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Criminal Procedure: Confession Search and Seizure

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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 and 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. RIGHT TO COUNSEL

During the Survey period, the Texas Court of Criminal Appeals confronted confusing issues arising from a defendant's assertion that evidence has been obtained from him in violation of his right to counsel. This right has two distinct constitutional bases. The Fifth Amendment has been interpreted as affording an accused a right to counsel during custodial interrogation, and the Sixth Amendment specifically guarantees the right to counsel after adversarial proceedings have been initiated.

In *Upton v. State*[1] a capital murder defendant moved to suppress two oral statements he gave to the police. One led the police to discover the victim's wallet; the other led to the discovery of the victim's body. Upton made the first statement on June 25th, when he was in custody on suspicion of burglary. Only the day before, Upton had met with an attorney for over an hour. The attorney advised Upton not to make any statements to the police. The attorney told the police that he had instructed Upton not to answer any questions and that he expected to be retained to represent him. After the lawyer left, the police resumed their questioning of Upton. When Upton mentioned that his lawyer had instructed him not to answer any questions, one officer replied, "Well he may be your lawyer, he's your employee, you know. It's up to you."[2] The next day, Upton was arraigned for burglary.

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1. 853 S.W.2d 548 (Tex. Crim. App. 1993).
2. *Id.* at 554.

After his arraignment, upon further questioning, he provided the police information that led to the discovery of the victim's wallet.

Approximately two weeks later on July 4th, Upton was questioned again. During this second questioning, he gave incriminating statements that led police to the victim's body. He was subsequently indicted for capital murder.

The Court of Criminal Appeals first concluded that Upton's Sixth Amendment right to counsel had attached to the capital murder charge for purposes of both the June 25th and July 4th statements, even though Upton had not been formally charged with the capital offense.[3] The court rejected a "technical" reading of the Sixth Amendment jurisprudence noting that, although Upton had only been charged with burglary at the time he made the incriminating statements, the burglary offense was used as a predicate for the capital murder charge.[4]

The court went on to conclude that Upton was indeed represented by counsel at the time he made the statements. Because the police may initiate interrogation in such a circumstance "only through notice to defense counsel," Upton's statements should have been suppressed.[5] Although not necessary to its resolution of the suppression issue, the court also noted that Upton's statements were obtained in violation of his Fifth Amendment rights. When Upton told the police that his lawyer had advised him not to make any statements, this constituted, in the court's view, "an equivocal request for counsel under the Fifth Amendment."[6] The officer's reply — "It's up to you" — did not sufficiently clarify whether Upton desired to have his lawyer present for any additional questioning. The officer's failure to so inquire "tainted the entire ensuing interrogation process."[7] Because the court concluded that Upton's reference to his lawyer created a duty to inquire, it did not need to address the issue of whether Upton's statement amounted to an indication of his desire to exercise his right to counsel.

B. Reasonable Suspicion

During the Survey period, several Texas courts dealt with a common issue in the litigation of "seizures" under federal and Texas constitutional law — what quantum of circumstances qualifies as reasonable suspicion sufficient to warrant an investigatory detention. The issue of "reasonable suspicion" arose in several different contexts.

In *Saenz v. State*[8] the en banc Court of Criminal Appeals considered the question of reasonable suspicion in the context of a border stop. A border patrol officer stopped Mr. Saenz between Marfa and Presidio, approximately fifty-three miles north of the Mexican border. Saenz had committed no traf-

3. *Id.* at 555.
4. *Id.*
5. *Id.* at 557.
6. *Id.*
7. *Id.*
8. 842 S.W.2d 286 (Tex. Crim. App. 1992)

fic violations. The officer instructed Saenz that he was conducting a routine immigration check. Saenz appeared nervous and the officer asked to search the vehicle's trunk. Saenz consented and the officer discovered marijuana. Saenz moved to suppress the marijuana seized from his trunk. The trial court denied the motion and the Court of Criminal Appeals affirmed.[9] The appellate court relied on the "border stop" factors of *United States v. Brignoni - Ponce*[10] to reverse the lower court's ruling.[11]

Brignoni - Ponce articulated eight factors for a reviewing court to consider in determining whether reasonable suspicion exists for a border stop. These factors include: proximity to the border, the vehicle's load, information on recent illegal border crossings in the area, and the officer's experience in detecting alien smuggling.[12] According to the *Saenz* court, only one factor supported a finding of reasonable suspicion here — the experience of the officer. All other factors argued against a finding of reasonable suspicion or were at best neutral. The court concluded that the officer's experience, standing alone, could not support the stop of Saenz's vehicle.[13]

Barely three weeks after its decision in *Saenz*, the Court of Criminal Appeals again considered the reasonable suspicion issue in Montana v. State,[14] this time in the context of an airport stop. In *Montano* Houston police detained two suspects on the basis of the following observations: (1) the suspects appeared nervous; (2) the suspects bypassed a ticket counter before heading to the concourse; (3) one of the suspects was wearing a heavy jacket though it was a warm day; (4) one suspect handed his carry-on bag to the other before going through the magnometer; and (5) the suspects identified their airline as Northwest but that airline did not fly to their stated destination at that hour.

The court, relying on its previous holding in *Crockett v. State*,[15] held that the suspects' conduct did not rise to the level of reasonable suspicion.[16] To amount to reasonable suspicion, the "conduct must have been sufficiently distinguishable from that of innocent people under the same circumstances as to clearly, if not conclusively, set [the suspects'] conduct apart from [that of innocent people]." The court concluded that none of the conduct observed by the officers "was so beyond the norm of the conduct of innocent airport passengers as to amount to a reasonable suspicion that criminal activity was afoot."[17] The court analyzed each circumstance individually — the nervousness, the reference to Northwest Airlines — and held that no reasonable suspicion existed.[18]

The final significant treatment of the reasonable suspicion issue during the

9. *Id.*
10. 422 U.S. 873 (1975).
11. *Saenz*, 842 S.W.2d at 287.
12. *Brignoni*, 422 U.S. at 885.
13. *Saenz*, 842 S.W.2d at 292.
14. 843 S.W.2d 579 (Tex. Crim. App. 1992).
15. 803 S.W.2d 308 (Tex. Crim. App. 1991).
16. *Montano*, 843 S.W.2d at 582.
17. *Id.*
18. *Id.* at 583.

Survey period occurred in *Hawkins v. State*.[19] In this case, a Lubbock police officer observed Hawkins in an area known for street-level drug dealing. The officer knew that Hawkins had a criminal record. When the officer shined a light at Hawkins's car, Hawkins reached under his seat. The officer detained Hawkins who, upon questioning, subsequently removed from his mouth papers used to wrap user quantities of cocaine. In reversing the trial court's denial of Hawkins's motion to suppress, the Amarillo Court of Appeals characterized the circumstances leading up to Hawkins's detention as "no more than an inarticulate hunch [by the officer] that illegal activity was occurring, or about to occur."[20] This hunch did not justify the detention of Hawkins.

C. CONSENT

Consent is a well-established exception to the requirement that police searches be conducted on authority of a warrant. Two significant cases during the Survey period explored the limits of the consent exception. The first case was *Brown v. State*,[21] and the second was *Woodberry v. State*.[22]

Brown v. State involved the doctrine of implied consent, an issue of first impression for the Court of Criminal Appeals. Brown reported to the police that his wife had been killed by a robber. When the police arrived, they questioned Brown and conducted a search of his residence. The search uncovered evidence that led to Brown's indictment as the murderer. He moved to suppress the evidence because no warrant had been obtained and he did not give the police express consent to search his residence.

The Court of Criminal Appeals rejected Brown's contention that the consent need be express.[23] The court held that, in circumstances where the owner of the premises reports a crime to the police and suggests that the crime was committed by a third person, he has impliedly consented to "a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator."[24] The court specifically limited the implied consent notion to the initial investigation at the scene. No consent should be implied for any subsequent search.[25]

The issue of who has authority to consent arose in *Woodberry v. State*. Woodberry and another man, Scott, were stopped by police on suspicion of robbery. In response to questioning, Scott informed police that both men lived in a nearby duplex. The police contacted Scott's wife, who consented to a search of the entire duplex, even though Woodberry lived in one bedroom and paid monthly rent for the room. The search of Woodberry's room uncovered incriminating evidence.

The court concluded that Mrs. Scott lacked sufficient authority and con-

19. 853 S.W.2d 598 (Tex. App.—Amarillo 1993, no pet.).
20. *Id.* at 602.
21. 856 S.W.2d 177 (Tex. Crim. App. 1993).
22. 856 S.W.2d 453 (Tex. App.—Amarillo 1993, no pet.).
23. *Id.* at 182.
24. *Id.*
25. *Id.*

trol over Woodberry's room to consent to the search.[26] Though she had access to Woodberry's room for cleaning purposes she, like a hotel manager or a landlord, had no authority to consent to a search of Woodberry's room.[27] The court focused on the State's failure to adduce "clear and convincing evidence" that Mrs. Scott did anything but clean the room. She did not have the sort of complete access sufficient to consent to a search.[28]

D. GRAND JURY SUBPOENAS

Grand jury subpoenas are a commonly used method to gather evidence in a criminal investigation. However, their use is typically confined to white collar or economic crime investigations. In *Thurman v. Texas*[29] the Houston Court of Appeals considered the propriety of a grand jury subpoena in an unusual context — a driving while intoxicated prosecution.

Thurman was involved in a one car collision. A paramedic at the scene smelled alcohol on his breath. Thurman was treated for injuries at the hospital. During his visit, medical personnel also took blood samples and tested the samples for alcohol and drugs. The tests revealed a blood/alcohol level of .219. The state used a grand jury subpoena to obtain the test results. Subsequently, a grand jury charged Thurman with DWI.

The Houston court first rejected Thurman's claim that he had a reasonable expectation of privacy in the medical records of the blood test. The court relied heavily on the absence of a physician/patient privilege in criminal cases.[30] The court went on to conclude that the state had not abused the grand jury process in obtaining Thurman's medical records.[31] The court, however, noted that "the opportunity for abuse is great." Thus, the court urged the legislature to adopt some safeguards "to balance the right to privacy with the need to investigate crime freely."[32]

E. STATE CONSTITUTIONAL CHALLENGES

Prior Survey articles have suggested the need for defendants to invoke Texas Constitutional provisions to challenge improper police conduct.[33] Indeed, the Court of Criminal Appeals in *Heitman v. State*[34] seemed to invite such challenges with its statement that the Texas Constitution "was not intended by our founding fathers to mirror that of the federal government."[35] The seed *Heitman* planted for defendants, however, did not bear significant fruit during the Survey period. In cases where a *Heitman*-type challenge

26. *Woodberry*, 856 S.W.2d at 456.
27. *Id.* at 457.
28. *Id.* at 456-57.
29. 861 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1993, no pet.).
30. *Id.* at 99.
31. *Id.* at 100.
32. *Id.*
33. *See, e.g.*, Gary A. Udashen & Robert Udashen, *Criminal Procedure: Confession, Search & Seizure, Annual Survey of Texas Law*, 46 SMU L. REV. 1237 (1992).
34. 815 S.W.2d 681 (Tex. Crim. App. 1991).
35. *Id.* at 690.

arose, the court did not reach a different result than it would have reached under the federal constitution. In *Muniz v. State*,[36] for example, the Court of Criminal Appeals held that it was error for the court of appeals to fail to address Muniz's claim that a police search violated the Texas Constitution.[37] The court remanded the case to allow the lower court to consider the state constitutional argument. However, on remand, the court of appeals refused to afford Muniz any additional rights under the Texas Constitution with respect to a hearing on the truthfulness of the statements contained in a search warrant affidavit than those provided in *Franks v. Delaware*[38] and the U.S. Constitution.[39]

The court reached a similar result in *Aycock v. State*.[40] A drug sniffing dog alerted on Aycock's luggage during a customs check of a flight from Houston to Belize. Customs officers searched the bag and discovered cocaine. Aycock challenged the search under both the federal and state constitutions.

The court noted its independent review obligations under *Heitman*, but also noted that, since *Heitman*, "the Court of Criminal Appeals has not interpreted Article 1, Section 9 of our state constitution any differently than the Fourth Amendment of the U.S. Constitution."[41] In upholding the propriety of the search of Aycock, the court specifically held that "the Texas Constitution does not guarantee an individual any greater rights at the border against unreasonable searches and seizures than does the United States Constitution."[42] These cases do not remove the need for defendants to make constitutional challenges based on the Texas Constitution. However, the current trends in the cases suggest that such challenges will rarely be successful.

F. ATTENUATION DOCTRINE

Article 38.23 of the Texas Code of Criminal Procedure provides that no evidence obtained by illegal means is admissible against an accused in a criminal case.[43] In *Garcia v. State*[44] a plurality of the Court of Criminal Appeals held that the notion that the evidence would have been inevitably discovered by lawful means is *not* an exception to Article 38.23.[45] The only exception is the one specifically identified in the statute — when the arresting officer is acting in good faith reliance on a warrant.[46]

The plurality opinion in *Garcia* led to some arguments that the attenuation doctrine no longer had viability under Texas law. The attenuation doc-

36. 852 S.W.2d 520 (Tex. Crim. App. 1993).
37. *Id.*
38. 438 U.S. 154 (1978).
39. Muniz v. State, 865 S.W.2d 513 (Tex. App.—San Antonio 1993, no pet.).
40. 863 S.W.2d 183 (Tex. App.—Houston [14th Dist.] 1993, pet. filed).
41. *Id.* at 185.
42. *Id.* at 186.
43. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1993).
44. 829 S.W.2d 796 (Tex. Crim. App. 1992).
45. *Id.*
46. *Id.* at 799.

trine is the notion that a piece of evidence could be so removed or "attenuated" from illegal police conduct so as to render it admissible. Two cases during the Survey period clearly reject the view that the attenuation doctrine has not survived *Garcia*.

In *State v. Johnson*[47] the trial court suppressed a post-arrest statement of the defendant. The district court ruled that the police had illegally arrested the defendant. The statement at issue, though made quite some time after the arrest, could not be saved by the attenuation doctrine because the trial court concluded that the doctrine had been overruled by *Garcia*.

The *Johnson* appellate court refused to read *Garcia* as abolishing the attenuation doctrine.[48] According to the *Johnson* court, "*Garcia* should therefore be limited to its specific holding, *i.e.*, the inevitable discovery rule is not an exception to Article 38.23."[49] The court reasoned that Article 38.23 is a bar to illegally gathered evidence. If the evidence is attenuated from the taint of illegality, it is not, by definition, illegally obtained.[50] The Dallas Court of Appeals reached a similar result in *Welcome v. State*.[51]

G. Jury Instructions on Voluntariness of Confession

Article 38.23 provides for more than simply the exclusion of illegally obtained evidence. It also provides that, if the evidence raises an issue of whether the evidence was legally obtained, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained illegally, then the jury shall disregard any such evidence.[52] This provision transfers considerable authority to the jury in deciding the legality of evidence.

In *Patterson v. State*[53] the El Paso Court of Appeals held that the provisions of Article 38.23 are mandatory and "when an issue of fact is raised as to compulsion or persuasion in obtaining a confession, a defendant has a statutory right to have the jury charged accordingly."[54] In Patterson's case the judge had simply instructed the jury that his confession could only be used against him if it was freely and voluntarily made. The court did not instruct the jury as to which party bore the burden of proving the legality of the statement. The court also did not inform the jury as to the standard of proof it should apply in deciding whether to consider the statement or not. The El Paso court held that the trial court's failure to so instruct the jury was error because the court concluded that there was "some harm" to Patterson in the trial court's action, and the appellate court reversed his conviction.[55]

47. 843 S.W.2d 252 (Tex. App.—Texarkana 1992, no pet.).
48. *Id.* at 258.
49. *Id.*
50. *Id.*
51. 865 S.W.2d 128 (Tex. App.—Dallas 1993, no pet.).
52. Tex. Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp. 1993).
53. 847 S.W.2d 349 (Tex. App.—El Paso 1993, no pet.).
54. *Id.* at 352.
55. *Id.* at 353.

H. SUSPICIONLESS SEARCHES

The Fourth Amendment prohibits only those seizures that are "unreasonable."[56] A "suspicionless search" — one done without a warrant and in the absence of probable cause or reasonable suspicion — is not per se unreasonable. Rather, such a search is judged under the balancing test of *Brown v. Texas*.[57] *Brown* sets forth three factors that must be analyzed in the context of a suspicionless search: (1) the asserted state interest; (2) the level of intrusion on individual privacy; and (3) the effectiveness of the procedure in achieving its stated goal.[58]

A classic form of suspicionless search is the police roadblock. These occur with some frequency. During the Survey period, the Court of Criminal Appeals considered the propriety of a driver's license and insurance check roadblock that led to the discovery of over fifty pounds of marijuana.

State v. Sanchez[59] involved a roadblock set up by four Texas Department of Public Safety officers in Victoria County. The officers had no authorization from a superior officer nor did they act in accordance with established procedure. Moreover, the state adduced no evidence demonstrating the effectiveness of the roadblock in identifying violators. The court stated:

> In the absence of evidence of authoritatively standardized procedure followed in operating the subject roadblock in order to serve its stated purpose and minimize the officers' discretion, and in the absence of testimony or empirical evidence demonstrating the effectiveness of the roadblock, we hold [that] the roadblock was [un]reasonable under the Fourth Amendment.[60]

II. FEDERAL CASES

A. UNITED STATES SUPREME COURT CASES

1. What Constitutes a Seizure

During the Survey period, the Court decided *Soldal v. Cook County, Illinois*.[61] *Soldal* was a case that defined further what actions constitute a "seizure" of property for purposes of the Fourth Amendment to the United States Constitution.[62] The issue in *Soldal* was whether the seizure and removal of the Soldals' trailer home from a rented lot in a mobile home park violated the Soldals' Fourth Amendment rights.

The owner and the manager of the mobile home park filed an eviction proceeding in Illinois state court in May of 1987 against the Soldals. Under

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56. U.S. CONST. amend. IV.
57. 443 U.S. 47 (1979).
58. *Id.* at 50-51.
59. 856 S.W.2d 166 (Tex. Crim. App. 1993) (en banc).
60. *Id.* at 170.
61. 113 S. Ct. 538 (1992).
62. "The Fourth Amendment, made applicable to the States by the Fourteenth [Amendment] provides in pertinent part that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .'" *Id.* at 543.

the Illinois Forcible Entry and Detainer Act,[63] a tenant cannot be dispossessed from his premises without a judgment of eviction being entered against him. Although this suit was dismissed in June of 1987, the owner and the manager filed a second eviction proceeding in August of 1987, asserting nonpayment of rent. The case was set for trial in late September of 1987.

Rather than wait for a judgment to be entered in their favor, the owner and the manager made the decision to forcibly evict the Soldals from the mobil home park. Two weeks prior to the scheduled hearing, the manager notified the Cook County's Sheriff's Department of her plans to remove the Soldals' trailer home from the mobile home park, and she requested that sheriff deputies be present to forestall any resistance. Later that same day, two of the owner's employees, accompanied by a Cook County sheriff deputy, arrived at the Soldals' trailer home. "The employees proceeded to wrench the sewer and water connections off the side of the trailer home, disconnect the phone, tear off the trailer's canopy and skirting, and hook the home to a tractor"[64] with all actions occurring in the presence of the deputy. The trailer home was then towed onto the street.

The United States Supreme Court began its review by defining a "seizure" of property as "some meaningful interference with an individual's possessory interests in that property."[65] The Court noted that " 'at the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home.' "[66] The Court wryly observed that the Soldals' trailer home was not only seized, it was "literally carried away, giving new meaning to the term 'mobile home.' "[67] The Court further added that it failed "to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment."[68]

The Court voiced its disagreement with the Seventh Circuit's definition of "seizure." The Court went to great lengths to distinguish past Court opinions to show that these cases did not support the view, as put forward by the Seventh Circuit, that the Fourth Amendment protects against unreasonable seizures of property only in situations where liberty or privacy are also implicated.[69] The Court pointed to its "plain view" decisions to show that such construction of the Fourth Amendment was untenable.[70]

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63. ILL. REV. STAT. ch. 110, ¶ 9-101-9-321 (1991).

64. *Soldal*, 113 S. Ct. at 541.

65. *Id.* at 543 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

66. *Id.* (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

67. *Id.*

68. *Id.* However, the Court added that the question of whether the Fourth Amendment was in fact violated requires determining if the seizure was reasonable, which would entail weighing various factors that were not before the Court in *Soldal*. *Id.*

69. *Id.* at 544-45.

70. If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, "plain view" seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, "plain view" seizures have been scrupulously subjected to Fourth Amendment inquiry . . . The plain view

2. Exceptions to the Warrant Requirement

On its face, the Fourth Amendment requires a warrant for any search or seizure. However, there are numerous exceptions to the warrant requirement. *Minnesota v. Dickerson*[71] focused upon the so-called "plain feel" exception to the Fourth Amendment's warrant requirement.[72] The issue in *Dickerson* was whether the Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search.

On the evening of November 9, 1989, two Minneapolis, Minnesota police officers saw Dickerson leaving an apartment complex which was familiar to one of the officers as a "crack house." Upon spotting the police car and making eye contact with one of the police officers, Dickerson abruptly stopped, changed direction and entered an alley. Because Dickerson's actions were suspicious and he had just left a building which was known for its trafficking of cocaine, the officers decided to stop Dickerson and investigate further.

The officers pulled their car into the alley and ordered Dickerson to stop and to submit to a patdown search. The officer who conducted the search found no weapons but felt a small lump in Dickerson's nylon jacket. He examined it with his fingers and, believing it to be a lump of crack cocaine, reached into Dickerson's pocket and retrieved a small plastic bag containing crack cocaine. Dickerson was arrested and charged with possession of a controlled substance.

Before trial, Dickerson moved to suppress the cocaine. The trial court denied this motion. The trial court reasoned that the officers were justified under *Terry v. Ohio*[73] in both stopping Dickerson to investigate whether he might be engaged in criminal activity, and in frisking him to ensure that he was not carrying a weapon. Finally, the trial court relied upon the "plain-feel" exception to warrantless searches and ruled that the seizure of the co-

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doctrine "merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property."

Soldal, 113 S. Ct. at 546. As to the "plain view" decisions, the Court noted that the Seventh Circuit had attempted to reconcile its holding in *Soldal* with these decisions by seemingly construing the Fourth Amendment to protect only against seizures that are the outcome of a search. The Court disagreed and held that seizures of property are subject to scrutiny under the Fourth Amendment even though no search within the meaning of the amendment has taken place. *Id.* at 547.

71. 113 S. Ct. 2130 (1993).

72. The Fifth Circuit has recognized a so-called "plain feel" or "plain touch" corollary to the plain-view doctrine. *See* United States v. Coleman, 969 F.2d 126, 132 (5th Cir. 1992).

73. 392 U.S. 1 (1968). In *Terry*, the Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot, the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions." *Id.* at 30. *Terry* also held that "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a patdown search to determine whether the person is in fact carrying a weapon." *Id.* at 24. Finally, the search "must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26.

caine did not violate the Fourth Amendment.[74]

The Minnesota Court of Appeals reversed Dickerson's conviction. Though finding that the investigative stop and patdown were lawful under *Terry*, the court concluded that the officers had exceeded *Terry*[75] in seizing the cocaine and, in so concluding, declined to adopt the "plain feel" exception to the warrant requirement.[76] The Minnesota Supreme Court affirmed the court of appeals' decision and "expressly refused 'to extend the plain view doctrine to the sense of touch' on the grounds that 'the sense of touch is inherently less immediate and less reliable than the sense of sight' and that 'the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment.' "[77] In so ruling, the Minnesota Supreme Court adopted a categorical rule which apparently would bar the seizure of any contraband detected by an officer through the sense of touch during a patdown search for weapons.[78]

The United States Supreme Court rejected this categorical rule. Analogizing to the plain view doctrine,[79] the Court used the example of a police officer who lawfully pats down a suspect's outer clothing and feels an object whose mass or contour makes its identity immediately apparent. In such a situation, the Court stated, there has not been an invasion of the suspect's privacy beyond that already authorized by the officer's search for a weapon.[80] Therefore, if the object is contraband, the seizure without a warrant would be justified by the same practical considerations that are inherent in the plain view context.[81]

Applying these principles to the facts of *Dickerson*, however, the Court

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74. *Dickerson*, 113 S. Ct. at 2134.

> To this Court, there is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile . . . . The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Id.

75. *Id.* at 2136. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.* (citing Sibron v. New York, 392 U.S. 40, 65-66 (1968)).

76. *Id.* at 2134.

77. *Id.* (citing Minnesota v. Dickerson, 481 N.W. 2d 840, 845 (1992)).

78. *Id.*

79. *See Dickerson*, 113 S. Ct. at 2137.

> The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment — or at least no search independent of the initial intrusion that gave the officers their vantage point. (citations omitted.) The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment.

Id.

80. *Id.* at 2139.

81. *Id.* at 2137.

concluded that the Minnesota Supreme Court correctly held that the police officer in this case went beyond "the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*."[82] Because the officer continued to explore Dickerson's pocket after having concluded that there was no weapon present, the court held that this search "was unrelated to 'the sole justification of the search [under Terry:] . . . the protection of the police and others nearby.' "[83] The search was thus constitutionally invalid.[84]

3. *Standing*

The final significant case handed down by the Supreme Court during the Survey period was *United States v. Padilla*.[85] *Padilla* concerned the issue of co-conspirator standing to invoke the protection of the Fourth Amendment.[86] In *Padilla*, an Arizona police officer spotted a Cadillac on Interstate Highway 10, and the officer thought the driver acted suspiciously. After following the Cadillac for several miles, the officer stopped the Cadillac for driving too slowly. The lone occupant of the car was the driver, but the insurance card given to the officer by the driver revealed that a United States customs agent actually owned the Cadillac. Believing that the driver matched the profile of a drug courier, the officer, who by this time was receiving assistance from another officer, requested and received the permission of the driver to search the car. The officers discovered 560 pounds of cocaine in the trunk and arrested the driver.

The driver agreed to make a controlled delivery of the cocaine and telephoned his contact from a motel. Maria and Jorge Padilla drove to the motel in response to the phone call, and both were arrested after attempting to drive away in the Cadillac. Maria Padilla agreed to cooperate with law enforcement officials and led these officials to the house where her husband, Xavier Padilla, was staying. The ensuing investigation then connected the customs agent who owned the Cadillac and his wife to Xavier Padilla. All of the arrested persons were charged with a narcotics conspiracy. All of the arrested persons moved to suppress the evidence discovered in the course of the investigation by claiming that all the evidence was the fruit of the initial unlawful investigatory stop of the Cadillac on Interstate Highway 10. The district court upheld these motions to suppress because the defendants were "involved in a joint venture for transportation . . . that had control of the

82. *Id.* at 2138. The Minnesota Supreme Court closely examined the record and concluded that "the officer determined that the lump was contraband only after 'squeezing, sliding, and otherwise manipulating the contents of the defendant's pocket' — a pocket which the officer already knew contained no weapon." *Id.* (quoting 481 N.W.2d at 844).

83. *Dickerson*, 113 S. Ct. at 2139 (quoting *Terry*, 392 U.S. at 29).

84. *Dickerson*, 113 S. Ct. at 2139.

85. 113 S. Ct. 1936 (1993).

86. The Ninth Circuit was the only Circuit that had recognized co-conspirator standing. *Padilla*, 113 S. Ct. at 1939. "[A] co-conspirator's participation in an operation or arrangement that indicates joint control and supervision of the place searched establishes standing." *Id.* at 1938. Under the reasoning of the Ninth Circuit, "a co-conspirator obtains a legitimate expectation of privacy for Fourth Amendment purposes if he has either a supervisory role in the conspiracy or joint control over the place or property involved in the search or seizure." *Id.* at 1937.

contraband."[87] The Ninth Circuit relied upon the co-conspirator standing exception to affirm the district court.[88]

The United States Supreme Court reversed the Ninth Circuit.[89] The Court recited the long-standing rule that a "defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure."[90] The Court rejected the co-conspirator exception and remanded the case so that the lower court could consider whether each arrested person had either a property interest protected by the Fourth Amendment that was interfered with by the stop of the Cadillac, or a reasonable expectation of privacy that was invaded by the search of the Cadillac.[91]

B. FIFTH CIRCUIT CASES

1. Reasonable Expectation of Privacy

United States v. Smith[92] concerned warrantless interceptions of conversations over cordless telephones, devices whose presence in homes and automobiles has become commonplace. Defendant David Lee Smith lived next door to Michael Varing. Varing suspected Smith of involvement in recent break-ins at Varing's home. Using a Bearcat scanner to monitor Smith's cordless phone calls,[93] Varing discovered not that Smith was connected to the recent burglaries, but that Smith was a drug dealer. After Varing contacted a friend in the police department of Port Arthur, Texas, he was provided some blank cassette tapes and "instructed" by the Port Arthur police to tape record Smith's calls. On one occasion, police officers were present with Varing to assist him in intercepting and recording Smith's calls. The calls which had been intercepted and the tape recordings of these calls eventually led to Smith's arrest and the arrest of four other defendants on charges of drug trafficking. Immediately after his arrest, Smith consented to a search of his residence. The search turned up crack-cocaine, drug paraphernalia, customer lists, and a loaded .38 calibre revolver. Smith was convicted of multiple narcotics violations.

On appeal, Smith argued that the interception of his cordless telephone conversations violated both Title III of the Omnibus Crime Control and Safe

87. *Id.* at 1938 (citing respondent's application for petition for cert. at 22A).
88. *Id.* at 1936.
89. *Id.*
90. *Id.* at 1939.
91. *Id.*
92. 978 F.2d 171 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1620 (1993).
93. A Bearcat scanner is a type of radio receiver which allows the user to monitor a number of radio frequencies. The scanner sequentially monitors all programmed frequencies. When a conversation on one of these frequencies is picked up, the scanner locks in on that frequency to allow the user to listen in. Bearcat scanners, along with similar scanners made by competitors, are commercially available at most radio and electronic stores.

Smith, 978 F.2d at 173, n.1.

Streets Act of 1968,[94] and the Fourth Amendment. The Fifth Circuit Court rejected Smith's position.[95] The court noted that generally a search has occurred when the government infringes on an expectation of privacy which society considers reasonable. The court further noted, however, that a mere subjective expectation of privacy alone is not protected by the Fourth Amendment. Rather, the expectation of privacy must be objective: one that society is prepared to recognize as reasonable.[96]

The court explained that cordless telephones are difficult to characterize for Fourth Amendment purposes — whether they are more like traditional telephones or more like radio transmitters:

> This difference is important because the Fourth Amendment clearly protects communications carried by land-based telephone lines. On the other hand, pure radio communications are afforded no such protection because "broadcasting communications into the air by radio waives is more analogous to carrying on an oral communication in a loud voice or with a megaphone than it is to the privacy afforded by a wire."[97]

The court noted that a cordless telephone does not fit neatly into either category.[98] The court then discussed earlier cases under Title III which discussed whether the user of a cordless telephone had a reasonable expectation of privacy.[99] In those earlier cases, it had been decided that the user did not have a reasonable expectation of privacy due to the ease with which cordless phone conversations could be intercepted and monitored.

The court, however, noted that today's cordless phones are very different from and not as easily susceptible to being intercepted as the cordless phones at issue in the earlier cases. Thus, "[a]pplication of the Fourth Amendment in a given case will depend largely upon the specific technology used, and a trial court must be prepared to consider that technology in a hearing on a motion to suppress."[100] The court further instructed courts to keep in mind that "the issue is not whether it is conceivable that someone could eavesdrop on a conversation but whether it is reasonable to expect privacy."[101] At some point, the court noted, as technological advances make cordless communications more private, such communication will be entitled to Fourth Amendment protection.[102]

The court stated that Smith had the burden to show that the evidence in his case was obtained in violation of his Fourth Amendment rights. The court pointed out that Smith offered no evidence — such as the frequency or range of the phone — that would demonstrate that his expectation of privacy was reasonable. Therefore, the district court properly denied his mo-

94. 18 U.S.C. §§ 2510-2521 (1988).
95. *Smith*, 978 F.2d at 173.
96. *Id.* at 177.
97. *Id.* at 177 (quoting United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973)).
98. *Id.* at 178.
99. *See, e.g.*, State v. Howard, 679 P.2d 197 (Kan. 1984).
100. *Smith*, 978 F.2d at 180.
101. *Id.* at 179.
102. *Id.* at 180.

tion to suppress.[103]

2. *Consent to Search*

In *United States v. Rich*[104] the Fifth Circuit addressed the question of "whether an individual's affirmative response to a police officer's request to 'have a look in' the individual's automobile is the equivalent of a general consent to search the automobile and the contents therein, including the individual's luggage."[105] With "some reluctance" the court held that such a search does not violate the Fourth Amendment.[106]

On the night of January 16, 1991, the defendant, William Rich, was stopped by a Texas Department of Public Safety Trooper so that the trooper could issue Rich a warning citation for the burned out light bulb on Rich's license plate. After being stopped, Rich volunteered that he was traveling to Mesquite, Texas "just for the day" even though there were clothes hanging on the passenger side, a travel bag sitting on the passenger side floorboard, and two suitcases sitting behind the seat in the extended cab portion of the cab, all in plain view when the trooper flashed his flashlight into the automobile. The trooper also detected the smell of fabric softener, which he knew was often used by narcotics smugglers to mask the scent of marijuana. The trooper again asked Rich how long he planned on staying in Mesquite. This time, Rich answered "a couple of days." When Rich handed the trooper his insurance papers, Rich's hands were trembling to the point that the papers were rattling.

The trooper was unable to have a license check run on Rich's plates due to a computer malfunction. The trooper asked Rich whether he had any narcotics or weapons in his vehicle. Rich answered that he did not. The trooper then asked Rich, "Can I have a look in your truck?" Rich looked at the ground and did not answer. The trooper repeated the question. Again, Rich did not answer. Finally, after the trooper asked yet a third time and told Rich that he needed either "a yes or a no," Rich said "yes" and the trooper then proceeded to search the automobile. Immediately, he pulled out one of the suitcases and opened it, finding marijuana packed in fabric softener tissues. Ninety-two pounds of marijuana were eventually taken from the truck. Rich was read his Miranda warnings and arrested. The time from the initial stop to the arrest was no more than five minutes.

The Fifth Circuit set out the standard for determining the scope of consent: "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness. The key inquiry focuses on what the typical reasonable person [would] have understood by the exchange between the officer and the suspect."[107] Rich argued that the trooper's request to "have a look in" the truck was, under the stan-

103. *Id.*
104. 992 F.2d 502 (5th Cir.), *cert. denied*, 114 S. Ct. 348 (1993).
105. *Id.* at 503.
106. *Id.*
107. *Id.* at 505 (citations omitted).

dard of objective reasonableness, only a request to "see inside" the vehicle. The district court similarly based its decision to suppress in part on the failure of the trooper to use the more precise term "search" when making his request.

The Fifth Circuit did not agree with either Rich's argument or the district court's decision.[108] The court noted that several other circuits have held that a request to "look in" or "look through" a vehicle is equivalent to a request to "search" the vehicle.[109] The court then established a similar rule for the Fifth Circuit:

> [I]t is not necessary for an officer specifically to use the term "search" when he requests consent from an individual to search a vehicle. We hold that any words, when viewed in context, that objectively communicate to a reasonable individual that the officer is requesting permission to examine the vehicle and its contents constitute a valid search request for Fourth Amendment purposes.[110]

After considering the factual circumstances of *Rich*, the court held that the trooper's request to "have a look in" Rich's truck effectively communicated to him that the trooper was asking for Rich's consent to search the vehicle.[111]

Rich further argued that he did not know that the trooper was searching for drugs in that the trooper did not expressly inform him that he wanted to search the car for drugs, and therefore Rich's general consent to search the automobile could not be interpreted as extending to any containers within the automobile which might bear drugs. The district court decided to grant Rich's motion to suppress, in part, because of its conclusion that the trooper did not tell Rich that he wanted to search the automobile for drugs. The Fifth Circuit, again, rejected a narrow or technical view of consent:

> When the conversation between [the trooper] and Rich is considered in toto, it is indisputable that Rich knew that the object of [the trooper's] search was illegal weapons or narcotics . . . . [A]fter the defendant handed his insurance papers to [the trooper], [the trooper] asked him if he had any narcotics or weapons in the vehicle; the defendant answered "no." The officer then asked, for the first of three times, if he could "have a look in" the defendant's truck . . . . In the light of the fact that the entire scenario was played out in a matter of minutes, . . . it is unreasonable to assume a period of silence ensued that was long enough to disassociate the two sentences from each other . . . . [I]f, as a result of the verbal exchange, an objectively reasonable individual would under-

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108. *Id.* at 507.

109. *See, e.g.*, United States v. Espinosa, 782 F.2d 888, 892 (10th Cir. 1986); United States v. Harris, 928 F.2d 1113, 1117 (11th Cir. 1991).

110. *Rich*, 992 F.2d at 506.

111. *Id.*

> Rich had observed [the trooper] shining his flashlight not only into the tinted window but into the open driver's side window of the truck and studying the truck's interior for at least thirty seconds; thus [the trooper] had already 'seen inside' the truck and an objectively reasonable person would assume at this point that [the trooper] was requesting permission to look further.

Id.

stand the object of the officer's search, then the object of the search has been sufficiently delineated for purposes of the Fourth Amendment.[112]

3. *Pre-Presentment Detention*

At issue in *United States v. Adekunle*[113] was how long someone suspected of alimentary canal drug smuggling may be detained before presentment to a neutral judicial officer must take place in order to determine that reasonable suspicion exists to support the continued detention. Adekunle and a companion, Masha,[114] were detained by customs officials in Brownsville, Texas because they were suspected of being alimentary canal drug smugglers. After being taken to a hospital for observation, a magistrate judge ordered that Adekunle and Masha be subjected to an x-ray. Attending physicians then administered laxatives to Adekunle and Masha, which caused both to excrete numerous balloons containing heroin. Both were then arrested. After excreting all of the balloons, they were taken to the local jail and presented before the magistrate judge. This presentment took place more than 100 hours after the initial detention and more than two days after their arrest.

Adekunle did not dispute that customs officials had a reasonable suspicion to detain him under suspicion of drug smuggling. Rather, Adekunle maintained that once the reasonable suspicion ripened into probable cause, he was no longer simply a subject of investigatory detention, but was instead under arrest. Adekunle therefore contended that the customs officials failed to timely provide him with the procedural protections required for warrantless arrests, and that this failure required suppression of any statements made during the period of detention.

The Fifth Circuit answered Adekunle's argument by stating that basic Fourth Amendment principles require the government, after detaining a person suspected of alimentary canal drug smuggling, to seek within a reasonable period a judicial determination that reasonable suspicion exists to support the detention:

> The [F]ourth [A]mendment does not require a formal adversary hearing for such a determination; informal presentation of the evidence supporting the customs agent's suspicion before a neutral and detached judicial officer satisfies the concerns underlying the [F]ourth [A]mendment. Failure to obtain such a judicial determination within 48 hours shifts the burden to the government to demonstrate a bona fide emergency or extraordinary circumstance justifying the lengthier delay.[115]

Under this standard, the court held that Adekunle's detention passed "constitutional muster" because customs officials brought the matter within 48 hours before a magistrate judge who ordered an x-ray.[116] The court rea-

112. *Id.* at 506-07.
113. 2 F.3d 559 (5th Cir. 1993).
114. The issues raised in *Adekunle* were raised only by Adekunle. Masha did not raise any issues before the Fifth Circuit which were addressed in *Adekunle*.
115. *Adekunle*, 2 F.3d at 562.
116. *Id.*

soned that this order of an x-ray by the magistrate judge "demonstrated an implicit determination that there was reasonable suspicion to warrant the continued detention."[117] Adekunle's conviction was therefore affirmed.[118]

4. Standard of Review for Motion to Suppress

The appropriate standard for appellate review of a motion to suppress predicated on a defective warrant was articulated with clarity by the Fifth Circuit in *United States v. Pofahl*.[119] Pofahl argued that the district court erred when it denied her motion to suppress evidence which was seized from three of her residences in California. She argued that the affidavits which supported the warrants did not establish probable cause. Pofahl challenged the affidavits on the basis that they charged her husband, Charles Pofahl, and another man with criminal activities in Texas, but failed to allege that she engaged in any illegal conduct or that any illegal conduct took place in California. Pofahl argued that the affidavits thereby failed to establish a nexus between her California residences and the evidence sought there by officials.

The Fifth Circuit set out a general standard for reviewing the district court's denial of the motion to suppress:

> [W]e review the denial of the motion to determine (1) whether the good-faith exception to the exclusionary rule applies and (2) whether the warrant was supported by probable cause. However, it is unnecessary to address the probable cause issue if the good-faith exception applies, unless the case involves a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates."[120]

The case did not involve a novel question of law and the court ultimately concluded that the officers acted in good faith reliance on the warrants.[121]

117. *Id.*
118. *Id.*
119. 990 F.2d 1456 (5th Cir.), *cert. denied*, 114 S. Ct. 226 (1993), and 114 S. Ct. 560 (1993).
120. *Id.* at 1473 (quoting Illinois v. Gates, 462 U.S. 213, 264 (1983)) (citations omitted).
121. *Id.* at 1474.