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Criminal Procedure: Confession, Search and Seizure

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This Article reviews significant cases during the Survey period on the subjects of confession, search, and seizure from the Texas Court of Criminal Appeals, the Texas courts of appeals, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.

I. TEXAS CASES

A. "SEIZURE" AND THE TEXAS CONSTITUTION

IN 1991, the United States Supreme Court's decision in *California v. Hodari D.*[1] altered the Fourth Amendment definition of "seizure." In *Hodari D.*, the Court departed from the notion that a "seizure" occurs from the time a reasonable person facing a show of authority believes he or she is not free to leave and formulated a new standard, holding that a "seizure" occurs at the time the suspect has actually yielded to the show of authority or been physically forced to yield.[2] In *Johnson v. State*,[3] the Texas Court of Criminal Appeals adopted the Supreme Court's revised definition of "seizure" in interpreting Article I, section 9 of the Texas Constitution. The court specifically upheld the continuing viability of *Heitman v. State*,[4] but cautioned that *Heitman* will justify a departure from the federal standard only where the facts of the case, state precedent on the issue, and state policy dictate.[5] The facts presented in *Johnson*, the court reasoned, did not warrant such a departure.[6]

In *Johnson*, police officers were on routine patrol in the public breezeway of an apartment complex. When the officers rounded a corner, Johnson immediately began to run. The police, lacking probable cause to detain Johnson, nevertheless chased him, drew their weapons, and ordered him to stop. Before Johnson's capture, the police saw Johnson toss aside a "Crown Royal" bag which was later found to contain illegal drugs and a gun. The question as to when Johnson was "seized" by the police was crucial to the court's analysis. If Johnson was "seized" when the police initially confronted him, and before he tossed the bag, no reasonable suspicion existed to detain him.

The Court of Criminal Appeals followed the Supreme Court's reasoning in *Hodari D.*, and held that, because Johnson did not actually yield to the initial show of authority by the police, he was not "seized" under

1. 499 U.S. 621 (1991).
2. *Id.* at 627-28.
3. Johnson v. State, 912 S.W.2d 227 (Tex. Crim. App. 1995).
4. Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (holding that decisions of the Supreme Court interpreting the Fourth Amendment are not binding upon Texas courts in their interpretations of Article I, section 9 of the Texas Constitution).
5. *Johnson*, 912 S.W.2d at 234.
6. *Id.*

Article I, section 9 of the Texas Constitution until he was physically detained.[7] By that time, the court reasoned, the police had already seen Johnson discard the bag containing the contraband, thereby giving the police reasonable suspicion to seize him.[8]

B. Appellate Deference in the Search and Seizure Context

The Texas Court of Criminal Appeals has traditionally adopted a broad policy of deference to the courts of appeals in reviewing suppression issues.[9] The high court will not interfere with an appellate court decision as long as the court of appeals, in reviewing the trial court, used the correct legal standard, considered all relevant evidence in the record, and afforded proper deference to the trial court as the primary fact finder.[10]

In *Dubose v. State*,[11] the Court of Criminal Appeals added new strength to the general rule of deference. In that case, the court reversed the appellate court, holding that the appellate court had not afforded proper deference to the trial court as the primary fact finder regarding the *legal significance* of historical facts.[12]

In *Dubose*, police approached and asked Dubose if they could search his outer clothing. Dubose agreed. The police then asked Dubose if they could search the inside of his pants. Again, Dubose agreed. The police then asked Dubose to remove his shoes. When he did, a plastic bag of methamphetamine fell out. The trial court found Dubose consented to the entire search. The court of appeals, however, held that there were actually three separate searches, and that Dubose had not consented to the search of his shoe.[13]

The Court of Criminal Appeals reversed. The court held that the appellate court should have deferred to the trial court's findings regarding the historical facts, as well as the trial court's conclusions regarding the legal significance of the historical facts if the trial court had applied the correct legal standard to those historical facts.[14] The court explained that appellate courts should reverse a trial court's decision only for an abuse of discretion—that is, when it appears that the trial court applied an erroneous legal standard, or when no reasonable view of the record could support the trial court's conclusion.[15] In this case, the court held that it was reasonable to assume that the trial court had found that there was one continuous search to which Dubose had consented, rather than three

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7. *Id.*
8. For a recent discussion of the three recognized categories of interaction between the police and citizens, namely, encounters, investigative detentions, and arrests, and the respective justifications required for each, *see* Francis v. State, 922 S.W.2d. 176 (Tex. Crim. App. 1996).
9. Arcila v. State, 834 S.W.2d 357 (Tex. Crim. App. 1992).
10. *Id.* at 360.
11. 915 S.W.2d 493 (Tex. Crim. App. 1996).
12. *Id.* at 496.
13. *Id.*
14. *Id.* at 496-97.
15. *Id.* at 497-98.

separate searches which each necessitated separate consent.[16] Therefore, the court held that the court of appeals erred in conducting essentially a de novo review of the facts.

C. Illegal Arrests, Confessions, and Attenuation of Taint

In *Dowthitt v. State*,[17] the Court of Criminal Appeals addressed the recurring issue of when a statement is sufficiently attenuated from an illegal seizure to make the statement admissible at trial. *Dowthitt* demonstrates that the attenuation inquiry is extremely fact intensive.

Dowthitt came to the sheriff's office to give a written statement in a murder investigation. At that time, law enforcement officials only suspected Dowthitt's son of the crime. Dowthitt finished and signed the statement at 11:00 a.m. and left for lunch. There were no Miranda warnings given. Dowthitt returned at 1:00 p.m. and asked to change his earlier statement because it contained a false alibi. A detective interrogated Dowthitt sporadically until 6:00 p.m., when his second written statement was signed. There were no Miranda warnings given in reference to the second statement.

The police suggested that Dowthitt take a polygraph test due to the inconsistencies between the two statements. Dowthitt agreed and, although he was told that he was not a suspect, he was read his Miranda warnings prior to the polygraph examination. The polygraph examination ended at 11:00 p.m. This portion of the interview was videotaped. Approximately two hours later, Dowthitt made an incriminating statement, recorded on videotape, about his presence at the crime scene. He was then advised by police, for the first time, that he would not be permitted to leave. The court reasoned that at this time, Dowthitt was in "custody" and that the police had probable cause to place him under arrest.[18]

Dowthitt was given his Miranda warnings before signing his third written statement, at approximately 3:55 a.m., wherein he did not admit to committing the murders but he admitted to having been present during the crime. Dowthitt was booked into custody. During the entire period of time Dowthitt never asked to leave.

One of the many questions confronted by the court in *Dowthitt* was whether Dowthitt's arrest fell within one of the warrantless arrest exceptions found in Article 14 of the Texas Code of Criminal Procedure.[19] The court held that it did not. The court explicitly found that there was no evidence of imminent escape on the part of Dowthitt to justify his warrantless arrest.[20] Thus, the court held that Dowthitt's warrantless arrest was illegal.

16. *Id.* at 496.
17. 931 S.W.2d 244 (Tex. Crim. App. 1996).
18. *Id.* at 255-57.
19. Tex. Code Crim. Proc. Ann. art. 14 (Vernon 1977).
20. *Dowthitt*, 931 S.W.2d at 260.

The court next addressed whether Dowthitt's statements were fatally tainted by the warrantless arrest. The court held that, under these circumstances, the taint of the illegal arrest and Dowthitt's custodial statements were sufficiently attenuated to render the statements admissible. In making this determination, the court applied the four-factor attenuation test found in *Brown v. Illinois*.[21] The court noted that while Miranda warnings were given, the proximity between arrest and confession was close, and there were no intervening circumstances. However, the court reasoned, the fourth prong of the test, the purpose and flagrancy of the police conduct, weighed more heavily in favor of the State.[22]

In addressing the purpose and flagrancy prong of the attenuation test, the court stressed that the interrogation of Dowthitt began as noncustodial, and that Dowthitt had initiated the encounter when he returned after lunch to correct his false alibi.[23] Moreover, Dowthitt's custodial statements appeared to flow as much from his precustodial admission to being present at the murders as from his custody status.[24] The court also found that even if there was error in the admission of Dowthitt's statements into evidence, any such error was harmless.[25]

Using a similar analysis, the Beaumont Court of Appeals reached a different result in *Neese v. State*.[26] The court held that there was no attenuation of the primary taint of an illegal warrantless arrest and the suspect's subsequent custodial statements. In *Neese*, police received a tip from a confidential informant that the informant had arranged for Neese to sell LSD to an undercover police officer at the house where Neese was staying. The informant also told the police that Neese did not have a car and that he would have to get a ride.

The police conducted surveillance on the house in question. They saw Neese enter the house, exit the house approximately five minutes later, and leave in a pickup truck driven by a female. Officers stopped the pickup truck and asked Neese to exit the vehicle. Neese complied with the request and officers patted him down for weapons. No weapons were found on Neese. Neese was then handcuffed, prior to any police questioning of the driver, prior to the search of the vehicle, and prior to the discovery that Neese had an outstanding warrant for his arrest.

Police then asked the driver for consent to search the truck. She consented, and no drugs were found. The driver was released. Police told the handcuffed Neese that they had confirmed his outstanding warrant and Neese was taken to jail. Police returned to the house in question and secured the owner's consent to search the premises for contraband; none was found. Upon return to the county jail where Neese was taken, the officer who had searched the house learned that Neese had stated that

21. Brown v. Illinois, 422 U.S. 590, 603-04 (1975).
22. *Dowthitt*, 931 S.W.2d at 261.
23. *Id.*
24. *Id.* at 262.
25. *Id.*
26. 930 S.W.2d 792 (Tex. App.—Beaumont 1996, pet. ref'd).

the drugs were at the house. The officer who had conducted the search of the house informed Neese that he was returning to the house with a search warrant, and that if he found drugs, the occupants would be charged with possession, since the contraband was in their possession. In response, Neese stated that he would show the officers where he had hidden the drugs if he could say goodbye to the occupants. Neese took the officers to a shed behind the house where he divulged the location of a large amount of LSD. On cross-examination, the officers testified that Neese had never been given Miranda warnings, though this point was not preserved on appeal.

The court of appeals held that, though a close call, the temporary investigative detention of Neese was valid.[27] However, the court held that the initial detention was converted into an illegal arrest once Neese was handcuffed.[28] The court expressly rejected the State's argument that Neese was not under arrest after the discovery of the outstanding warrant. The court explained that "[n]othing occurred between the stop, the pat down, and the handcuffing that elevated the reasonable suspicion to temporarily detain [Neese] to probable cause to arrest him."[29]

In a strongly worded critique of the "flagrantly abusive" police conduct, the court concluded that not only was Neese's arrest illegal, there was also no attenuation of the primary taint of the illegal arrest.[30] Finding no substantial basis in the record to support the trial court's ruling on Neese's motion to suppress, the court reversed Neese's conviction and remanded the cause for a new trial.[31]

D. Automobile Searches

The special considerations involved in a police search of an automobile and its passengers were the subject of several cases during the Survey period. In *Perry v. State*,[32] a Bay City police officer observed Perry run a stop sign. During the routine traffic stop, the officer discovered that Perry had failed to appear in two previous traffic cases and placed Perry under arrest. During the inventory search of the vehicle, officers checked the partially opened ashtray for change and discovered a partially unwrapped piece of white paper towel containing rocks of crack cocaine. Perry was subsequently convicted of cocaine possession with the intent to distribute.[33]

On appeal, Perry argued that the trial court erred in denying his motion to suppress the cocaine seized from his ashtray on grounds that the inventory of the ashtray was an impermissible search of a "closed

27. *Id.* at 799.
28. *Id.*
29. *Id.*
30. *Neese*, 930 S.W.2d at 803.
31. *Id.*
32. 933 S.W.2d 249 (Tex. App.—Corpus Christi 1996, pet. ref'd).
33. *Id.* at 250.

container."[34] While finding that the detention and subsequent arrest of Perry were lawful, and that the police had good reason to inventory the vehicle, the Court of Appeals, citing *Autran v. State*,[35] noted that the Texas Constitution provides a privacy interest in closed containers that is not outweighed by the general policy considerations underlying an inventory.[36] Thus, the question before the court was whether a vehicle ashtray is a "closed container" for the purposes of inventory purposes. The court concluded that it is not, and while Perry's conviction was reversed on other grounds, the court of appeals held that the trial court did not abuse its discretion by admitting the evidence from the ashtray as an incident of a proper impoundment and inventory search.[37]

In *Rhodes v. State*,[38] the Fort Worth Court of Appeals held that the occupant of a vehicle is subject to proper investigative detention just as a pedestrian. In this case, Fort Worth police officers saw a vehicle backing through an intersection at 11:00 p.m. in a high crime area known for gang activity. The police activated their vehicle's overhead lights and the suspect vehicle accelerated. The police pursued and witnessed the passenger opening the door of the suspect vehicle and dropping a "Crown Royal" bag onto the street. The officers slowed their vehicle, grabbed the bag, and dropped it on the floorboard of the patrol car without looking in it.

The officers resumed their pursuit, activated their siren, and the suspect vehicle eventually stopped. The driver of the suspect vehicle fled and one of the officers gave chase on foot. Rhodes, who was on the passenger side of the suspect vehicle, remained in the car. Rhodes was ordered out of the vehicle by another officer, handcuffed, and escorted to the patrol car. As Rhodes was being escorted to the car, the officer noticed Rhodes drop a clear ziplock bag to the ground. It was later determined that the Crown Royal bag contained $321 in one-dollar bills, and the bag dropped by Rhodes contained crack cocaine.

At trial, the officer who escorted Rhodes to the patrol car testified that by handcuffing Rhodes he was detaining him to investigate the situation and for the officer's safety, and that he was not placing Rhodes under arrest.

On appeal, Rhodes argued that the cocaine was only discovered after his illegal arrest and that the cocaine should have been suppressed as "fruit of the poisonous tree."[39] Rhodes contended that the arrest was illegal because the officer who detained him never articulated facts or circumstances that gave him probable cause to make an arrest.[40] The appellate court disagreed. The court found that under the facts and circumstances of this case, the detention and handcuffing of Rhodes was

34. *Id.* at 250.
35. 887 S.W.2d 31, 41-42 (Tex. Crim. App. 1994).
36. *Perry*, 933 S.W.2d at 252.
37. *Id.* at 253.
38. 913 S.W.2d 242 (Tex. App.—Fort Worth 1995, pet. granted).
39. *Id.* at 246.
40. *Id.*

reasonable and justified.[41] The court noted that the situation unfolded late at night in a high-crime area and that Rhodes' conduct was not consistent with innocent behavior.[42] The court also refused to adopt a bright-line test providing that handcuffing is the equivalent of arrest.[43] The court held that the officer made a lawful investigative detention of Rhodes under *Terry*[44] and its progeny, which was further justified when Rhodes dropped the cocaine in the officer's presence. The court accordingly confirmed the propriety of Rhodes' warrantless arrest and his conviction was affirmed.[45]

E. Warrantless Search/Abandonment/Consent

In *Franklin v. State*,[46] the Beaumont Court of Appeals wrestled with the issue of when property can be said to have been legally abandoned for Fourth Amendment purposes. Franklin, who was carrying one suitcase and a small sports bag, hurriedly entered a Houston bus station forty minutes prior to the bus' scheduled departure time. Franklin stood in line at a gate and placed his suitcase on the floor in line beside him. Appearing nervous, Franklin looked over his shoulder several times and scanned the lobby. He then walked away from the gate and kept his gaze on the bag. Franklin repeatedly looked at the nearby plain clothes police officer and appeared increasingly nervous. Franklin eventually returned to the gate, approached his suitcase and told the man who was in line in front of him, Morales, that he needed to use the phone. Franklin asked Morales to place his bag on the bus if the bus boarded while he was on the phone. Franklin then left the boarding area and while he was gone the bus arrived. Morales boarded the bus with Franklin's suitcase.

A police officer boarded the bus and asked Morales for consent to search the suitcase. Although Morales indicated that it was not his suitcase, the officer proceeded to search the suitcase, finding cocaine. Despite Franklin's denial to having any luggage other than the sports bag, he was arrested.

Franklin was convicted of the drug offense. On appeal, Franklin complained that the cocaine was obtained through an illegal warrantless search and seizure of his suitcase and that the trial court erred in overruling his motions to suppress.[47] The Court of Appeals found that the totality of Franklin's conduct did not give police probable cause to search his suitcase.[48] "Such actions," the court explained, "either taken together or separately, do not lead one to believe a crime has been committed or that

41. *Id.* at 249.
42. *Id.*
43. *Id.* at 248.
44. Terry v. Ohio, 392 U.S. 1, 22 (1968).
45. *Rhodes*, 913 S.W.2d at 249.
46. Franklin v. State, 913 S.W.2d 234 (Tex. App.—Beaumont 1995, pet. ref'd).
47. *Id.* at 238.
48. *Id.* at 239.

the luggage contains contraband."[49]

The State also argued that Franklin abandoned the suitcase prior to the search and therefore did not have a legitimate expectation of privacy in the suitcase.[50] However, the court held that Franklin did not abandon the suitcase when he entrusted it to Morales.[51] The court also rejected the State's contention that Franklin's disavowal of ownership of the suitcase after it had already been searched was evidence of abandonment.[52]

Having found that Franklin had not abandoned the suitcase, that he had a legitimate expectation of privacy in its contents, that the warrantless search was not supported by probable cause, and that there was no valid third party consent to the search, the court reversed Franklin's conviction and remanded it to the trial court for a new trial.[53]

F. Consensual Searches

In *State v. Ibarra*,[54] the Houston Court of Appeals reaffirmed the burden of proof required when the state relies on consent to justify a search. Ibarra, charged with possession of marijuana and failure to pay the marijuana tax, filed a pretrial motion to suppress evidence that was obtained by police during a search of his car. The trial court determined that although the State had demonstrated by a *preponderance* of the evidence that Ibarra's consent was voluntary, it had failed to demonstrate by *clear and convincing* evidence that Ibarra voluntarily consented to the search.[55] The court concluded that Texas law required the State to demonstrate that the consent to search was voluntary by clear and convincing evidence and therefore granted Ibarra's motion to suppress.[56]

The State appealed, citing three decisions in which the Supreme Court held that the Fourth Amendment only requires proof of consent to search by a preponderance of the evidence.[57] The State urged the court to adopt the lower burden of proof, arguing that Texas appellate decisions on point were incorrectly based on Supreme Court decisions which had later been clarified to provide for the lower burden of proof.[58]

Citing *Heitman v. State*[59] for the proposition that Texas may provide rights to its citizens in addition to those provided by the United States Constitution, the Texas Court of Appeals upheld the trial court's ruling that the voluntariness of consent to search must be proven by clear and convincing evidence.[60]

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49. *Id.*
50. *Id.*
51. *Id.* at 240
52. *Franklin*, 913 S.W.2d at 240.
53. *Id.* at 241.
54. 918 S.W.2d 15 (Tex. App.—Houston [14th Dist.] 1995, pet. granted).
55. *Id.* at 16.
56. *Id.*
57. *Id.*
58. *Id.*
59. 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).
60. *Id.*

G. Investigatory Detention and Reasonable Suspicion

Several cases during the Survey period analyzed the issue of what circumstances create reasonable suspicion sufficient to justify an investigative detention. Because a determination of whether reasonable suspicion exists is so fact intensive, the cases present widely divergent results.

In *Strowenjans v. State*,[61] the Dallas Court of Appeals held that a police officer's belief that the defendant's truck might be stolen because it "did not belong in the area" amounted to nothing more than mere hunch or suspicion, not reasonable suspicion necessary to justify an investigative detention.[62]

At 3:00 a.m., Dallas police officers saw a neat and clean late-model pickup truck parked in front of a known drug house in a high crime area. The officers, suspecting that the vehicle might be stolen, inspected the truck for signs of forced entry; there were none. The officers checked the truck's registration and learned that it had not been reported stolen. The officer then decided to contact Strowenjans, the truck's owner. The officer reached Strowenjans' wife by telephone and she told the officer that her husband was probably in the area where the truck was parked because he had a softball game in the area. The officer nonetheless remained suspicious and requested that officers in an unmarked car watch the truck.

Approximately forty-five minutes later, Strowenjans and another person entered the truck and drove away. The officers were not able to determine whether they had come out of the alleged drug house. Strowenjans traveled approximately two miles and turned into a motel parking lot that officers believed was frequented by prostitutes and drug users. The police then activated the vehicle's overhead lights and stopped the vehicle. Strowenjans exited his vehicle and produced his license, which confirmed that he owned the truck. The police did not smell alcohol and when they frisked Strowenjans they discovered no weapons. A separate officer approached the passenger and recognized her as a known prostitute and drug addict.

The passenger told the officer that Strowenjans had cocaine in his pocket. The officer the asked Strowenjans for consent to search his pockets, and Strowenjans acquiesed. The first search did not reveal the cocaine, and the officer asked if he could look deeper in Strowenjans' pockets. Again, Strowenjans replied that he had no objection. This time the officer found a small amount of cocaine, and Strowenjans was arrested.[63]

The court of appeals found that the police did not have sufficient reasonable suspicion to detain Strowenjans, that Strowenjans' actions were

61. 919 S.W.2d 142 (Tex. App.—Dallas), *remanded*, 927 S.W.2d 28 (Tex. Crim. App. 1996) (the court asked the court of appeals to reconsider its judgment in light of Waston v. State, 924 S.W.2d 711 (Tex. Crim. App. 1996)).

62. *Id.* at 147.

63. *Id.*

as consistent with legal activity as they were with illegal activity, and that the trial court erred in not suppressing the evidence obtained through the search of Strownjans' pockets.[64]

In *Worley v. State*,[65] the Fort Worth Court of Appeals held that an arresting officer's seizure of the wrist of an individual suspected of purchasing controlled substance was an investigative stop of the nature contemplated in *Terry*. The intrusion was of short duration, lasting only as long as it took the officer to seize the suspect's wrist and view gelatin capsules contained in his hand.

Fort Worth police officers were patrolling in a marked car in an area known for its drug activity. The officers noticed a truck stopped at an intersection adjacent to a house known for illegal drug sales. As the officers approached the suspect vehicle, the driver immediately moved the vehicle and gave the officers "a good hard stare" as they drove by. Given the location of the suspect vehicle next to a house known for drug sales, and the officers' knowledge that drug users purchasing illegal narcotics normally traveled in pairs (one driver and one passenger), the officers believed that a passenger retrieval was about to occur. Shortly thereafter, the officers saw Worley walk out of the door of the house in question and step onto the porch steps.

Worley's head was down and his left hand was cupped and open. As Worley approached the street, an officer noticed three capsules in Worley's left hand. When Worley reached the curb, he saw the officers and froze. The officers testified that Worley looked very nervous and scared. Worley continued to stare at the officers until one of the officers was within arm's reach. Worley then clenched his left hand and attempted to turn away. As he turned, the officer grabbed Worley's left hand and asked him what was in it. Worley offered mild resistance before opening his hand, revealing the gelatin capsules containing heroin and cocaine.

The court of appeals held that the circumstances presented in the case, taken as a whole, provided the officer with reasonable suspicion to believe Worley was engaged in criminal activity and thus justified the investigatory stop.[66] The court held that the officer's seizure of Worley's wrist represented a brief intrusion, and once the officer had the opportunity to inspect the capsules, he clearly had probable cause to make the arrest.[67]

II. FEDERAL CASES

A. UNITED STATES SUPREME COURT CASES

1. *The Relevance of Motive to Traffic Stops Conducted for the Purpose of Investigating Other Crimes*

During the Survey period, the Supreme Court in *Whren v. United*

64. *Id.*
65. 912 S.W.2d 869 (Tex. App.—Fort Worth 1995, pet. ref'd).
66. *Id.* at 874.
67. *Id.* at 873.

States[68] declined to create an exception to the established rule that probable cause justifies a search and seizure. In a unanimous opinion delivered by Justice Scalia, the Court held that no Fourth Amendment violation occurs when an officer's otherwise justifiable probable cause determination is motivated by an ulterior motive to investigate another possible crime.[69] The Court's unanimous opinion illustrates its willingness to uphold a search in almost any circumstance as long as probable cause exists.

In *Whren*, plainclothes policemen patrolling a "high drug area" in an unmarked car became suspicious when a truck paused at a stop sign for an unusually long time, turned suddenly without signaling, and then sped off. The policemen overtook the truck and one of the officers exited the vehicle to approach the truck while it was stopped at a red light. The plain clothes officer identified himself as a police officer and directed the driver, Defendant Brown, to put the truck in park. The officer then observed two large plastic bags appearing to contain crack cocaine in passenger Whren's hands. Both Brown and Whren were arrested and quantities of several types of illegal drugs were recovered from the truck.

Brown and Whren were convicted of violating various federal drug laws. At a pretrial suppression hearing, the district court rejected the defendants' argument that the officers lacked probable cause to believe the defendants were engaged in illegal drug dealing activity, and that therefore the asserted ground for approaching the truck—a traffic violation—was impermissibly pretextual.[70] The district court thus denied the motion to suppress.

The United States Court of Appeals for the District of Columbia affirmed, holding that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation."[71] The Supreme Court granted certiorari to decide

> whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.[72]

The Court started from the fundamental premise that an automobile stop by the police constitutes a "seizure" within the meaning of the Fourth Amendment, and, as such, must comport with the constitutional requirement that it not be "unreasonable."[73] The Court further acknowl-

68. 116 S. Ct. 1769 (1995).
69. *Id.* at 1774.
70. *Id.*
71. United States v. Whren, 53 F.3d 371, 375 (D.C. Cir. 1995).
72. *Whren*, 116 S. Ct. at 1771-72.
73. *Id.* at 1772.

edged that, in general, automobile stops motivated by probable cause to believe that a traffic violation has occurred are constitutionally reasonable.[74] But, the defendants added another consideration in formulating their challenge to the general principle that automobile stops are justified by probable cause to believe that a traffic violation has occurred. The defendants contended that, because the use of automobiles is so heavily and minutely regulated, total compliance is nearly impossible.[75] This, according to the defendants, enables police officers to almost invariably catch any motorist in a technical violation and thereby creates the temptation to use traffic stops as a means of investigating other crimes, as to which no probable cause exists. Because of these concerns, the defendants argued that a different probable cause inquiry should be applied to traffic stops: "whether a police officer, acting reasonably, would have made the stop *for the reason given*."[76] Stated differently, the defendants intended that a search cannot be justified if a reasonable officer would not have stopped the vehicle for the purpose of enforcing the traffic laws.

In support of their argument, the defendants relied on a line of Supreme Court cases, which, they contended, disapproved of police reliance on a valid basis for probable cause as a pretext for investigating other crimes.[77] The Court found the defendants' reliance on these cases to be misplaced because each addressed the validity of a search *wholly lacking in probable cause*.[78] For example, administrative or inventory searches, pursuant to judicially recognized exceptions, may be conducted without probable cause. This exception, however, will not support an administrative or inventory search not made for those purposes.[79] In other words, a law enforcement officer may not conduct an inventory or administrative search for the purpose of investigating a crime for which no probable cause exists.[80] The court saw these examples as distinguishable from this case, where the officer had valid probable cause as to the traffic violation.

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74. *Id.*

75. *Id.* at 1772-73. In this case, the defendants conceded that the officer had probable cause to believe that various provisions of the District of Columbia traffic code had been violated. The District of Columbia traffic code provides that "[a]n operator shall . . . give full time and attention to the operation of the vehicle," 18 D.C. Mun. Regs. § 2204.3 (1985); that "[n]o person shall turn any vehicle . . . without giving an appropriate signal," 18 D.C. Mun. Regs. § 2200.3; and that "[n]o person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions." *Id.*

76. *Whren*, 116 S. Ct. at 1773 (emphasis added).

77. Specifically, the defendants relied on Florida v. Wells, 495 U.S. 1, 4 (1990) ("an inventory search must not be used as a ruse for a general rummaging in order to discover incriminating evidence"); Colorado v. Bertine, 479 U.S. 367, 372 (1987) (noting that as to a valid inventory search, there was "no showing that the police, who were following standard procedures acted in bad faith or for the sole purpose of investigation"); New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987) (a warrantless administrative inspection did not appear to be a "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws.").

78. *Whren*, 116 S. Ct. at 1773-74 (emphasis added).

79. *Id.* at 1773 (citing *Bertine*, 479 U.S. at 371-72; *Burger*, 482 U.S. at 702-03).

80. *Id.*

Not only did the Court find there to be a lack of affirmative support for the defendants' argument, but the Court also pointed to contrary authority which "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the officers involved."[81] The Court placed significant importance on *United States v. Robinson*,[82] where it held that a traffic violation arrest would not be rendered invalid merely because it was a pretext for a narcotics search.[83] The *Robinson* Court further held that a lawful post-arrest search of the offender would not be rendered invalid on grounds that it was not motivated by the "officer safety" concern that justifies such searches.[84] The *Whren* Court explained that *Robinson*, and other related cases,[85] established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[86]

The Court rejected the defendants' attempt to frame the standard they advocated as an "objective" one, rather than a "subjective" one. The defendants insisted that objective considerations governed the inquiry of "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[87] The Court, however, viewed this inquiry as "plainly and indisputably driven by subjective considerations."[88] The "reasonableness" analysis mandated by the Fourth Amendment, according to the Court, does not make the individual officer's subjective motivation the touchstone of "reasonableness."

The Court dismissed the notion that the standard urged by the defendants would involve a less strenuous evidentiary inquiry than a straight subjective inquiry regarding the particular officer's state of mind. The Court pointed to the difficulty of "plumb[ing] the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."[89] The Court also pointed to an additional problem with a standard that assesses whether an officer, acting reasonably, would have chosen to enforce a traffic violation. Such a standard would impermissibly result in Fourth Amendment protection that varies from "place to place and from time to time," according to the traffic regulations of the jurisdiction where the

81. *Id.* at 1774.

82. 414 U.S. 218 (1973).

83. *Id.* at 221, n.1.

84. *Id.* at 236.

85. The Court also relied on United States v. Villamonte-Marquez, 462 U.S. 579 (1983), and Scott v. United States, 436 U.S. 128 (1978).

86. *Robinson*, 436 U.S. at 138.

87. *Whren*, 116 S. Ct. at 1774.

88. *Id.*

89. *Id.* at 1775.

traffic stop occurred.[90]

Finally, the Court addressed the defendants' argument that the balancing of governmental interests and individual interests inherent to Fourth Amendment "reasonableness" analysis militates against sanctioning investigation of minor traffic infractions by plainclothes police in unmarked vehicles. The defendants contended that the governmental interest in traffic safety was only minimal, as reflected by the police department's own regulations generally prohibiting the practice. Conversely, the defendants argued, as to the individual interests at stake, traffic stops conducted by plainclothes officers in unmarked cars "may create substantial anxiety."[91]

The Court recognized that a determination of the reasonableness of a search or seizure necessarily involves a balancing of interests. However, the Court explained, this balancing is invariably struck in favor of allowing the search or seizure when the search was predicated on probable cause, which ensures appropriate constraint of police action. The only exception to the general premise that probable cause sufficiently protects the individual interests at stake are cases where searches or seizures are conducted in an extraordinary manner, as a seizure by use of deadly force or an unannounced entry into a home.[92] The officer in *Whren* unquestionably acted on valid probable cause to believe that various traffic violations had occurred, and therefore, the Court concluded, the stop was reasonable under the Fourth Amendment.[93]

2. *Standard of Review of Determinations of Probable Cause and Reasonable Suspicion*

The Supreme Court resolved a conflict among the circuits in addressing the standard of review applicable to probable cause and reasonable suspicion determinations.[94] In *Ornelas v. United States*,[95] the Court addressed undisputed facts. A police detective conducting drug-interdiction surveillance became suspicious of a 1981 two-door Oldsmobile with California license plates in a motel parking lot. The officer then learned the

90. *Id.* The District of Columbia police regulations permit plain clothes officers in unarmed vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others." *Id.* (citing *Metropolitan Police Dep't—Washington D.C.*, General Order 303.1, pt. 1, Objectives and Polices (A)(2)(4) (Apr. 30, 1992)). Thus, if the officer in this case had been wearing a uniform, this provision would not have applied and would not have served as a Fourth Amendment limitation as urged by the defendants. The Court explained that it would be unacceptable to hold that Fourth Amendment protections "are so variable, and can be made to turn on such trivialities." *Whren*, 116 S. Ct. at 1776.

91. *Id.* at 1776 (quoting Delaware v. Prouse, 440 U.S. 648, 657 (1979)).

92. *Id.* (citing Tennessee v. Garner, 472 U.S. 1 (1985) (deadly force); Wilson v. Arkansas, 115 S. Ct. 1081 (1995) (unannounced entry into home)).

93. *Id.*

94. Ornelas v. United States, 116 S. Ct. 1657, 1661 (1996). For circuit cases in conflict over the applicable standard of review, *compare* United States v. Puerta, 982 F.2d. 1297, 1300 (9th Cir. 1992) (*de novo* review) *with* United States v. Spears, 965 F.2d 262, 268-71 (7th Cir.) (clear error), *cert. denied*, 506 U.S. 989 (1992).

95. 116 S. Ct. 1657.

name of the owner of the vehicle from a radio dispatcher and confirmed with the motel registry that a man by a similar name, accompanied by a second man, had registered at 4:00 a.m. without reservations. A subsequent search through a federal database of known and suspected drug traffickers[96] identified the name listed as owner of the vehicle and the names registered at the motel as narcotics dealers.

When the two suspected men emerged from their motel room and got into the Oldsmobile, one of the detectives approached the car, made several inquiries, and was ultimately given consent to search the car. During the search of the Oldsmobile's interior, the detective observed that a panel appeared loose; he suspected that the panel might have been removed and narcotics hidden inside. The detective removed the panel[97] and discovered two kilograms of cocaine. The two men were arrested.

The district court denied the defendant's pretrial motions to suppress complaining of the detective's warrantless search inside the panel. The district court reasoned that the model, age, and source-state origin of the car, and the fact that two men traveling together checked into a motel at 4:00 a.m. without reservations, formed a drug-courier profile. This profile, together with the NADDIS reports, gave rise to reasonable suspicion of drug-trafficking activity. Further, the district court found that this reasonable suspicion gave rise to probable cause upon discovery of the loose panel.[98]

The Seventh Circuit reviewed the district court's determinations of reasonable suspicion and probable cause for "clear error."[99] The Seventh Circuit found no clear error as to reasonable suspicion, but with regard to the probable cause determination, remanded for a determination of whether the detective's testimony regarding the loose panel was credible.[100] On remand, the detective's testimony was found to be credible, a determination that the Seventh Circuit subsequently held was not clearly erroneous.[101]

In setting out to determine the appropriate standard of review, the Supreme Court began by noting that the legal standards regarding probable cause and reasonable suspicion are not readily reducible to a neat set of legal rules.[102] Instead, probable cause and reasonable suspicion are fluid concepts that derive meaning from the context in which they are

96. The federal database is known as the Narcotics and Dangerous Drugs Information System (NADDIS). *Id.* at 1659.

97. The lower courts assumed that consent to search the car did not provide the officers with authority to search inside the panel because under Seventh Circuit precedent, the police may not dismantle the body of a car during an otherwise valid search, unless the police have probable cause to believe the car's panels contain narcotics. *Id.* at 1660 (citing United States v. Garcia, 897 F.2d 1413, 1419-20 (1990)). This Supreme Court declined to address the correctness of the Seventh Circuit limitation on the scope of consent, assuming its validity only for purposes of its decision.

98. *Id.*

99. United States v. Ornelas, 16 F.3d 714, 719 (7th Cir. 1994).

100. *Id.* at 721-22.

101. *See Orlelas*, 116 S. Ct. at 1661.

102. *Id.*

assessed.[103] It follows that probable cause and reasonable suspicion are determined by analysis of whether the events leading up to the stop or the search, when viewed from the standpoint of an objectively reasonable police officer, amount to probable cause or reasonable suspicion. Thus, the Court explained, the first part of the analysis is factual, but the second part is a mixed question of law and fact.[104]

The Court, noting that it had never expressly deferred to a trial court's probable cause or reasonable suspicion determination, explained that deferential review would permit "[i]n the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause."[105] Moreover, because the concepts of probable cause and reasonable suspicion acquire meaning only through application, the Court reasoned that independent review is necessary for appellate courts to control and clarify the legal principles associated with probable cause and reasonable suspicion.[106] In the same vein, the Court explained that plenary review would unify precedence providing law enforcement officers with a defined and predictable set of standards for determining probable cause and reasonable suspicion.[107]

B. Fifth Circuit Cases

1. The Automobile Exception

In *United States v. Sinisterra*,[108] the Fifth Circuit issued an important opinion regarding the scope of the automobile exception to the warrant requirement, further enhancing the strength of the exception to justify warrantless searches of automobiles. In that case, the defendant arrived at a house under surveillance in one car and ultimately left the house in a van. The defendant then drove the van to a shopping mall, parked, got out with a small dog, and then engaged in what the court termed "unusual behavior."[109] For example, he walked around the mall, walked to a nearby medical office building, rode a city bus for one and one-half miles and walked back to the mall. During this time, the defendant made several telephone calls from pay telephones.

After the agents lost the defendant in a neighborhood, they approached the van with a narcotics-detecting dog, who alerted strongly to the van. The defendant thereafter returned to the mall parking lot, but did not approach the van. After the officers arrested him, he refused to consent to a search of the van. A United States Customs agent then ob-

103. *Id.*
104. *Id.* at 1662.
105. *Id.*
106. *Id.* (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)).
107. *Id.* (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).
108. 77 F.3d 101 (5th Cir. 1996).
109. *Id.* at 105.

served through the van's window cellophane-wrapped packages consistent in size and appearance to packages typically containing cocaine or marijuana. The van was then towed to the police department. A warrantless search revealed approximately 200 kilograms of cocaine.

The district court granted the defendant's pretrial suppression motion on grounds that the automobile exception to the warrant requirement could justify a warrantless search only when both probable cause *and* exigent circumstances existed.[110] The district court found no exigent circumstances because the police could have seized the van and later obtained a warrant before searching the van.[111] Moreover, in holding the automobile exception inapplicable, the district court placed emphasis on the fact that the van was parked in a privately owned parking lot, as opposed to a public street.[112]

The Fifth Circuit reversed. The court reasoned that "[t]here is no constitutional difference between 'seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.'"[113] Moreover, the court rejected the notion that the automobile exception requires exigent circumstances other than the potential mobility of the vehicle. The automobile exception applies, the court explained, when the vehicle is "readily capable of being used on the highways and it is found stationary in a place not regularly used for residential purposes."[114] Thus, concluded the court, probable cause alone justifies a warrantless search of a vehicle parked in a public place. Here, the court found probable cause based on the dog alert, the informant's tip, the defendant's unusual behavior, and the agent's observation of suspicious packages inside the van.[115]

Finally, the court dismissed the defendant's argument that the warrantless search was unjustified because the van was parked in a privately owned mall parking lot. The court pointed to authority that the vehicle need only be parked in a public place as opposed to a residential place.[116] The court expressly rejected the notion that a privately owned parking lot could not constitute a public place for purposes of the automobile exception to the warrant requirement.[117]

110. *Id.* The district court recognized that the plain-view exception to the warrant requirement justified seizure of the van, but that, in the absence of an applicable exception, a warrant or consent was required to justify the search. *Id.*

111. *Id.*

112. *Id.* at 103-04.

113. *Id.* at 104 (quoting Chambers v. Maroney, 399 U.S. 42, 52 (1970)).

114. *Id.* (quoting California v. Carney, 471 U.S. 386, 392 (1985)).

115. *Id.* at 105.

116. *Id.* at 104-05.

117. *Id.* at 105 (citing United States v. Buchner, 7 F.3d 1149, 1150-51 (5th Cir. 1993)).

2. The Independent Source Doctrine

Through an interlocutory appeal, the government challenged a district court order suppressing evidence seized pursuant to a warrant obtained after an illegal entry to the premises. The Fifth Circuit reversed the suppression order, relying on a theory not initially considered by the district court. In *United States v. Hassan*,[118] United States Customs agents discovered a woman in an airport carrying five pounds of heroin in a suitcase. The woman then identified Hakeem Lawal as the individual who recruited her to smuggle the heroin. After his arrest, Lawal agreed to cooperate with the agents, and thereafter implicated the defendants in the heroin scheme.[119]

Lawal then accompanied law enforcement officials to the defendants' apartment. While just outside the apartment, one of the agents peeked through the drawn mini-blinds to determine whether any of the occupants were armed. The officer observed two of the defendants pouring a white substance through what appeared to be a heroin strainer. Another officer then knocked on the door; the defendants were observed frantically moving back towards the table as the officer yelled "police." The officer kicked in the door and the defendants were arrested inside. The apartment was not searched until a warrant was obtained the following day.

The district court suppressed the evidence seized pursuant to the warrant on grounds that the warrantless entry was not justified by exigent circumstances. In a motion for reconsideration, the government argued for the first time that, under the independent source doctrine, the subsequent acquisition of a warrant based on information independent of the illegal warrantless entry justified the seizure of evidence seen in plain view during the warrantless search.[120]

The *Hassan* court explained that a two-part analysis governed the applicability of the independent source doctrine: (1) whether the warrant affidavit, absent the tainted information gained through the illegal entry, contains sufficient remaining facts to establish probable cause; and (2) whether the illegal entry affected or motivated the officer's decision to procure the search warrant.[121] In reviewing a lower court's analysis of each prong, the court noted that the first inquiry regarding the warrant affidavit's sufficiency absent the tainted information required *de novo* re-

118. 83 F.3d 693 (5th Cir. 1996).

119. *Id.*

120. *Id.* The *Hassan* court summarily dismissed the defendants' contention that the government waived its argument that the independent source doctrine justified admission of the seized evidence by raising it for the first time in its motion for reconsideration. *Id.* at 696. Nonetheless, the court went on to conclude that the district court did not abuse its discretion in refusing to allow the government to present additional evidence on the independent source doctrine issue based on its failure to assert the issue prior to its motion for reconsideration. *Id.* at 696-97. The government did not appeal the district court's conclusion that exigent circumstances did not exist. *Id.* at 696.

121. *Id.* at 697 (citing United States v. Restrepo, 966 F.2d 964, 966 (5th Cir. 1992)).

view.[122] On the other hand, the second inquiry regarding the effect of the illegal entry required clearly erroneous appellate review because it involved a factual determination.[123]

Attempting to obtain a deferential standard of review, the defendants contended that the district court's determination that "but for the illegal entry, the officers probably would not have had sufficient evidence to obtain the warrant," involved a factual determination regarding the effect of the illegal entry.[124] Conversely, the government asserted that the district court's finding should be reviewed *de novo* because it related to the sufficiency of the warrant absent the tainted information.[125]

Conceding that the district court's ruling contained ambiguous terms, the *Hassan* court ultimately accepted the government's proposed standard of review. In reaching this conclusion, the court reasoned that the language of the district court's order focused on the existence of sufficient evidence to obtain the warrant, not on the motivations of the agents who made the illegal entry and ultimately obtained the warrant.[126]

The *Hassan* court then concluded that, as a matter of law, the expurgated affidavit contained sufficient information to establish probable cause.[127] The court pointed to the tips from the informants, including Lawal, and the customs agents' actual observance through the mini blinds of the defendants cutting heroin. This information alone, lawfully acquired, would have established probable cause to obtain the warrant. As such, the court held that the district court erred in finding the independent source doctrine inapplicable based on a lack of probable cause.[128]

Finally, the court decided to remand as to the second independent source doctrine factual inquiry regarding the effect of the illegal entry.[129] To guide the district court's analysis, the *Hassan* court suggested that the district court consider "the precise nature of the information acquired after the illegal entry, the importance of this information compared to all the information known to the agents, and the time at which the officers first evinced an intent to seek a warrant."[130]

3. *Electronic Signal Alone Sufficient to Create Probable Cause*

In *United States v. Levine*,[131] the Fifth Circuit addressed for the first time the issue of whether an electronic signal alone may constitute a suffi-

122. *Hassan*, 83 F.3d at 697 (citing *Restrepo*, 966 F.2d at 971; United States v. Phillips, 727 F.2d 392, 394-95 (5th Cir. 1984)).
123. *Id.* (citing *Restrepo*, 966 F.2d at 972; United States v. Andrews, 22 F.3d 1328, 1333 (5th Cir.), *cert. denied*, 115 S. Ct. 346 (1994)).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 698 (citing *Restrepo*, 966 F.2d at 972).
128. *Id.*
129. *Id.* at 699 (citing *Restrepo*, 966 F.2d at 972).
130. *Id.* (citing *Restrepo*, 966 F.2d at 972; United States v. Register, 931 F.2d 308, 311 (5th Cir. 1991)).
131. 80 F.3d 129 (5th Cir. 1996).

cient basis for probable cause for a warrantless arrest and a subsequent search. Although the court dealt with an issue of first impression, it relied heavily on the established principle that an alert from a narcotics-sniffing dog may alone suffice to create probable cause.

The electronic tracking device at issue was given to the defendant during an armed bank robbery in two packets of "bait money."[132] The defendant, however, spilled some of the money as he exited the bank, including one of the packets containing "bait money." The defendant was arrested about forty minutes later by an officer who tracked his signal with a vehicular tracking unit. A subsequent search of the vehicle's trunk revealed evidence implicating the defendant in the robbery, including the "bait money" and detailed plans of the robbery.

The defendant contended on appeal that the district court erred in admitting evidence, over his objection, in violation of his Fourth Amendment rights. At the heart of the defendant's argument was his contention that the signal transmitted from the tracking device did not provide sufficient probable cause for his arrest and the subsequent search of his vehicle. In support of this argument, the defendant pointed to the fact that simultaneous signals were received from different parts of the city because one tracking device remained at the bank.[133]

The Fifth Circuit, like the district court, rejected the defendant's argument.[134] The court pointed to testimony at the suppression hearing that the tracking system at issue had proven ninety-five to ninety-seven percent effective at apprehending bank robbers during its eleven years in use.[135] The officer who arrested the defendant also testified that he systematically eliminated all other vehicles in the area before concluding that the defendant's vehicle contained the tracking device.

In reaching its conclusion, the court analogized to cases holding that a dog alert to narcotics is alone sufficient to create probable cause.[136] The court reasoned that the electronic device at issue was at least as reliable as a dog sniff and, as such, gave the officer probable cause to arrest the defendant. Finally, the court, citing *Sinisterra*, concluded that the warrantless automobile search did not violate the defendant's Fourth Amendment rights because probable cause alone justifies a warrantless search of a vehicle lawfully parked in a public place.[137]

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132. *Id.* at 131. The tracking device was utilized as a joint effort by the Austin police and local financial institutions to apprehend bank robbers. *Id.*

133. *Id.* at 132.

134. *Id.* at 133.

135. *Id.*

136. *Id.* (citing United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995)).

137. *Id.* (citing *Sinisterra*, 77 F.3d at 104). Although the defendant was arrested at the scene, the court made no analysis as to whether the search of his vehicle was permissible as a search incident to a lawful arrest.

4. Limitations on Consent to a Search

In *United States v. Jaras*,[138] the Fifth Circuit faced questions regarding the scope of consent to search a vehicle and its contents.[139] The court illustrated its willingness to enforce the requirement that an individual with actual or apparent authority must give consent in order to sustain the search.

In *Jaras*, the driver of a vehicle gave consent to a search of the vehicle. When the officer found a garment bag and two suitcases in the trunk, the driver claimed ownership of the garment bag, but claimed that the suitcases belonged to the defendant passenger.[140] The officer searched all three bags and found marijuana in two of the suitcases.[141] The district court denied the defendant passenger's pre-trial suppression motion and the defendant appealed.

On appeal, the defendant contended that the search of the two suitcases was illegal because it was conducted without a warrant and without valid consent. In acknowledging valid consent, the court made clear that the government must demonstrate either that the defendant himself consented to the search or that consent was obtained from a third party with authority to give valid consent.[142] As to the two suitcases at issue, the court explained that the government must establish that the driver had actual or apparent authority to consent to a search of the luggage.[143]

The *Jaras* court first concluded that the driver lacked actual authority to consent to a search of the luggage. To establish actual authority, the court explained that the government must prove that the party who gave consent and the party challenging the search

> mutually used the property searched and had joint access to and control of it for most purposes, so that it is reasonable to recognize that either user had the right to permit inspection of the property and that the complaining co-user had assumed the risk that the consenting co-user might permit the search.[144]

As to the issue of actual authority, the court made clear that merely placing suitcases in the trunk of a car and riding as a passenger do not vest the driver with joint access or control.

The court also found that the driver lacked apparent authority to consent to a search of the luggage.[145] According to the court, even if the officer subjectively believed that the driver had authority to consent to

138. 86 F.3d 383 (5th Cir. 1996).

139. The officer conducted a warrantless search of the vehicle during a traffic stop. The government conceded that the search was not justifiable by probable cause; as such, the validity of the search rested entirely on the effectiveness of the consent given for the search. *Id.* at 388-89.

140. *Id.* at 386. The court noted that the truthfulness of the driver's statement about the ownership of the luggage was irrelevant.

141. *Id.*

142. *Id.* at 389 (citing United States v. Matlock, 415 U.S. 164 (1974)).

143. *Id.* (citing Illinois v. Rodriguez, 497 U.S. 177, 186-87 (1990)).

144. *Id.* (quoting United States v. Rizk, 842 F.2d 111, 112-13 (5th Cir. 1988)).

145. *Id.*

the disputed search, his belief would have been unreasonable under the circumstances.[146] The driver did not purport to possess authority to consent. To the contrary, the driver unequivocally disavowed ownership of the luggage. This statement, the court explained, indicated that the driver's consent to the search did not purport to extend to the luggage.[147]

The *Jaras* court also rejected the government's argument that the defendant had "impliedly consented" to the search of the luggage.[148] In support of its argument, the government pointed to the fact that the defendant was aware that the driver had consented to a search of the vehicle and made no objection as the officer searched his suitcases. But, the court found that these circumstances did not warrant the inference that the defendant passenger consented to the search. The court noted that the officer did not ask the defendant passenger whether he would consent to the search and that the defendant passenger was not present when the driver consented to the search.

5. *Standing Required to Challenge a Search*

The Fifth Circuit reversed a district court's suppression order relating to evidence seized during a warrantless search of a rented automobile in *United States v. Riazco*.[149] The court addressed the issue of authority to challenge a search. This time, however, the court's conclusion resulted in admission, rather than suppression, of the evidence.

In *Riazco*, an officer's search of a rental car revealed cocaine hidden in the speaker cavities.[150] The officer had conducted the search after its driver, a non-English speaking person, signed a consent form written in English. The district court ruled that the driver, but not the passenger, had standing to challenge the search of the rental car and that the search was conducted without valid consent because of the language barrier.[151]

The Fifth Circuit reversed based on the conceded fact that the defendant driver did not rent the car, was not authorized to drive the rental car, and did not even know who had rented the car.[152] The court explained that whether a defendant has standing to challenge an allegedly illegal search is established by a two-part inquiry: "(1) whether the defendant is able to establish an actual, subjective expectation of privacy with respect to the place being searched or items being seized, and (2) whether that expectation of privacy is one which society would recognize as objectively

146. *See id.*
147. *Id.* at 390.
148. *Id.*
149. 91 F.3d 752, 753 (5th Cir. 1996).
150. The officer determined that the car was a rental car during the traffic stop, but prior to the search. The passenger, in fact, produced the rental agreement upon the officer's request. *Id.*
151. *Id.* at 753-54.
152. *Id.* The passenger, who was also arrested upon discovery of the cocaine, also was not listed as an authorized driver on the rental agreement. *Id.* at 753.

reasonable."[153] The court concluded that, under this standard, the defendant driver, as an unauthorized driver of the vehicle, lacked standing to challenge the search because the driver had no property or possessory interest in the vehicle.[154] In the court's view, any actual, subjective privacy expectation with respect to the vehicle would be unreasonable.[155]

6. *Withdrawal of Consent to a Search*

In *United States v. Ho*,[156] the Fifth Circuit addressed the propriety of a search incident to an arrest where the defendant revoked his consent to the search prior to his arrest. Under these circumstances, the validity of the search is wholly dependent on whether the officer had probable cause to make the arrest before the defendant withdrew his consent.[157] The court applied careful analysis in determining the timing effect of the withdrawal of consent.

The arresting officer in *Ho*, a member of the New Orleans International Airport Narcotics Interdiction Unit, initially suspected the defendant of drug trafficking based on his suspicious behavior after deboarding a flight from Los Angeles.[158] The investigation took an unexpected and sudden turn when the defendant first consented to a search of his portfolio and then suddenly attempted to retrieve the portfolio when the officer focused on a blank, white plastic card the size of a credit card. The officer struggled with the defendant, retained possession of the portfolio, and discovered that the white card had a magnetic strip on the back. The officer then arrested the defendant for possession of a counterfeit credit card.[159]

As to the propriety of the search, the Fifth Circuit first noted that warrantless searches are justified if conducted incident to a lawful arrest.[160] To justify the search, however, the warrantless arrest must be based on probable cause.[161] The court explained that because the officer continued the search after the defendant withdrew his consent, the continued search was constitutionally permissible only if the officer had probable cause to arrest the defendant at the time the defendant withdrew his

153. *Id.* at 754 (quoting United States v. Kye Soo Lee, 898 F.2d 1034, 1037-38 and n.5 (5th Cir. 1990)).

154. *Id.* at 754-55.

155. *Id.* The court also noted that its holding was not inconsistent with cases from other circuits. *Id.* at 754-55 (citing United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990)).

156. 94 F.3d 932 (5th Cir. 1996).

157. *Id.* at 933-34.

158. *Id.* at 934, 938.

159. A later search revealed another similar blank credit card, seventeen counterfeit travelers checks and a piece of paper containing credit card numbers. The defendant was charged with knowingly possessing counterfeit securities. *Id.*

160. *Id.* at 935 (citing United States v. Barton, 17 F.2d 85, 89 (5th Cir.), *cert. denied*, 115 S. Ct. 148 (1994)).

161. *Id.* (citing United States v. Wadley, 59 F.3d 510, 512 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 240 (1996)).

consent.[162]

Based on the undisputed facts, the court made clear that whether the arrest was constitutionally sound turned solely on whether the officer's discovery of a blank, white plastic card the size of a credit card created probable cause to believe that the defendant had committed or was committing a crime. The court held that there was no probable cause.[163]

In reaching its conclusion on the probable cause issue, the court placed great emphasis on the officer's testimony regarding the importance of the discovery of the magnetic strip to his determination that the card was fraudulent.[164] Without knowledge of the magnetic strip, the court explained that the officer's discovery of the card might have created a mere suspicion of wrongdoing, but not probable cause.[165] Thus, the court stated that "the discovery of the magnetic strip after [the defendant] revoked his consent was an essential element of the probable cause determination for an officer with [the arresting officer's] knowledge and experience."[166] In sum, the court concluded that the arrest was made without probable cause and, therefore, the evidence obtained incident to the illegal arrest was suppressed as the fruit of an unlawful search.[167]

7. *Permissibility of Forcibly Obtaining Blood and Hair Samples for DNA Testimony*

In *United States v. Bullock*,[168] the Fifth Circuit indicated its willingness to uphold the taking of blood and hair samples pursuant to a warrant based on probable cause, even when the defendant forcibly objects to the procedure. In *Bullock*, the police suspected the defendant of robbing a bank based on a report of a security guard at the defendant's apartment complex.[169] In the bank parking lot, the police found a baseball cap matching the description of the one worn by the robber; the hat contained a substance suitable for DNA testing. Thus, while the defendant was in custody, law enforcement officers obtained a warrant to obtain

162. *Id.* Ordinarily, the defendant bears the burden of proving that the search or seizure was unconstitutional. In this case, however, the government was charged with the burden of proof because the search was conducted without a warrant. *Id.* at 936.

163. *Id.* at 937.

164. *Id.* at 936-37.

165. *Id.* at 937-38.

166. *Id.* at 937. The court also pointed to three other factors to buttress its conclusion. First, the court noted that the government had offered no explanation as to why a white plastic card should create probable cause to believe that it is fraudulent. Second, the government offered no evidence as to the arresting officer's knowledge of credit card fraud. Finally, and relatedly, the arresting officer was investigating the defendant for possible drug offenses; as such, until discovery of the magnetic strip, there was no predicate background in the investigation to support the fraudulent character of the card. *Id.* at 937-38.

167. *Id.* at 938 (citing *Wadley*, 59 F.3d at 512).

168. 71 F.3d 171 (5th Cir. 1995).

169. *Id.* The police also discovered that, approximately fifteen minutes after the robbery, a cash deposit was made to the defendant's bank account, bringing the account to its highest level in months. A search of the defendant's apartment conducted pursuant to a warrant revealed $4,052 in bills identified as having come from the robbed bank. *Id.*

blood and hair samples.[170] He kicked, hit, and attempted to bite the agents until the agents handcuffed him between two cots and ultimately obtained the samples.[171]

In a pretrial suppression motion, the defendant sought the exclusion of the blood and hair samples on grounds that the medical procedure constituted an unreasonable intrusion, despite the existence of probable cause.[172] The court balanced the three factors enunciated by the Supreme Court in *Schmerber v. California*:[173]

> 1) the extent to which the procedure may threaten the safety or health of the individual; 2) the extent of intrusion upon the individual's dignitary interest in personal privacy and bodily integrity; and, weighed against these interests, 3) the community's interest in fairly and accurately determining guilt and innocence.[174]

In balancing the first factor, the court noted that a registered nurse took the samples using proper technique. As such, the procedure did not pose any threat to the defendant's health or safety. Therefore, the first factor weighed in the government's favor.[175]

The second *Schmerber* factor also favored the government. The court reached this conclusion on grounds that the procedure was virtually risk and pain free and, as the Supreme Court has recognized, blood tests "have become routine in our everyday life."[176] The court made clear that the use of force was only caused by the defendant's non-compliance and was judicially authorized in the event of the defendant's refusal.[177]

Finally, as to the third factor, the court found the government's need for the scientific evidence to be great. The court pointed out the lack of an eyewitness identification of the defendant, and the defendant's intent to rely on an alibi defense. Therefore, the court concluded, the scientific evidence was essential to establishing the defendant's guilt or innocence.[178] Based on its consideration of the *Schmerber* factors, the court held the search to be a reasonable one, with a relatively minor risk and a limited intrusion.[179]

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170. The defendant was taken into custody after he was stopped for speeding and the officers discovered warrants issued for his arrest for traffic violations. *Id.* at 173-74.
171. *Id.* at 174.
172. *Id.* at 175 (citing Winston v. Lee, 470 U.S. 753 (1985)).
173. 384 U.S. 757 (1966).
174. *Bullock*, 71 F.3d at 176 (citing *Schmerber*, 384 U.S. at 757).
175. *Id.*
176. *Id.* (quoting Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 625 (1989)).
177. *Id.*
178. *Id.* at 177.
179. *Id.*