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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

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I. INTRODUCTION

THERE were some significant changes to confession, search, and seizure jurisprudence during the 2011 Survey period. As usual, the Supreme Court of the United States delivered opinions that will undoubtedly affect Texas law. This impact will be mainly felt in the area of confessions—especially confessions stemming from custodial interrogation. The Court did, however, touch on one major issue surrounding searches and seizures: whether employees have a legitimate expectation of privacy in using electronic communication devices issued by their employers. With one major exception, the Fifth Circuit Court of Appeals and Texas state courts focused on following Supreme Court precedent and clarified established law. This exception comes from the Texas Court of Criminal Appeals's opinion modifying Texas's version of the Plain View Doctrine.

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II. CONFESSIONS

That "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" is one of many individual rights bestowed upon all citizens by the Fifth Amendment to the U.S. Constitution.[1] To protect this right, in *Miranda v. Arizona*, the U.S. Supreme Court formulated a set of warnings that are an "absolute prerequisite" to interrogation of a suspect in police custody.[2] The reason for *Miranda*'s strong language dictating these warnings as mandatory is that custodial interrogation easily creates an environment so inherently coercive that it violates the Fifth Amendment protection against compelled self-incrimination.[3] Now, over forty years later, police officers must still give all suspects in custody the *Miranda* warnings before interrogation begins, but there is no question the landscape has changed.

Over the years, certain *Miranda*-related issues were repeatedly raised and the Court consistently denied certiorari.[4] Justice Breyer foreshadowed the present, however, in his statement regarding the Court's denial of certiorari in *Bridgers v. Texas*. He predicted that, because police officers frequently read *Miranda* warnings from varying standard forms, the Court might face endless petitions for certiorari concerning effectiveness of *Miranda* warnings.[5] And during the last term the accuracy of his expectation was confirmed—the Court decided to hear *Maryland v. Shatzer*,[6] *Florida v. Powell*,[7] and *Berghuis v. Thompkins*.[8] Exactly how these cases have changed *Miranda*'s landscape is yet to be fully understood, but one thing is certain—all three holdings are sympathetic to law enforcement, which will make it more difficult for defendants to prevail during suppression proceedings.

A. BREAKS IN CUSTODY: THE FOURTEEN-DAY RULE

A detective went to a Maryland prison to interrogate inmate Michael Shatzer about a sexual-abuse allegation.[9] Because Shatzer insisted on having an attorney present during the interrogation, the detective terminated the questioning and closed the case. Two-and-a-half years later—long after Shatzer had been released into the general prison population—another detective attempted to interrogate Shatzer regarding the same allegation. This time Shatzer waived his *Miranda* rights and made incriminating statements. Pursuant to *Edwards v. Arizona* (discussed in detail below) Shatzer moved to suppress these statements. A Maryland trial

1. U.S. CONST. amend. V.
2. Miranda v. Arizona, 384 U.S. 436, 468–72 (1966).
3. *Id.*
4. *See, e.g.*, Bridgers v. Quarterman, 548 U.S. 909 (2006); Bridgers v. Texas, 532 U.S. 1034 (2001); Anthon v. United States, 454 U.S. 1164 (1982).
5. *See Bridgers*, 532 U.S. at 1034.
6. 130 S. Ct. 1213 (2010).
7. 130 S. Ct. 1195 (2010).
8. 130 S. Ct. 2250 (2010).
9. *Shatzer*, 130 S. Ct. at 1217.

judge denied Shatzer's request, reasoning that the *Edwards* protections did not apply because of the break in custody between the first and second interrogations.[10] Then, based partly on Shatzer's statements made during the second interrogation, the trial judge found him guilty of sexual abuse.[11] Holding that "the passage of time *alone* is insufficient to end the protections afforded by *Edwards*," the Maryland Court of Appeals reversed and remanded.[12]

Writing for the majority, Justice Scalia expounded upon the rules announced in *Miranda v. Arizona* and *Edwards v. Arizona*.[13] In *Miranda* the Court held that, before the start of a custodial interrogation, a suspect must be informed: (1) of the right to remain silent; (2) that any statement made by the suspect can and will be used against the suspect in court; (3) that the suspect has the right to consult with an attorney and to have an attorney present throughout interrogation; and (4) the right to have an attorney appointed in the case of an indigent suspect.[14] These *Miranda* rights serve to "protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[15] But the Court determined that "additional safeguards" were needed to protect a suspect's right to counsel at a subsequent interrogation when the suspect had made a request for counsel at a previous interrogation.[16] These safeguards come from *Edwards*, where the Court held that when a suspect demands an attorney during custodial interrogation, an officer may not further interrogate the suspect until an attorney is made available or the suspect independently initiates communication with the officer.[17]

In *Shatzer*, the Court addressed whether an officer may, after a break in custody, reinitiate custodial interrogation of a prisoner who previously asserted his Fifth Amendment right to counsel.[18] The "inherently compelling pressures" of custodial interrogation led the Court to conclude that Shatzer was in custody for purposes of Miranda. And police officers read the Miranda warnings to Shatzer before his initial and subsequent interrogations. In its holding, the majority explained a prisoner's waiver of *Miranda* rights at a subsequent interrogation, coupled with a break in custody of at least fourteen days, adequately protects against the coercive affects of custodial interrogation.[19] The Court also held that the release of a prisoner into the general prison population is a break in custody for the purposes of the Fifth Amendment.[20] "[L]awful imprisonment im-

10. *Id.*
11. *Id.*
12. *Id.* at 1218.
13. *Id.* at 1219–24.
14. Miranda v. Arizona, 384 U.S. 436, 467–73 (1966).
15. *Id.* at 467.
16. Edwards v. Arizona, 451 U.S. 477, 484 (1981).
17. *Id.* at 484–85.
18. *Shatzer*, 130 S. Ct. at 1218.
19. *Id.* at 1223.
20. *Id.* at 1224–25.

posed upon conviction of a crime does not create the coercive pressures identified in *Miranda*." Therefore, release back into the general prison population after interrogation is a break in *Miranda* custody.

If the Court decided *Edwards* never lets police reinitiate interrogation after a break in custody, too many suspects would never be questioned. A suspect would only have to ask for a lawyer and the suspect would always be shielded from questioning—even if decades go by and the police gathered mounds of new evidence. The Court even noted that without a limit on *Edwards*, the rule would bar questioning on completely different crimes than the crime a suspect was first questioned about.[21] But if the Court decided that *Edwards* could be brushed aside by any break in custody, law enforcement would have almost unbridled discretion in questioning a suspect.[22] Police could simply first release a suspect who demanded a lawyer then immediately re-arrest the suspect, opening the door to further questioning without a lawyer, and the *Miranda* right to counsel would be rendered meaningless.[23]

Thus, the Court faced a tough decision. The majority explained that "the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis," and therefore subject to the Court's revision.[24] The majority also noted that "[l]ower courts have uniformly held that a break in custody ends the *Edwards* presumption."[25] After discussing costs and benefits of the *Edwards* rule, the Court decided there was no justification to extend it.[26] Therefore, after a sufficient break in custody, repeating the *Miranda* warnings to a suspect is enough to ensure that reinitiating interrogation will not infringe upon that suspect's rights.[27]

But choosing how long the break in custody must be to satisfy the purpose of *Edwards*—to protect a suspect's right to counsel at a subsequent interrogation when the suspect had made a request for counsel at a previous interrogation—was no easy task. With no guideposts to follow, the Court came up with fourteen days.[28] While appearing to be an arbitrary number, as the Court points out it is a number police need to know; they cannot be left to guess whether a break in custody lasted long enough to re-question a suspect, especially when time is of the essence.

The Court stated fourteen days "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[29] But why is a fourteen-day break in custody long enough for a suspect to get back into the ordinary rhythm of life? Why not five days? Why not thirty

21. *Id.* at 1222.
22. *See id.* at 1223.
23. *See id.*
24. *Id.* at 1220.
25. *Id.* (citing People v. Storm, 52 P.3d 52, 61–62 (Cal. 2002) (internal citations omitted) (collecting state and federal cases)).
26. *Id.* at 1222.
27. *Id.*
28. *See id.* at 1223.
29. *Id.*

days? These questions have yet to be answered. Thus, the Court's new fourteen-day rule regarding the invocation of the right to counsel is open to attack—something prosecutors and defense attorneys should keep in mind.

In *Herrera v. State*, the Court of Criminal Appeals "refuse[d] to equate incarceration with 'custody' for purposes of *Miranda* when an inmate is questioned by a state agent about an offense unrelated to the inmate's incarceration."[30] The court explained that to determine whether the interrogation of an inmate constitutes *Miranda* custody, certain factors should be evaluated:

> (1) the language used to summon the inmate;
> (2) the physical surroundings of the interrogation;
> (3) the extent to which the inmate is confronted with evidence of his or her guilt;
> (4) the additional pressure exerted to detain the inmate or the change in the surroundings of the inmate which results in an added imposition on the inmate's freedom of movement; and
> (5) the inmate's freedom to leave the scene and the purpose, place, and length of the questioning.[31]

The Supreme Court in *Shatzer*, however, opined that there is no question that Shatzer was in custody during both of his interrogations.[32] During Shatzer's first interrogation, the officer told Shatzer that the interrogation was unrelated to his incarceration. And Shatzer's second interrogation took place away from the general prison population in a maintenance room equipped with a desk and chairs. Some *Herrera* factors were present in *Shatzer* and some were not. Thus, it is unclear whether *Shatzer* undermines or is consistent with *Herrera*. For the time being, Texas attorneys should continue to use the *Herrera* factors to determine custody in the prison context—it should not be assumed that *Shatzer* means incarceration is per se *Miranda* custody.

As of the writing of this article, *Shatzer* has had some, albeit little, impact in Texas federal courts—"it has been" cited in only three cases, two which do not involve the fourteen-day rule. In *Cooper v. Thaler*, the Southern District of Texas used *Shatzer* as authority in holding a suspect can waive *Miranda* rights.[33] While not a novel concept, the facts in *Cooper* did not involve a break in custody plus a subsequent interrogation. Similarly, in *United States v. Velasco-Garcia*, the Southern District of Texas used *Shatzer* in determining a traffic stop did not constitute *Miranda* custody.[34] The facts in *Velasco-Garcia*, however, did not involve interrogating someone in custody, a break in custody, then reinterrogating the same person. Thus, *Cooper* and *Velasco-Garcia* do not give any guidance as to how *Shatzer* will ultimately change jurisprudence in

30. 241 S.W.3d 520, 532 (Tex. Crim. App. 2007).
31. *Id.*
32. *Shatzer*, 130 S. Ct. at 1224.
33. No. H-09-2261, 2010 U.S. Dist. LEXIS 35466, at *25 (S.D. Tex. Mar. 31, 2010).
34. No. C-10-910, 2010 U.S. Dist. LEXIS 124043, at *19 (S.D. Tex. Nov. 23, 2010).

Texas's federal courts. In *United States v. Mendez-Arredondo*, the Southern District of Texas did, however, use *Shatzer's* fourteen-day rule.[35] In that case, the defendant was detained after crossing a bridge between the United States and Mexico. He requested an attorney during his initial interrogation, thus the officer terminated the questioning. Later the same day, a different officer read the defendant his *Miranda* rights and obtained a confession. The court held that, because the defendant was subjected to reinterrogation before "an attorney was made available, the Defendant himself reinitiated communication, or there was a fourteen day break in Defendant's custody," his Fifth Amendment rights were violated.[36] Thus, the court granted the defendant's motion to suppress.[37] *Mendez-Arredondo* indicates that federal courts in Texas will abide by *Shatzer*'s fourteen-day rule under the right facts.

Shatzer has been discussed twice in Texas state cases. In *Pecina v. State*, the Fort Worth Court of Appeals cited to *Shatzer* but only during an explanation of *Edwards v. Arizona*.[38] The court of appeals noted *Shatzer* added the fourteen-day rule to the *Edwards* rule.[39] Because there was no break in custody, however, the court of appeals did not apply *Shatzer* to *Pecina*.[40] The Beaumont Court of Appeals also cited *Shatzer* when explaining *Edwards*.[41] But, like the *Pecina* court, because there was no break in custody, that court did not apply *Shatzer*. The Beaumont Court of Appeals made no mention of the fourteen-day rule.[42]

B. *Miranda*'s Right-to-Counsel Warning

In *Florida v. Powell*, the Supreme Court considered whether warnings that "a suspect has 'the right to talk to a lawyer before answering any of the law enforcement officers' questions,' and that he can invoke this right 'at any time . . . during the interview,'" satisfy *Miranda*.[43] The Court held the warnings sufficient.[44]

Tampa police officers found Powell, who was under investigation for robbery, at his girlfriend's apartment as he was leaving the bedroom. A search of the bedroom produced a loaded handgun. As a convicted felon, Powell was placed under arrest and taken to police headquarters. Before interrogation, he was read the Tampa Police Department Consent and Release Form. Powell acknowledged that he understood his rights. He also said he was willing to speak to the officers. Then, after signing the Consent and Release Form, Powell admitted to owning the handgun.

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35. No. L-10-902, 2010 U.S. Dist. LEXIS 99463, at *12–13 (S.D. Tex. Sept. 21, 2010).
36. *Id.*
37. *Id.* at *13.
38. 226 S.W.3d 249, 260 (Tex. App.—Fort Worth July 15, 2010, pet. granted).
39. *Id.*
40. *See id.* at 253–55.
41. Spence v. State, No. 09-08-00369-CR, 2010 Tex. App. LEXIS 4725, at *10 (Tex. App.—Beaumont June 23, 2010, pet. denied).
42. *Id.*
43. 130 S. Ct. 1195, 1199–1200 (2010) (quoting *Miranda*, 384 U.S. at 471).
44. *Id.* at 1200.

In support of his motion to suppress the statement admitting handgun ownership, Powell argued in trial court that the *Miranda* rights read to him were insufficient because they did not apprise him of the right to have an attorney present during interrogation. Opining that the officers properly put Powell on notice of his right to an attorney, the trial judge denied Powell's motion to suppress and convicted him of unlawful gun possession.[45] But because the Florida appellate court believed the *Miranda* warnings did not adequately inform Powell of his right to have an attorney present during questioning, the court held Powell's incriminating statements should have been suppressed.[46] Determining that "the advice Powell received was misleading because it suggested that Powell could 'only consult with an attorney before questioning,'" the Florida Supreme Court agreed with the lower court.[47]

After highlighting why the U.S. Supreme Court had jurisdiction to hear *Powell*, it undertook a discussion of *Miranda*. The Court found the warnings given to Powell—that "a suspect has 'the right to talk to a lawyer before answering any of the law enforcement officers' questions,' and that he can invoke this right 'at any time during the interview'"—satisfied *Miranda*.[48]

Because "the circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of [an individual] merely made aware of" the right to remain silent, the *Miranda* rule that a suspect being questioned "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation" is an "absolute prerequisite to interrogation."[49] But, according to the Court, there are no exact words necessary to adequately convey this right.[50] In fact, in the past, the Court stated that when determining the adequacy of *Miranda* warnings, there is no requirement that lower courts review the words used "as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings 'reasonably convey to a suspect his rights as required by *Miranda*.'"[51]

The Court held the warning given to Powell satisfied this standard of reasonableness.[52] The first portion of the warning, that Powell had the right to consult with an attorney before answering any questions, conveyed to Powell exactly what it stated—that he could speak to an attorney before the interrogation began.[53] And the second portion of the warning, that Powell can invoke this right at any time during the interview, conveyed to Powell "that he could exercise [his] right while the in-

45. *Id.*
46. *Id.*
47. *Id.* at 1201 (quoting State v. Powell, 998 So. 2d 531, 541 (Fla. 2008)).
48. *Id.* at 1199–1200.
49. *Id.* at 1203 (quoting *Miranda*, 384 U.S. 469–71).
50. *Id.* at 1204 (citing California v. Prysock, 453 U.S. 355, 359 (1981)).
51. *Id.* (quoting Duckworth v. Eagan, 492 U.S. 195, 203 (1989)).
52. *Id.* at 1205–06.
53. *Id.* at 1204–05.

terrogation was underway."[54] The Court concluded that "[i]n combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times."[55] In the Court's opinion, it would have been unreasonable for Powell to interpret the warning in any other way.[56]

Does the decision in *Powell* expand the language that may be used to convey *Miranda* warnings? Or does it approve using more limited warnings? Either way, it is now clear that police officers do not have to explicitly inform a suspect of his or her right to have an attorney present during interrogation. The Court wrote that the right-to-counsel warning used by the Federal Bureau of Investigation (FBI) is "exemplary" because it states that: "You have the right to talk to a lawyer for advice before we ask you any questions [and] the right to have a lawyer with you during questioning," but "its precise formulation [is not] necessary to meet *Miranda's* requirements."[57] Because the FBI warnings and the warnings given to Powell both satisfy *Miranda*, and one explicitly states an accused has the right to an attorney during questioning while the other does not, it is clear that police officers have considerable leeway in administering the right-to-counsel warning.[58] Article 26.13 of the Texas Code of Criminal Procedure provides a list of admonishments that a trial judge must give to a defendant before accepting a plea of guilty or *nolo contendere*.[59] But the court only has to substantially comply with these admonishments.[60] Now, based on *Powell*, it appears substantial compliance is also part of the *Miranda* rule.

The warning, however, must still reasonably convey to a suspect that he or she has the right to counsel before and throughout the entire interrogation.[61] Thus, a defendant can still prevail in a motion to suppress statements made after an unreasonable or non-existent right-to-counsel *Miranda* warning.[62] Therefore, defense attorneys must investigate the exact language used by law enforcement. If the right to counsel warning was unreasonably conveyed, unclear, or non-existent, *Powell* might benefit the defendant in a motion to suppress.

Powell had even less of an impact than *Shatzer* in Texas courts. *Powell* has not been used in any Texas state cases and has come up sparingly in Texas federal cases. In *United States v. Strother*, the district court found that the arresting officer read the complete set of *Miranda* warnings to the defendant.[63] The Fifth Circuit used *Powell* as authority in holding the

54. *Id.* at 1205.
55. *Id.*
56. *Id.*
57. *Id.* at 1206.
58. *See id.*
59. TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2010).
60. *Id.* § (c).
61. *See Powell*, 130 S. Ct. at 1205.
62. *See id.* at 1205–06.
63. No. 09-40169, 2010 U.S. App. LEXIS 17765, at *3–4 (5th Cir. Aug. 18, 2010).

district court's finding was not clearly erroneous.[64] The Fifth Circuit, however, did not discuss the right-to-counsel warning. Thus, *Strother* gives no guidance as to how the Fifth Circuit will interpret *Powell.*

C. Implied Waiver of *Miranda* Rights

In *Berghuis v. Thompkins*,[65] a shooting in Michigan left one victim dead while another survived. Thompkins, a suspect in the shooting, successfully evaded police for close to a year, but was later found and arrested in Ohio. Two Michigan police officers traveled to Ohio to interrogate Thompkins.

The interrogation took place in an eight foot by ten foot room and lasted nearly three hours. Similar to the events in *Powell*, the interrogation of Thompkins began with the reading of a standard *Miranda* form. There was no conflict as to whether the form complied with *Miranda*; it included all the necessary warnings. But there was a conflict as to whether Thompkins verbally acknowledged understanding the rights contained in the form. An officer asked Thompkins to read the fifth warning aloud, which Thompkins did, but he refused to sign the form.

Other than an occasional "yeah, no, or I don't know," Thompkins remained virtually silent for the first two hours and forty-five minutes of the interrogation.[66] Telling the officers that his chair was hard and that he did not want a peppermint were the only other things Thompkins said during this time; he never requested an attorney, stated he wished to remain silent, or stated he did not want to speak to the officers. Officer Helgert then asked Thompkins, "Do you believe in God?"[67] Thompkins responded that he did.[68] Officer Helgert then asked, "Do you pray to God?"[69] Thompkins again answered in the affirmative.[70] Finally, Officer Helgert asked, "Do you pray to God to forgive you for shooting that boy down?"[71] Thompkins again said "[y]es."[72] Thompkins argued in a motion to suppress that he invoked his Fifth Amendment right to remain silent, thus requiring the officers to end the interrogation immediately. He also argued that he at no time waived this right, and therefore his statements were involuntary. The trial judge denied Thompkins's motion to suppress, and a jury found him guilty of murder.[73] He was later sentenced to life without parole.[74] The trial judge denied his motion for new trial.[75] The Michigan Court of Appeals held that Thompkins had not in-

64. *Id.*
65. 130 S. Ct. 2250 (2010).
66. *Id.* at 2256–57.
67. *Id.* at 2257.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 2257–58.
74. *Id.* at 2258.
75. *Id.*

voked his right to remain silent but had waived it.[76] He requested habeas relief from the federal district court but was unsuccessful.[77] Moving up the appellate chain, the Sixth Circuit granted Thompkins relief, reasoning he had not impliedly waived his right to remain silent.[78]

The U.S. Supreme Court rejected Thompkins's argument that he invoked his right to remain silent.[79] The Court held that when determining whether an accused has invoked the right to remain silent, courts must use the standard for determining whether the right to counsel was invoked.[80] This standard requires the accused to "unambiguously" invoke the right to counsel.[81] If an accused makes no statement regarding counsel or makes a statement that is "ambiguous or equivocal," then the right to counsel was not invoked.[82] The same now holds true when invoking the right to remain silent.[83] Because efficient law enforcement is a must, when faced with ambiguity "police are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights."[84] Here, Thompkins did not unambiguously invoke his right to remain silent.[85] If he said "that he wanted to remain silent or that he did not want to talk with the police," he would have invoked his right, but he made neither statement.[86]

The Court then addressed whether Thompkins waived his right to remain silent. The Court stated that, when an accused fails to invoke the right to remain silent, any statement made during an interrogation is inadmissible according to *Miranda* "unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived *Miranda* rights' when making the statement."[87] The Court also noted that *Miranda* seems to suggest that without "an explicit written waiver or a formal, express oral statement," the prosecution will have a hard time establishing a waiver by the accused.[88] But, according to the Court, some of its decisions since *Miranda* ease the prosecution's burden.[89] Through *Thompkins*, the Court reiterated *Miranda* rights can be "impliedly waived 'through the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'"[90] It seems *Thompkins* invalidates *Miranda*'s suggestion that "an explicit written waiver or a formal, express oral statement" is required to waive *Miranda*

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 2259.
80. *Id.* at 2260.
81. *Id.* at 2259.
82. *Id.* at 2259–60 (internal citations omitted).
83. *Id.* at 2260.
84. *Id.* at 2259–60.
85. *Id.* at 2260.
86. *Id.*
87. *Id.* (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).
88. *Id.* at 2261.
89. *Id.* (citing *Butler*, 441 U.S. at 370–72, 376.
90. *Id.* (quoting *Butler*, 441 U.S. at 373).

rights.[91] The practical effect of *Thompkins*: (1) allows an implied waiver of *Miranda* rights if the prosecution establishes the accused was given *Miranda* warnings, understood them, and made uncoerced statements; and (2) statements of an accused will be admissible in court, even when an explicit waiver did not precede interrogation.[92]

The Court held that Thompkins waived the right to remain silent.[93] "There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak."[94] The fact that Thompkins was given a copy of the *Miranda* form, that he understood English, and that he read the fifth warning aloud shows he understood his rights.[95] Thompkins's responses to Officer Helgert's questions about praying to God further constituted "a course of conduct indicating waiver" of the right to remain silent.[96] Last, the Court concluded that Thompkins's statements were not coerced.[97]

From *Powell*, we learn police officers do not have to explicitly inform a suspect of his or her right to have an attorney present during interrogation to comply with *Miranda*.[98] Similarly, *Thompkins* teaches us that *Miranda* rights can be waived by an accused even when the interrogating officer does not explicitly discuss the waiver with the accused.[99] *Miranda* warnings must still be given, the accused must still understand them, there must be conduct constituting waiver, and statements made cannot be coerced, but it appears the Court opened the door to implied waivers becoming commonplace.[100] And the Court's holding in *Thompkins* should not be read too narrowly. Because the Court analyzed invoking the right to remain silent in the same analysis used to determine whether the right to counsel has been invoked, there is no reason to believe the Court's implied-waiver discussion will apply only to the right to remain silent; it will likely apply to all *Miranda* rights.[101]

As evidenced by Justice Sotomayor's blistering dissent in *Thompkins*, there will undoubtedly be some question as to the strength of implied waivers.[102] Although absence of an explicit waiver of *Miranda* rights no longer forecloses the possibility of custodial interrogation, police officers wanting to avoid suppression should obtain explicit waivers. This is likely the most effective way to ensure the admissibility of any statements elic-

91. *Id.* at 2260–61.
92. *See id.* at 2261–62.
93. *Id.* at 2262.
94. *Id.*
95. *Id.*
96. *Id.* at 2263.
97. *Id.*
98. *See generally* Florida v. Powell, 130 S. Ct. 1195 (2010).
99. *See Thompkins*, 130 S. Ct. at 2264.
100. *See id.*
101. *See id.* at 2260.
102. *See generally id.* at 2266–78 (Sotomayor, J., dissenting).

ited from an accused. But, should an explicit waiver fail, a court might find an implied waiver to be valid.

Thompkins has not been a major player in Texas law during this Survey period. In *United States v. Whitmore*, the Fifth Circuit used *Thompkins* as authority to reiterate the proposition that, "[u]nder *Miranda*, a 'suspect must unambiguously request counsel.'"[103] The court explained that *Thompkins* extended this principle to the right to remain silent.[104] And, based on *Thompkins*, the court held one of the defendants did not unequivocally invoke his right to counsel when he asked "how he could go about getting a court appointed attorney."[105] The court's application of *Thompkins* did not center on the principles discussed above—that (1) implied waivers of *Miranda* rights are permissible if the prosecution establishes that the accused was given *Miranda* warnings, understood them, and voluntarily made statements; and (2) to be admissible in court, an accused need not make an explicit waiver before interrogation begins. Thus, *Whitmore*, one of the few cases in which the Fifth Circuit mentioned *Thompkins*, offers little (if any) insight into how *Thompkins* will affect Texas law. *Thompkins* appears in one other Fifth Circuit case, but the court only mentioned it in a discussion of what standard federal courts must apply when petitioners seek habeas relief from state-court decisions.[106]

Texas state courts discussed *Thompkins* even less than the Fifth Circuit. In *Estrada v. State*, the appellant was not in custody while questioned by the police; thus, he was not entitled to be informed of his *Miranda* rights.[107] An officer did, however, inform the appellant of his *Miranda* rights and that he was allowed to leave. But the appellant made it clear that he was there on his own volition. Without expressly waiving any rights, the appellant confessed to the crime while giving a voluntary statement to the police. The Texas Court of Criminal Appeals explained, based on *Thompkins*, that "the totality of the circumstances indicate that appellant knowingly waived [his *Miranda* rights]."[108] The court opined that *Thompkins* made it clear that the "prosecution does not need to show that a waiver of *Miranda* rights was express."[109] It is now entirely possible that many suspects in Texas will inadvertently waive their rights during interrogation, something both prudent prosecutors and defense attorneys must pay close attention to.

103. 386 F. App'x. 464, 470 (5th Cir. 2010) (quoting Davis v. United States, 512 U.S. 452, 459 (1994)).

104. *Id.*

105. *Id.*

106. Paredes v. Thaler, 617 F.3d 315, 318–19 (5th Cir. 2010).

107. 313 S.W.3d 274, 289–93 (Tex. Crim. App. 2010).

108. *Id.* at 300.

109. *Id.* (citing *Thompkins*, 130 S. Ct. 2250, 2261–62).

III. SEARCHES AND SEIZURES

A. EMERGING TECHNOLOGY IN THE WORKPLACE

During this Survey period, the Supreme Court only granted certiorari in two cases involving Fourth Amendment issues. One case is *City of Ontario v. Quon*.[110] In 2001, the City of Ontario, California purchased alphanumeric pagers with text-messaging capabilities and distributed them to certain officers in the Ontario Police Department (OPD), including Officer Jeff Quon. The City issued a "Computer Usage, Internet and E-Mail Policy" to each officer that received a pager.[111] The policy stated "the City reserve[d] the right to monitor and log all network activity . . . [u]sers should have no expectation of privacy or confidentiality when using [the pagers]."[112] Arch Wireless (Arch) established a plan with the City giving each pager a certain number of characters that could be sent and received each month. The City incurred additional fees for usage exceeding the allotted amount. When Quon and others exceeded their monthly limits multiple times, the OPD chief obtained transcripts of text messages from Quon and another employee. The OPD audited the transcripts to determine if the overages were due to work or personal messages. Upon examining the transcripts, the OPD learned that many of Quon's messages were personal in nature and some contained sexually explicit material. OPD's internal affairs division handled the situation and Quon was reprimanded.

Quon and others filed suit against the City and several OPD officers. They alleged that the City and its officers violated the Fourth Amendment and the federal Stored Communications Act (SCA) when they acquired and read the text-message transcripts. They also alleged that Arch violated the SCA by providing the text-message transcripts to the OPD. A California federal district judge determined that Quon had a reasonable expectation of privacy in his text messages, but the judge held a jury trial to determine whether the audit of the messages was reasonable.[113] The court opined that "if the audit's purpose 'was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, no constitutional violation occurred.'"[114] Because the audit was to "determine the efficacy of the character limits," the jury concluded that it was a reasonable search and therefore not a violation of the Fourth Amendment.[115] The Ninth Circuit agreed with the district court that Quon had a reasonable expectation of privacy concerning the text messages.[116] But the circuit court held that, although the audit was "for 'a legitimate work-related rationale,' . . . it 'was not reason-

110. 130 S. Ct. 2619 (2010).
111. *Id.*
112. *Id.* at 2625.
113. *Id.* at 2626–27.
114. *Id.* at 2627 quoting Guon v. Arch Wireless Operating Co., 445 F. Sup. 2d 1116, 1146 (C.D. Cal. 2006)).
115. *Id.*
116. *Id.*

able in scope.'"[117] The court provided a list of less intrusive measures that the OPD could have used in place of the audit.[118] The court also held that Arch violated the SCA by providing the transcripts to the OPD.[119] The Supreme Court granted certiorari and reversed, holding that the search of the transcripts was reasonable.[120]

Many people think the Fourth Amendment protects against unreasonable searches and seizures by the police. While true, as the Court stated in *Quon*, the Amendment also applies to the government when it "acts in its capacity as an employer."[121] The Court went on to decide *Quon* on narrow grounds; it assumed, without explicitly deciding, that (1) Quon had a reasonable expectation of privacy in the messages sent from his city-provided pager; (2) the audit of the transcripts was a Fourth Amendment search; and (3) when the government "intrudes on [an] employee's privacy in the electronic sphere," it must abide by the same rules that govern a physical search of an employee's office.[122] The Court held the search was reasonable, and thus viewed in light of either the plurality or concurring opinion in *O'Connor v. Ortega*,[123] it did not violate the Fourth Amendment.[124]

E-mail and text messaging are now almost universal. But should those who use these means of communication expect electronic privacy under the Fourth Amendment? The Court stated: "[We] must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[125] Thus, as a matter of practicality, one should not decide whether a legitimate expectation of privacy exists when using electronic communication devices in his or her place of employment. And because the Court assumed, without explicitly deciding, that (1) Quon had a reasonable expectation of privacy in the messages sent from his city-provided pager and (2) the audit of the transcripts was a reasonable Fourth Amendment search, prudent attorneys should use caution when advising clients on similar matters.[126]

Last, *Quon* only deals with government employers. But after reading *Quon* together with *Mancusi v. DeForte*,[127] one would be ill-advised in limiting *Quon*'s rationale to government employers. In *Mancusi*, the Court explained that "[i]t has long been settled that [a private employee]

117. *Id.*
118. *Id.*
119. *Id.*
120. *See id.*
121. *Id.*
122. *Id.* at 2630.
123. *See* 480 U.S. 709, 718, 725–26, 731–32 (1987).
124. *Quon*, 130 S. Ct. at 2633–34.
125. *Id.* at 2629.
126. *Id.* at 2630.
127. 392 U.S. 364 (1968).

has standing to object to a [physical] search of his office, as well as of his home."[128] Reading this statement together with the statement from *Quon*—that when the government "intrudes on [an] employee's privacy in the electronic sphere," it must abide by the same rules that govern a physical search of an employee's office—leads to the conclusion that *Quon* could very well apply to both government and private employers.[129] The search must still be made by a government actor, but the point here is that *Quon* can apply to both government and non-government offices.

B. Emergency Aid/Community Caretaking Exception to the Fourth Amendment's Warrant Requirement

The other Fourth Amendment case decided by the Supreme Court during this Survey period is *Michigan v. Fisher*.[130] In *Fisher*, the Court further clarified the community caretaking/emergency aid exception to the Fourth Amendment's warrant requirement.[131] Officer Goolsby and his partner responded to a disturbance call. According to a couple in the area of the purported disturbance, a man was "going crazy" in a nearby house.[132] When the officers approached the house they noticed it was in a state of "considerable chaos."[133] Three windows were shattered, broken glass remained on the ground, and a pickup truck with a smashed front end was parked in the driveway. Before entering the house, the officers noticed the smashed front end of the pickup bore stains of blood; and not only was there blood on the truck, but also on an exterior door of the house. A couch barricaded the front door of the house and the back door was locked. The man "going crazy" in the house was the respondent, Jeremy Fisher, and officers could see him through a window "screaming and throwing things."[134] Fisher ignored the officer's knocks on the door. When the officers noticed a laceration on Fisher's hand, they inquired whether he needed medical care, but he responded with a profanity-laced demand that they produce a search warrant. After ignoring Fisher's demand and pushing the door partially open, Officer Goolsby "ventured into the house" and caught a glimpse of Fisher "pointing a long gun at him."[135] Officer Goolsby immediately left the house.

Fisher was charged with possession of a firearm during the commission of a felony and assault with a dangerous weapon.[136] Fisher moved to suppress Officer Goolsby's statement that "Fisher pointed a rifle at him."[137] A Michigan trial judge granted the motion, reasoning that Of-

128. *Id.* at 369.
129. *Quon*, 130 S. Ct. at 2630.
130. 130 S. Ct. 546 (2009).
131. *See id.* at 548–49.
132. *Id.* at 547.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 547–48.

ficer Goolsby violated Fisher's Fourth Amendment rights by entering Fisher's house without a warrant.[138] The Michigan Court of Appeals affirmed the suppression order, and the Michigan Supreme Court denied the State's request for leave to appeal.[139]

In *Brigham City v. Stuart*, the U.S. Supreme Court held that "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." And in Fisher, the court held that "[a] straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable."[140] The majority in *Fisher* reasoned that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening injury' to invoke the emergency aid exception."[141] In the Court's view, the "signs of a recent injury" together with the fact that "Fisher [was] screaming and throwing things" were enough to deem Officer Goolsby's warrantless entry reasonable under the Fourth Amendment.[142]

Although the Court's holding is reasonable, the emergency aid exception is now subject to broad interpretation—possibly too broad. In *Fisher*, blood on a damaged pickup truck outside of Fisher's house coupled with the officers' observation of Fisher "screaming and throwing things" made it clear that an occupant of the house might have been in danger of imminent injury or someone might have been gravely injured in a car accident. But what about a simple verbal altercation between a husband and wife or parent and child that is audible from outside of the house? Or a situation where a person with a previously damaged vehicle has a screaming match inside the house, which can be heard from the street? Or when someone suffers a minor cut while outside and leaves blood on the door before going inside? Would those situations make an officer's warrantless entry into a house reasonable? Based on the Court's holding in *Fisher*, such an argument could be made. That "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception," could save lives in face of an ongoing violent situation—officers need not wait for serious injury before entering a residence.[143] But this interpretation could also allow warrantless police entry of residences in situations where common sense dictates entry is unreasonable. It remains to be seen how frequently *Fisher* will apply to justify warrantless entries into homes.

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138. *Id.*

139. *Id.*

140. *Id.* at 548 (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.")).

141. *Id.* at 549 (quoting People v. Fisher, No. 276439, 2008 Mich. App. LEXIS 633, at *4 (Mich. Ct. App. Mar. 25, 2008) (not designated for publication)).

142. *Id.* at 548–49.

143. *Id.* at 549 (quoting *Fisher*, 2008 Mich. App. LEXIS 633, at *4).

C. Expansion of Texas's Plain View Doctrine

One exception to the Fourth Amendment's warrant requirement is the Plain View Doctrine. The warrantless seizure of an item is lawful under the plain view doctrine when three requirements are met: (1) law enforcement officers must lawfully be in a place where the item can be viewed in plain sight; (2) it must be immediately apparent to the officers that the item constitutes evidence, fruits, or instrumentalities of a crime; and (3) the officers must have the lawful right to access the object.[144] However, during the 2011 Survey period, the Texas Court of Criminal Appeals made significant changes to its previous interpretation of the "immediately apparent" requirement.

The Court of Criminal Appeals issued *State v. Dobbs* ten days outside of the Survey period. However, it is an important enough opinion to include in this article. In *Dobbs*, Plano police officers searched Dobbs's residence pursuant to a warrant, where they happened upon two sets golf clubs that "looked brand new."[145] There was no question that the clubs were in plain view—they were in the middle of the bedroom floor.[146] The officers also found "brand new golf shirts" embroidered with the logo from a local country club in a closet connected to the bedroom.[147] The officers did not have probable cause to believe the merchandise was stolen, but were subsequently informed that the country club recently reported theft of certain golf merchandise after contacting police dispatch.[148] Via direct communication with the country club, the officers developed probable cause that the clubs and shirts were stolen property.[149] The officers seized the property and Dobbs was charged with theft.[150]

In support of his motion to suppress the seized items, Dobbs argued that it was not "immediately apparent" that the items were contraband because the officers did not have probable cause to believe that the items were stolen when they first discovered them.[151] The trial judge, based on *White v. State*,[152] granted Dobbs's suppression motion, and the court of appeals affirmed.[153]

The Texas Court of Criminal Appeals used *State v. Dobbs* to modify its prior reading of the plain view doctrine.[154] According to the settled rule prior to *Dobbs*, compliance with the doctrine required, among other things, that it be "immediately apparent" to law enforcement that the

144. Keehn v. State, 279 S.W.3d 330, 334 (Tex. Crim. App. 2009).
145. State v. Dobbs, 323 S.W.3d 184, 185 (Tex. Crim. App. 2010).
146. *Id.*
147. *Id.*
148. *Id.* at 185–86.
149. *Id.* at 186.
150. *Id.*
151. *Id.*
152. 729 S.W.2d 737, 740 (Tex. Crim. App. 1987).
153. *Dobbs*, 323 S.W.3d at 186.
154. *See generally id.*

seized items were evidence, fruits, or instrumentalities of a crime.[155] In *White v. State*, the Court of Criminal Appeals construed the plain view doctrine to require an additional layer of probable cause for further investigation to develop the probable cause needed to seize an item in plain view if police officers did not instantly recognize the item as contraband.[156]

But now, after the Court of Criminal Appeals's opinion in *Dobbs*, *White* is no longer good law, and the plain view doctrine in Texas is back in line with the Supreme Court's version of the doctrine. In *Dobbs*, the State argued that *White* "overextends the legitimate scope of Fourth Amendment protection," and the Court of Criminal Appeals "agree[d] with the State's assessment."[157] The court held that:

> So long as the probable cause to believe that items in plain view constitute contraband arises while the police are still lawfully on the premises, and their 'further investigation' into the nature of those items does not entail an additional and unjustified search of . . . , or presence on . . . , the premises, [the seizure of those items is permissible under the Fourth Amendment.][158]

The court made clear that the rule in *Dobbs* does not apply to cases where the further investigation "incrementally impinge[s] upon any protected privacy or possessory interest of the defendant."[159] The court stated that the further investigation in *Dobbs* did not exceed the scope of the original search warrant.[160] The court then held that the officers seized the golf merchandise while still legitimately on the premises and after they developed probable cause to believe the merchandise was stolen.[161]

The new rule to be taken from *Dobbs* is that the plain view doctrine in Texas requires an officer to have probable cause to believe an item is contraband before seizing it—there is no longer a requirement that officers have probable cause to believe an item is contraband at the exact moment they see it. It is also important to note that in *Dobbs* the Court of Criminal Appeals used federal law to reinterpret the plain view doctrine, something practitioners should be aware of when putting together arguments for or against the suppression of evidence.[162] "The Supreme Court has construed 'immediately apparent' to mean simply that the viewing officers must have probable cause to believe an item in plain view is contraband before seizing it."[163]

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155. *See, e.g.*, Haley v. State, 811 S.W.2d 600, 603 (Tex. Crim. App. 1991); Joseph v. State, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991); State v. Powell, 268 S.W.3d 626, 632–33 (Tex. App.—Fort Worth 2008).
156. 729 S.W.2d at 741.
157. *Dobbs*, 323 S.W.3d at 186–87.
158. *Id.* at 189.
159. *Id.* at 188.
160. *Id.*
161. *Id.*
162. *Id.* at 189.
163. *Id.*

D. The "New" Search Incident to Arrest Exception to the Fourth Amendment's Warrant Requirement

Recently, the Supreme Court in *Arizona v. Gant* limited the search incident to arrest exception to the Fourth Amendment's warrant requirement.[164] The Court held that police officers may not search a vehicle incident to the arrest of a recent occupant after the arrestee was secured and cannot access the interior of the vehicle.[165] Explaining when search of an automobile after arresting a recent occupant is permissible, the Court stated that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[166] The following is a discussion of how *Gant* appears to affect Texas law during this Survey period.

In the Fifth Circuit case *United States v. Steele*, the defendant was stopped because of his expired license plate.[167] He argued the search of the compartment under the carpet in his trunk violated his Fourth Amendment rights. He argued that because he was secured in the officer's cruiser when the search took place, the search was not justified under *Gant*. After discussing the automobile exception to the Fourth Amendment warrant requirement, the court held that "[c]ontrary to [the defendant's] assertion, the Supreme Court's recent ruling in *Gant* is inapplicable to the present case as the Court specifically limited its ruling to searches pursuant to an arrest, and the Court did not modify the standards regarding searches pursuant to the automobile exception."[168] In this case, the Fifth Circuit did not apply *Gant* because the arrest had not taken place at the time of the search.

Later, in *United States v. Hinojosa*, the Fifth Circuit issued a similar ruling.[169] Based on witness information describing the color and type of vehicle involved in a crime, police stopped the defendant's vehicle. The officers saw stolen goods in plain view through the vehicle's window. The district judge held that the officers' search of the vehicle was reasonable because they had probable cause to believe they would find stolen goods.[170] In the Fifth Circuit, the defendant argued the search of his vehicle was unreasonable under *Gant*, but the court simply held *Gant* was inapplicable because there was no arrest involved.[171] Based on these two cases, it is clear that the Fifth Circuit has taken to heart the Supreme Court's warning that *Gant* only applies to searches incident to arrest. So, unless a search of a defendant's vehicle is made while a defendant is

164. 129 S. Ct. 1710, 1714 (2009).
165. *Id.*
166. *Id.*
167. 353 F. App'x. 908, 909 (5th Cir. 2009).
168. *Id.* at 910.
169. No. 4:09-CR-51-1, 2010 U.S. App. LEXIS 17217, at *4 (5th Cir. Aug. 16, 2010).
170. *Id.* at *3–4.
171. *Id.* at *4.

under arrest, and evidence of the offense might be in the vehicle, a *Gant*-based argument in the Fifth Circuit will prove fruitless.

The Dallas Court of Appeals faced a different issue concerning *Gant*.[172] In granting Ogeda's motion to suppress, the trial judge explained an officer's subjective intent in searching a vehicle is important in determining reasonableness of an automobile search under *Gant*.[173] He stated that officer testimony explaining the purpose of the search was necessary to determine reasonableness.[174] The State disagreed and appealed. The court of appeals reversed, explaining that "[t]he fact that the officer does not have the state of mind providing the legal justification for her action does not invalidate the action taken, so long as the circumstances, viewed objectively, justify it," and "[b]ased on the totality of the circumstances in this case, we conclude an arresting officer could have reasonably believed that evidence supporting the . . . arrest would be found in the car."[175] Therefore, *Ogeda* stands for the proposition that in determining the reasonableness of a search under *Gant*, as long as the totality of the circumstances, viewed objectively, justify the search, it is unnecessary to know the exact purpose of the search.

In *Palacios v. State*, the Fort Worth Court of Appeals agreed with the holding in *Ogeda* that the circumstances, not the searching officer's subjective intent, dictate the reasonableness of a vehicle search under *Gant*.[176] But the court of appeals's interpretation of *Gant* is at odds with the Fifth Circuit's interpretation. Although Palacios was driving during the day—a time when the use of headlights is not required—he nevertheless had them turned on. And Texas law requires that: "A taillamp or a separate lamp . . . be constructed and mounted to emit a white light that . . . illuminates the rear license plate," and that "[a] taillamp, including a separate lamp used to illuminate a rear license plate, must emit a light when a headlamp or auxiliary driving lamp is lighted."[177] "While Palacios may not have had a duty to have the lights on his van turned on, because the lights on his van were in fact turned on, [Texas law] required that the van's rear license plate also be illuminated." But Palacios's rear license plate was not illuminated, so a police officer pulled him over.[178] The officer then summoned another officer for help. The officers subsequently learned that neither Palacios nor his passenger had a driver's license. Both officers testified that Palacios was acting nervous. Palacios and his passenger also gave conflicting stories about where they were going. Because neither of the vehicle's occupants had a driver's license, the officers impounded the vehicle and conducted an inventory search. During the search, the officers noticed a "strong odor of fabric softener,"

172. State v. Ogeda, 315 S.W.3d 664 (Tex. App.—Dallas 2010, pet. ref'd).
173. *Id.* at 666.
174. *See id.*
175. *Id.* at 667.
176. 319 S.W.3d 68, 75 (Tex. App.—Fort Worth 2010, no pet. h.).
177. TEX. TRANSP. CODE ANN. § 547.322(f)–(g) (West 2010).
178. *Palacios*, 319 S.W.3d at 73.

which is used "to mask odors of illegal drugs."[179] After the search produced a suitcase containing marijuana, Palacios and his passenger were arrested.

The court of appeals appears to construe portions of *Gant* in a way that conflicts with the Fifth Circuit's reading of the case. As discussed above, the Fifth Circuit will only apply *Gant* if the search is incident to an arrest.[180] In *Palacios*, the search was a lawful inventory search and the officers did not arrest Palacios and his passenger until after the search. But the court did not simply use lawful impoundment and inventory to justify the warrantless search; it used *Gant*.[181] Quoting *Gant*, the court explained "that 'if there is probable cause to believe a vehicle contains evidence of criminal activity,' officers may without a warrant search 'any area of the vehicle in which the evidence might be found.'"[182] The court determined Palacios's nervous behavior, the conflicting stories offered by Palacios and his passenger, and the odor of fabric softener gave the officers probable cause to search for drugs inside the suitcase found in the vehicle.[183] But this application of *Gant* conflicts with the Fifth Circuit's application—neither Palacios nor his passenger were under arrest when the search took place. Therefore, attorneys in Texas should be aware that the forum—state or federal court—may be determinative of whether *Gant* will be applied.

The Texas Court of Criminal Appeals applied *Gant* in *State v. Elias*. In *Elias*, a police officer had information that led him to believe Elias's van contained narcotics.[184] The officer noticed Elias sitting at a stop sign in a turn-only lane but without a turn signal. After the officer passed Elias, Elias turned right. The officer made a u-turn and stopped Elias. When the officer learned of Elias's prior outstanding warrants, the officer arrested Elias. While Elias was under arrest, the officer's canine sniffed the van exterior. After the canine alerted to an area of the van, the officer conducted a search and found marijuana. The trial judge granted Elias's suppression motion finding, among other things, that the officer did not have reasonable suspicion to stop and detain Elias or to believe that a traffic violation had occurred.[185] Based on *Gant*, the court of appeals upheld the trial judge's ruling.[186] The court found that while Elias was under arrest he was not close enough to his van to gain access to the inside.[187] The court also found that there was no reasonable basis to be-

179. *Id.* at 75.

180. *See* United States v. Hinojosa, No. 4:09-CR-51-1, 2010 U.S. App. LEXIS 17217, at *4 (5th Cir. Aug. 16, 2010).

181. *Palacios*, 319 S.W.3d at 75.

182. *Id.* (quoting *Gant*, 129 S. Ct. at 1721).

183. *Id.*

184. State v. Elias, No. 08-08-00085-CR, 2010 Tex. App. LEXIS 2731, at *1 (Tex. App.—El Paso Apr. 14, 2010).

185. *Id.* at *4.

186. *Id.* at *10–12.

187. *Id.* at *11–12.

lieve that evidence of Elias's offenses could be found in the van.[188] The Court of Criminal Appeals granted the State's petition for discretionary review to determine whether the court of appeals erred in finding the search unreasonable.

The Court of Criminal Appeals affirmed the court of appeals's application of *Gant*,[189] which is consistent with the Fifth Circuit's application.[190] Observing that Elias was arrested before the van was searched, the Court held that the search of the van was not a lawful search incident to arrest under *Gant* because Elias "had stepped away from the van by the time the search was conducted, and no evidence of [Elias's] offenses" could reasonably be expected to be found in a search of the van.[191]

IV. CONCLUSION

During the 2011 Survey period, the Supreme Court did some major work in the area of confessions, searches, and seizures—especially confessions. The Texas Court of Criminal Appeals reinterpreted the plain view doctrine, and lower federal and state courts continued to follow established law. It will be interesting to see how Texas judges and attorneys deal with the changes to the law made during this Survey period.

188. *Id.*
189. State v. Elias, 339 S.W.3d 667, 677 (Tex. Crim. App. 2011).
190. United States v. Steele, 353 F. App'x. 908, 910 (5th Cir. 2009); United States v. Hinojosa, No. 4:09-CR-51-1, 2010 U.S. App. LEXIS 17217, at *4 (5th Cir. Aug. 16, 2010).
191. *Elias*, 339 S.W.3d at 677.