Brimage v. State, 918 S.W.2d 466 (Tex.Cr.App. 1996) is frighteningly unclear.).
3. Juvenile searches and seizures. State courts will probably follow the federal courts. See Coronado v. State, 835 S.W.2d 636 (Tex.Cr.App. 1992)(Independent state grounds not mentioned.). But see Cornealius v. State, 900 S.W.2d 731 (Tex.Cr.App. 1995).
4. Plain-touch exception. Given that the Supreme Court followed standard Terry and plain view doctrines in recognizing this exception, the Court of Criminal Appeals may also recognize the doctrine under the Texas Constitution. If, however, the Court of Criminal Appeals continues to impose the "inadvertent discovery" requirement for the plain view doctrine under state law, then this requirement will likely be included in any plain-touch exception recognized under Texas law.