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Criminal Procedure: Confessions, Searches, and Seizures

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CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

*Leonel V. Mata**
*The Honorable Michael E. Keasler***

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I. INTRODUCTION

This article summarizes and analyzes cases decided by the U.S. Supreme Court, Texas Court of Criminal Appeals, and Texas courts of appeals during the Survey period, spanning from December 1, 2018 to November 30, 2019.

Section II covers confessions caselaw, which did not experience any substantial changes. Section III covers search and seizure caselaw, where we see important developments. Subjects covered include involuntary confession, reasonable expectations of privacy, probable cause, exigent circumstances, implied consent, and the private-party search doctrine.

II. CONFESSIONS

The Fifth Amendment is the bedrock of the law governing confessions.¹ In Texas we also have added protections found in Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure.² The Supreme Court

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1. U.S. CONST. amend. V.

2. TEX. CODE CRIM. PROC. ANN. arts. 38.21, 38.22.

of the United States has interpreted the Fifth Amendment to prevent the admissibility of statements made by suspects during a custodial interrogation by law enforcement unless certain requirements are met.³ Those requirements are that suspects being held and interrogated are (1) given warnings regarding their rights,⁴ and (2) they understand and waive those rights voluntarily.⁵ In *Miranda v. Arizona*, the necessary warnings were identified as: (1) the right to remain silent, and that any statement made may be used as evidence against them in court; (2) that they have the right to a lawyer and to have that lawyer present during any interrogation; and (3) that if they cannot afford to hire a lawyer then they have the right to have a lawyer appointed concerning that matter.⁶ This protection has been codified in Texas under Article 38.22 of the Texas Code of Criminal Procedure.⁷ Texas also requires that any statement used in evidence against a suspect in custody must be given “freely and voluntarily made without compulsion or persuasion.”⁸

There have been no significant developments in confession caselaw by the U.S. Supreme Court or the Texas Court of Criminal Appeals during the Survey period. Therefore, select cases from the Texas courts of appeals during the Survey period will be reviewed. Frequently, the credibility of witnesses is important in determining whether a confession was legally obtained, and reviewing courts apply a deferential standard of review to that determination. The selected cases demonstrate the difficulty appellants can face on appeal under that standard.

A. TWO-STEP INTERROGATION

In *Foster v. State*, Leslie Ray Foster sought to suppress custodial statements he made to a police officer after being arrested and statements he made to a detective at the police station.⁹ Only the detective warned Foster of his *Miranda* rights. Foster argued that law enforcement had circumvented his *Miranda* rights by applying a two-step technique known as “question first, warn later.”¹⁰ The State conceded that the pre-*Miranda* statements were inadmissible, and the trial judge denied Foster’s motion to suppress the post-*Miranda* statements.¹¹

The Fourteenth Houston Court of Appeals analyzed whether an impermissible two-step interrogation occurred. The court found that the threshold question to decide was whether the State deliberately used a “question first, warn later” strategy.¹² If the strategy was deliberate, then

3. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

4. See *id.* at 471.

5. *Id.* at 475.

6. See *id.* at 444.

7. TEX. CODE CRIM. PROC. ANN. art. 38.22.

8. *Id.* art. 38.21.

9. *Foster v. State*, 579 S.W.3d 606, 609–10 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

10. *Id.* at 609.

11. *Id.*

12. *Id.* at 612.

post-*Miranda* statements related to the pre-*Miranda* statements must be suppressed unless curative measures were taken before the post-*Miranda* statements were made.¹³ If the strategy was not deliberate, “then the post-*Miranda* statements may be admitted if [Foster] voluntarily waived his *Miranda* rights.”¹⁴

In order to determine deliberateness, the court focused on the subjective intent of the arresting officer who questioned Foster before Foster was advised of his *Miranda* rights.¹⁵ Since such a determination turns on the credibility of the officer, and the trial judge is the fact finder, the court of appeals applied a highly deferential standard in reviewing the trial judge’s findings.¹⁶ The court found that the officer did engage in an interrogation, which violated *Miranda*, and that those answers were inadmissible.¹⁷ However, the fact that Foster initiated the questioning and that the questioning was conversational in nature went against a finding that a two-step strategy was deliberately used.¹⁸ Foster’s argument that the officer and detective spoke to each other after the arrest and prior to Foster’s transport, and that they interrogated Foster close in time, was not enough to prove that a two-step strategy was deliberately used.¹⁹ It was also not enough that the officer knew that Foster was under arrest and interrogated him without *Miranda* warnings.²⁰ Because a court of appeals affords almost total deference to a trial judge’s determination that is supported by the record, the trial judge’s implied finding of a lack of deliberateness by the officer was upheld.²¹

The court then turned to the issue of voluntariness. The trial judge found that Foster understood and voluntarily waived his *Miranda* rights when speaking to the detective.²² The court reviewed this finding for an abuse of discretion.²³ The court of appeals considered:

- the detective’s demeanor;
- that Foster’s handcuffs were removed;
- that Foster responded that he understood his *Miranda* rights; and
- that Foster was cooperative.²⁴

The court rejected the argument that the “statements to the detective were involuntary because they were a continuation of his pre-*Miranda* statements to the officer.”²⁵ The factors in rejecting it were the amount of

13. *Id.* (citing *Carter v. State*, 309 S.W.3d 31, 37 (Tex. Crim. App. 2010)).

14. *Id.* at 613.

15. *Id.* at 612–13 (citing *Carter*, 309 S.W.3d at 39).

16. *Id.* at 613 (citing *Carter*, 309 S.W.3d at 40).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 613–14.

21. *Id.* at 614.

22. *Id.*

23. *Id.* (citing *Carter v. State*, 309 S.W.3d 31, 41–42 (Tex. Crim. App. 2010)).

24. *Id.* at 614.

25. *Id.*

time between interrogations, whether there was a change in place of the interrogations, and whether the interrogators changed.²⁶ The court found that one to two hours between interrogations, different locations, and different interrogators supported the trial judge's finding that it was not a continuation of the pre-*Miranda* interrogation.²⁷ Again, the court of appeals found that the trial judge did not abuse his discretion in finding that Foster voluntarily waived his *Miranda* rights when speaking to the detective.²⁸ The trial judge's ruling was affirmed.²⁹

B. INVOLUNTARY CONFESSIONS

In *Miranda v. State*, the Amarillo Court of Appeals reviewed two issues: (1) whether Amado R. Miranda involuntarily confessed to the police, and (2) whether Miranda received effective assistance of counsel.³⁰ Only issue one is relevant to this discussion. Issue one implicated *Miranda v. Arizona*,³¹ the Texas confession statute,³² and the right to be free from police coercion.³³ As stated previously, *Miranda v. Arizona* protects one's Fifth Amendment rights during custodial interrogation by requiring that certain warnings be given.³⁴ Under Article 38.21, any statement given by an individual must have been given freely and voluntarily.³⁵ Lastly, "the due process clause of the Fourteenth Amendment requires that an accused's statement be voluntary and not the product of police coercion."³⁶

Miranda argued that the totality of the circumstances proved that his confession was involuntary. The trial judge denied Miranda's motion to suppress. A court of appeals reviews a motion to suppress ruling for an abuse of discretion.³⁷ The record noted that Miranda testified that he voluntarily went to the police station, believing he was going to speak to the police about payment of property taxes. He testified that the detective he spoke to only spoke in English, and that "a certain amount of time" or "a lot of time" went by before someone who spoke imperfect Spanish came in to assist with communication between him and the detective.³⁸ Mi-

26. *Id.* at 615 (citing *Oregon v. Elstad*, 470 U.S. 298, 310 (1985)).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Miranda v. State*, No. 07-17-00327-CR, No. 07-17-00328-CR, 2019 WL 5280980, at *1, *5 (Tex. App.—Amarillo Oct. 17, 2019, no pet.) (mem. op., not designated for publication).

31. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

32. TEX. CODE CRIM. PROC. ANN. art. 38.21.

33. *See U.S. CONST.* amend. XIV, §1.

34. *See Miranda*, 384 U.S. at 471.

35. TEX. CODE CRIM. PROC. ANN. art. 38.21.

36. *Lopez v. State*, No. 13-13-00307-CR, 2015 WL 5602278, at *4 (Tex. App.—Corpus Christi-Edinburg June 25, 2015, pet. ref'd) (mem. op., not designated for publication); *see U.S. CONST.* amend. XIV.

37. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010).

38. *Miranda v. State*, No. 07-17-00327-CR, No. 07-17-00328-CR, 2019 WL 5280980, at *1, *4 (Tex. App.—Amarillo Oct. 17, 2019, no pet.) (mem. op., not designated for publication).

randa admitted that the police never said, “I promise you that I’m going to do this,” but that, through their statements, they suggested that things would be okay if he told them what they wanted to hear.³⁹ In fact, Miranda testified that the police said they could not make promises about how Miranda’s situation would be handled.⁴⁰ Miranda was not restrained and was told at the beginning of the interview that he was free to leave.⁴¹ When the translator arrived, the police communicated that Miranda did not have to talk to them and that he could leave at any time.⁴² Miranda argued that, during the interrogation, he maintained his innocence for a long time before making some admissions.⁴³

The court of appeals found that the trial judge, based on the record, was within his discretion to conclude that, while Miranda may have been confused, confusion is not equivalent to coercion.⁴⁴ It also noted that an ill-advised statement is not the same as an involuntary statement.⁴⁵ It is not enough, under this standard of review, for an appellant to show that there could be a different interpretation of the record. The court of appeals affirmed the trial judge’s ruling.⁴⁶

III. SEARCH AND SEIZURE

Both the United States Constitution and the Texas Constitution provide individuals with protections against unreasonable searches and seizures.⁴⁷ Intrinsic to those protections is a reasonable expectation of privacy recognized by the courts.⁴⁸ Recently, this understanding has been applied to modern technologies such as cell phones.⁴⁹ While our constitutions grant substantial protection for individuals, that protection is not unlimited. Among the various limits or exceptions that will be reviewed are when probable cause exists, when there are exigent circumstances, and when consent is given.

A. REASONABLE EXPECTATION OF PRIVACY

The courts have looked to the word “reasonable” to guide them in determining the limits on what is protected under the Constitution.⁵⁰ Not long before this Survey period, the U.S. Supreme Court decided *Carpenter v. United States*.⁵¹ *Carpenter* has been recognized as a landmark deci-

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at *5.

45. *Id.*

46. *Id.*

47. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9.

48. *See Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

49. *See Riley v. California*, 573 U.S. 373, 393–97, 401 (2014); *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

50. *See Katz*, 389 U.S. at 361.

51. *Carpenter*, 138 S. Ct. at 2206.

sion in Fourth Amendment jurisprudence. In his opinion, Chief Justice Roberts highlighted “the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.”⁵² In a narrow decision, the Court held that there is a reasonable expectation of privacy in certain amounts of historical cell-site location information (CSLI) data.⁵³ The Court rejected the third-party doctrine as an exception to the warrant requirement in this type of situation.⁵⁴ Since then, the Texas Court of Criminal Appeals has been presented with two opportunities to evaluate how this ruling applies.

First, in *Sims v. State*, the Texas Court of Criminal Appeals was presented with a situation where law enforcement used real-time location information to track Christian Vernon Sims’s cell phone without a warrant.⁵⁵ The police used that information to find and arrest Sims.⁵⁶ Sims filed a motion to suppress, arguing that the police violated the United States Constitution,⁵⁷ the Texas Constitution,⁵⁸ the Stored Communications Act (SCA),⁵⁹ and Articles 18.21⁶⁰ and 38.23 of the Texas Code of Criminal Procedure.⁶¹ The trial judge denied the motion and the court of appeals affirmed.

Sims argued that the real-time location data must be suppressed under Article 38.23(a) because it was obtained in violation of the SCA and Article 18.21.⁶² The SCA and Article 18.21 contain exclusivity provisions that state that without a federal constitutional violation (the SCA) or a federal or state constitutional violation (Article 18.21), the only remedies available are those provided by the statutes.⁶³ The court rejected Sims’s argument that the provisions were ambiguous and held that the language of the statutes was “plain and that effectuating that language does not lead to absurd results.”⁶⁴ Applying the “general versus the specific” canon of statutory construction, the court was able to harmonize the SCA and Article 18.21 with Article 38.23.⁶⁵ This canon states that if there is a conflict between a general provision and a special provision then the specific pro-

52. *Id.* at 2219.

53. *Id.* at 2217.

54. *Id.* at 2220.

55. *Sims v. State*, 569 S.W.3d 634, 636 (Tex. Crim. App. 2019), *cert. denied*, 139 S. Ct. 2749 (2019).

56. *Id.* at 637.

57. U.S. CONST. amend. IV.

58. TEX. CONST. art I, § 9.

59. 18 U.S.C. §§ 2702, 2703 (2012).

60. Act. of Aug. 26, 1985, 69th Leg., R.S. Ch. 587, § 5, 1985 Tex. Gen. Laws 2216 (repealed 2019).

61. TEX. CODE CRIM. PROC. ANN. art 38.23(a).

62. *Sims v. State*, 569 S.W.3d 634, 639 (Tex. Crim. App. 2019), *cert. denied*, 139 S. Ct. 2749 (2019).

63. 18 U.S.C. § 2708 (2012); Act. of Aug. 26, 1985, 69th Leg., R.S. Ch. 587, § 5, 1985 Tex. Gen. Laws 2216 (repealed 2019).

64. *Sims*, 569 S.W.3d at 641.

65. *See id.*; TEX. GOV’T CODE ANN. § 311.026(a); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 183 (2012).

vision prevails only to the extent that they overlap.⁶⁶ Thus, the SCA and Article 18.21 exclusivity provisions control in this situation over Article 38.23, a general statutory suppression remedy.⁶⁷

Turning to the Fourth Amendment claim, to prevail, Sims needed to show (1) “a subjective expectation of privacy and (2) that the subjective expectation of privacy is one that society recognizes, or is prepared to recognize, as reasonable.”⁶⁸ When evaluating whether Sims’s allegations met this standard, the court applied *Carpenter*.⁶⁹ Acknowledging that *Carpenter* dealt specifically with historical CSLI, the court decided that the analysis for real-time CSLI records is not meaningfully different from *Carpenter*.⁷⁰ In fact, it noted that, “unlike historical CSLI . . . real-time CSLI records are generated solely at the behest of law enforcement.”⁷¹ Also, the expectation-of-privacy analysis is the same as in *Carpenter*, because it “turns on the significance of the invasion of a protected privacy interest.”⁷² As a result, the court found that the third-party doctrine⁷³ and the public-thoroughfare rule⁷⁴ were not valid exceptions here.⁷⁵ Instead, for a government action to be considered a “search” or “seizure” one must evaluate whether enough information was searched or seized that it violated a reasonable expectation of privacy.⁷⁶

The court refused to announce a bright-line rule in determining how this type of situation should be decided.⁷⁷ Instead, it called for a case-by-case determination.⁷⁸ The court then relied on the fact that the police used less than three hours of real-time CSLI data that was gathered by pinging Sims’s cell phone less than five times.⁷⁹ It recognized that the U.S. Supreme Court has stated that longer-term surveillance might infringe on a person’s reasonable expectation of privacy if the records reveal the “privacies of [his] life,” but this was not that scenario.⁸⁰ Since no violation of the United States or Texas constitutions occurred, suppression was not appropriate under any of Sims’s theories. Notably, the court expanded the application of the Fourth Amendment and has provided guidance for courts and practitioners to apply.

In *State v. Martinez*, Juan Martinez, Jr. was indicted for intoxication manslaughter, and he filed a motion to suppress the results of the blood

66. See TEX. GOV’T CODE § 311.026(a); SCALIA & GARNER, *supra* note 65, at 183.

67. *Sims*, 569 S.W.3d at 642.

68. *Id.* at 643 (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

69. *Id.*

70. *Id.* at 645.

71. *Id.* at 645 n.15.

72. *Id.*

73. See *United States v. Miller*, 425 U.S. 435, 443 (1976); *Smith*, 442 U.S. at 743–44.

74. See *United States v. Knotts*, 460 U.S. 276, 283 (1983); *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

75. *Sims*, 569 S.W.3d at 645.

76. *Id.* at 645–46.

77. *Id.* at 646.

78. *Id.*

79. *Id.*

80. *Id.*

draw done to him at a hospital for medical purposes.⁸¹ The trial judge granted the motion, and the Corpus Christi–Edinburg Court of Appeals affirmed. Martinez was involved in a traffic accident and transported to a nearby hospital. Martinez was not under arrest at that time and the hospital began “trauma procedures” that involved taking blood from him.⁸² Martinez became aware of the blood draw and told the hospital staff he could not afford any tests and needed to leave. Trooper Quiroga arrived at the hospital but did not meet with Martinez. The hospital staff told Quiroga that they had Martinez’s blood. Quiroga told the staff not to destroy the blood and obtained a Grand Jury Subpoena. The hospital released the blood to the police once they received the subpoena. The blood was sent by law enforcement to the Department of Public Safety lab in Austin, Texas for testing.

Martinez argued that his blood was obtained, in part, in violation of the United States Constitution and the Texas Constitution.⁸³ The trial judge made findings of historical fact that the Texas Court of Criminal Appeals deferred to.⁸⁴ The State argued that the lower courts did not follow the court’s previous holdings in *State v. Hardy*⁸⁵ and *State v. Huse*.⁸⁶ The State also argued that *State v. Comeaux* was improperly relied on.⁸⁷ The court reviewed *Comeaux*, finding that it addressed a similar question that was presented in *Martinez*; however, *Comeaux* resulted in only a plurality opinion finding that *Comeaux*’s Fourth Amendment rights were violated.⁸⁸ In *Hardy*, blood was drawn by hospital staff and tested by the hospital to determine blood alcohol content (BAC).⁸⁹ The court distinguished *Hardy* from *Comeaux*, stating that *Comeaux* required a warrant to obtain and test the blood, whereas *Hardy* held that the State obtaining the hospital’s test results of blood was not protected by the Fourth Amendment in that narrow scenario.⁹⁰ *Huse* was granted by the court to review *Hardy* in light of the enactment of the federal Health Insurance Portability and Accountability Act.⁹¹ The holding in *Hardy* was reaffirmed in *Huse*.⁹²

The State argued that Martinez had no subjective expectation of privacy and that Martinez lost any potential expectation of privacy when he left the hospital, thus abandoning and surrendering the blood that was drawn.⁹³ The court reiterated that the test for determining abandonment “does not begin with a presumption of abandonment that must be rebut-

81. *State v. Martinez*, 570 S.W.3d 278, 283 (Tex. Crim. App. 2019).

82. *Id.*

83. *Id.* at 281–82.

84. *Id.* at 282.

85. 963 S.W.2d 516, 527 (Tex. Crim. App. 1997).

86. 491 S.W.3d 833, 835–36 (Tex. Crim. App. 2016).

87. 818 S.W.2d 46, 53 (Tex. Crim. App. 1991).

88. *Martinez*, 570 S.W.3d at 284 (citing *Comeaux*, 818 S.W.2d at 48–49, 53).

89. *Id.* (citing *Hardy*, 963 S.W.2d at 518).

90. *Id.* (citing *Hardy*, 963 S.W.2d at 526–27).

91. *Huse*, 491 S.W.3d at 835.

92. *Id.* at 841.

93. *Martinez*, 570 S.W.3d at 285–86.

ted” by Martinez.⁹⁴ The State needed to prove an affirmative intent by Martinez to abandon his blood.⁹⁵ The court considered that Martinez told hospital staff that he did not want any tests to be performed because he could not afford them.⁹⁶ This showed that he did not intend to surrender all decision-making authority over the blood.⁹⁷ The court also considered the location of where the blood was left.⁹⁸ The court found that by leaving it in possession of the hospital, in combination with testimony stating it would not be turned over without a court order, indicated that this location was distinct from leaving blood in a public place where anybody can access it.⁹⁹ Therefore, the blood was not considered to be abandoned.¹⁰⁰

Turning to whether Martinez’s expectation of privacy was reasonable, the court considered whether the third-party doctrine was applicable.¹⁰¹ The third-party doctrine ordinarily involves a voluntary relinquishment of information to a third party.¹⁰² Here, the court found a lack of voluntariness. Martinez was taken to the hospital by ambulance after a traffic accident.¹⁰³ The hospital staff noted that Martinez gave consent to be treated only concerning his hand and was uncooperative with all other procedures attempted.¹⁰⁴ The issue of implied consent was raised through hospital staff testimony stating that they had no paperwork showing a refusal of a blood draw.¹⁰⁵ Addressing this point, Martinez argued that his incoherent state at the time prevented any sort of implied consent. The court took note of another hospital staffer’s records, which indicated that Martinez was in an altered mental state.¹⁰⁶ The court ultimately found a lack of voluntariness that rendered the third-party doctrine inapplicable.¹⁰⁷

As to whether a reasonable expectation of privacy exists regarding one’s own blood, the court reviewed U.S. Supreme Court jurisprudence that found that the collection and analysis of biological samples are Fourth Amendment searches.¹⁰⁸ As to collection, the U.S. Supreme Court has held that blood collection implicates a privacy interest due to the intrusive nature of the extraction which requires a surgical intrusion into the body.¹⁰⁹ As to analysis, the U.S. Supreme Court held that the ability to uncover various private medical facts about someone implicates

94. *Id.* at 286.

95. *Id.*

96. *Id.* at 282.

97. *Id.* at 286.

98. *Id.* at 287 (quoting *United States v. Oswald*, 783 F.2d 663, 666–67 (6th Cir. 1986)).

99. *Id.*

100. *Id.*

101. *Id.* at 288.

102. *See* *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018).

103. *Martinez*, 570 S.W.3d at 288.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 289–90 (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 615–16 (1989)).

109. *Id.*

a privacy interest.¹¹⁰ The Texas Court of Criminal Appeals went on to hold that a continuing privacy interest existing in containers of such biological samples is consistent with the U.S. Supreme Court's reasoning concerning cell phones.¹¹¹

The court affirmed the lower court's holding that there is a Fourth Amendment privacy interest in blood that has been taken for medical purposes.¹¹² That the State subsequently tested it and there were no applicable exceptions to the warrant requirement meant the State violated Martinez's Fourth Amendment rights by conducting an analysis of the blood.¹¹³ The distinctions the court made here provide insight into how courts and practitioners should analyze the facts surrounding voluntariness and abandonment in a Fourth Amendment context.

Because of recent developments in Fourth Amendment jurisprudence it is worth following up on a case, *Hankston v. State*,¹¹⁴ discussed in a prior Survey period.¹¹⁵ The Texas Court of Criminal Appeals had decided that Article I, Section 9 of the Texas Constitution, like the Fourth Amendment, does not recognize a privacy interest in call logs or CSLI data.¹¹⁶ Since then, *Carpenter* has been decided by the U.S. Supreme Court and *Hankston* was remanded to the Texas Court of Criminal Appeals.¹¹⁷ Acknowledging *Carpenter*, the Texas Court of Criminal Appeals granted Hankston's Fourth Amendment ground, dismissed the Article I, Section 9 ground without prejudice, vacated the lower court's judgment, and remanded the case to be reexamined based on *Carpenter*.¹¹⁸

B. PROBABLE CAUSE

Under the United States and Texas constitutions, probable cause is the standard that the State must satisfy in order to obtain a warrant for a search or arrest.¹¹⁹ Unless an exception to the warrant requirement applies, a warrant must be obtained for a valid search or arrest. Probable cause "exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of a crime or evidence pertaining to a crime will be found."¹²⁰

In *Hyland v. State*, the Texas Court of Criminal Appeals addressed whether, after a *Franks* hearing¹²¹ is conducted and any recklessly false

110. *Id.* at 290 (citing *Skinner*, 489 U.S. at 617).

111. *Id.*; see *Riley v. California*, 573 U.S. 373, 395–96 (2014).

112. *Martinez*, 570 S.W.3d at 292.

113. *See id.*

114. 582 S.W.3d 278 (Tex. Crim. App. 2019) (per curiam).

115. Benjamin S. Brown & The Honorable Michael E. Keasler, *Criminal Procedure: Confessions, Searches, and Seizures*, 4 SMU ANN. TEX. SURV. 141, 146 (2018).

116. *Hankston v. State*, 517 S.W.3d 112, 121–22 (Tex. Crim. App. 2017).

117. *Hankston v. Texas*, 138 S. Ct. 2706 (2018).

118. *Hankston*, 582 S.W.3d at 280.

119. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9.

120. *Washington v. State*, 660 S.W.2d 533, 535 (Tex. Crim. App. 1983) (en banc).

121. *See generally* *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

statements are removed from the search warrant, a heightened probable cause standard existed.¹²² Richard Hyland was involved in a motorcycle accident that killed his wife. An officer obtained a search warrant for Hyland's blood using a pre-printed affidavit form where the officer filled in details. The blood was drawn, and an analysis found that Hyland was intoxicated at the time of the accident. Hyland was convicted of intoxication manslaughter.

During the trial stage of the proceeding, the trial judge conducted a *Franks* hearing due to Hyland's claim that the search warrant was issued based on false statements in the affidavit.¹²³ Hyland focused on paragraphs seven and nine of the affidavit, which were pre-printed paragraphs that had no alterations by the officer. Paragraph seven stated that the officer requested field sobriety tests to be done by Hyland and that the results were attached. Paragraph nine stated that the officer had seen intoxicated persons previously and based on that, his experience and training, and the rest of the facts offered, the officer placed Hyland under arrest for DWI and requested a breath and/or blood sample that Hyland refused to provide. Hyland argued neither of those paragraphs could be true since Hyland was unconscious. The trial judge excised paragraph seven and part of paragraph nine.¹²⁴ Then, the trial judge reviewed what remained in the affidavit and found it supported a finding of probable cause.¹²⁵ The court of appeals reversed the trial judge and Hyland's conviction. The court of appeals held that, after the *Franks* hearing, what remained of the search warrant affidavit did not support a finding of probable cause to take Hyland's blood.¹²⁶

The State argued before the Texas Court of Criminal Appeals that the word "clearly" in *McClintock* was not meant to show that a higher probable cause standard existed after a *Franks* hearing.¹²⁷ The court agreed.¹²⁸ It stated that the purpose of "clearly" was to express "that a reviewing court must ensure that whatever remains in the purged affidavit is still enough to establish probable cause."¹²⁹ The court then turned to distinguishing this case from other cases with similarities.¹³⁰ Finally, the court found that probable cause did exist based on facts stating that: (1) there was a strong odor of alcohol on Hyland; (2) the circumstances of the crash indicated that Hyland was the driver; and (3) serious injuries resulted from the crash.¹³¹ The court of criminal appeals reversed the holding of the court of appeals.¹³²

122. Hyland v. State, 574 S.W.3d 904, 907 (Tex. Crim. App. 2019).

123. *Id.* at 909.

124. *Id.*

125. *Id.* at 909–10.

126. *Id.* at 910 (citing *McClintock v. State*, 444 S.W.3d 15, 20 (Tex. Crim. App. 2014)).

127. *Id.*

128. *Id.*

129. *Id.* at 913.

130. *Id.* at 915.

131. *Id.*

132. *Id.* at 916.

In *State v. Martinez*, a motion to suppress was filed by Roger Anthony Martinez concerning the legality of his arrest for public intoxication.¹³³ The trial judge and court of appeals agreed with Martinez.¹³⁴ The Texas Court of Criminal Appeals addressed whether the collective-knowledge doctrine applied to the warrantless arrest of Martinez.¹³⁵

It was undisputed that Martinez was arrested without a warrant. The State argued that Article 14.01(b) applied and allowed for such an arrest.¹³⁶ The trial judge and court of appeals found a lack of direct evidence that the arresting officer, Officer Quinn, had observed Martinez's intoxication.¹³⁷ The State argued that the collective-knowledge doctrine should apply and that the knowledge of Officers Guerrero and Ramirez, who testified that they observed Martinez's intoxication, should be added to the knowledge of the arresting officer, Quinn. The court relied on *Woodward v. State*, holding that when several officers are cooperating, their cumulative information may be considered in determining probable cause.¹³⁸ Martinez argued that communication between the officers is a key part of the collective-knowledge doctrine that needed to be satisfied. The State argued that communication is only a way to prove cooperation between officers, and that cooperation itself is "the true cornerstone of the doctrine."¹³⁹ Martinez warned against adopting this rationale as endorsing a "hive thinking" approach.¹⁴⁰ The court acknowledged Martinez's concerns, but found that due to the facts of this specific case—that all officers responded to the same call, were present at the scene, communicated with Martinez, and were present at the arrest—the collective-knowledge doctrine applied.¹⁴¹ It was undisputed that Officers Guerrero and Ramirez had probable cause to arrest Martinez, and the court's review of the facts supported such a belief.¹⁴² The matter was reversed and remanded to the lower court.¹⁴³ Here, it was the type and amount of cooperation that resulted in the collective-knowledge doctrine being applicable.¹⁴⁴ The court did not establish the outer limit on when cooperation is enough to apply the collective-knowledge doctrine, but an effort to determine such a limit will likely be made by practitioners in the courts.

C. EXCEPTIONS TO THE WARRANT REQUIREMENT

Under the Fourth Amendment, a warrant is ordinarily required to con-

133. *State v. Martinez*, 569 S.W.3d 621, 623 (Tex. Crim. App. 2019).

134. *Id.*

135. *Id.* at 626.

136. TEX. CODE CRIM. PROC. ANN. art. 14.01(b).

137. *Martinez*, 569 S.W.3d at 625.

138. *See Woodward v. State*, 668 S.W.2d 337, 344 (Tex. Crim. App. 1982).

139. *Martinez*, 569 S.W.3d at 627.

140. *Id.*

141. *Id.*

142. *Id.* at 627–28.

143. *Id.* at 630.

144. *See id.* at 627.

duct a legally permissible search or seizure of an individual.¹⁴⁵ It follows that a warrantless search or seizure is a violation of the Fourth Amendment unless an exception to the rule applies.¹⁴⁶ One such exception is exigent circumstances.¹⁴⁷ This applies “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment” in order to prevent the imminent destruction of evidence.¹⁴⁸ Another exception is when consent is given by the individual subject to the search.¹⁴⁹ When the State relies on consent as its justification, it must prove that the consent was “freely and voluntarily given.”¹⁵⁰ “Voluntariness depends on the totality of the circumstances.”¹⁵¹ Whether the individual’s will has been overborne and his capacity for self-determination critically impaired affects such a determination.¹⁵² Additionally, when a search or seizure is done by a private party, no Fourth Amendment violation occurs, and the State is allowed to use the evidence if lawfully acquired—but there may be a statutory remedy available for the individual subjected to that search.¹⁵³

1. *Exigent Circumstances*

In *Mitchell v. Wisconsin*, Gerald Mitchell was arrested for driving a vehicle while intoxicated.¹⁵⁴ A preliminary breath test found that Mitchell’s blood alcohol concentration was triple the legal limit for driving in Wisconsin. The arresting officer then drove Mitchell to the police station to use the more reliable breath test equipment there. Upon arrival, Mitchell was too lethargic to complete the breath test. The officer chose to drive Mitchell to a nearby hospital for a blood test. At the hospital, Mitchell was unconscious, but his blood was drawn anyway. The blood test found Mitchell’s BAC to be above the legal limit. Mitchell filed a motion to suppress the results of the blood test, arguing that it violated his Fourth Amendment right against unreasonable searches since it was done without a warrant. The State argued that the search was valid under the theory of implied consent based on Wisconsin state law, which presumes that a person incapable of withdrawing implied consent to BAC testing has not done so. The trial judge denied the motion.¹⁵⁵ The Wisconsin Supreme Court affirmed the lawfulness of the blood draw.¹⁵⁶

145. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

146. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

147. *See Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013).

148. *Id.*

149. *See Beeman v. State*, 86 S.W.3d 613, 615 (Tex. Crim. App. 2002).

150. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

151. *State v. Ruiz*, 581 S.W.3d 782, 786 (Tex. Crim. App. 2019) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973)).

152. *Meekins v. State*, 340 S.W.3d 454, 459 (Tex. Crim. App. 2011) (citations omitted).

153. *See Walter v. United States*, 447 U.S. 649, 656 (1980); *State v. Ruiz*, 577 S.W.3d 543, 547–48 (2019).

154. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532 (2019) (plurality opinion).

155. *Id.*

156. *Id.*

Sidestepping the issue of implied consent, the U.S. Supreme Court found that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally allows for a blood test without a warrant.¹⁵⁷ The exigent-circumstances doctrine requires that there be a “compelling need for official action and no time to secure a warrant.”¹⁵⁸ The U.S. Supreme Court has previously held that the dissipation of BAC alone is not enough to allow for the exigency exception to apply.¹⁵⁹ Justice Alito, with whom three justices joined, relied on *Schmerber v. California*¹⁶⁰ to assert that an exigency exists when “(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.”¹⁶¹ Justice Alito stated that both conditions are met when a suspected drunk driver is unconscious.¹⁶² Justice Thomas, who concurred in the judgment only, would have applied a per se rule that the natural dissipation of BAC itself creates a sufficient exigency to allow for a warrantless blood draw.¹⁶³ The U.S. Supreme Court vacated and remanded.¹⁶⁴

*State v. Garcia*¹⁶⁵ was decided during the current Survey period, December 12, 2018, but has been discussed in the immediately preceding *SMU Annual Texas Survey*.¹⁶⁶ For that reason it will only briefly be mentioned here. *Garcia* is a case concerning the exigent circumstances exception to the warrant requirement.¹⁶⁷ Officers suspected Garcia was intoxicated and were concerned that he might soon receive a medical treatment that could destroy evidence of intoxication, so a sample of Garcia’s blood was taken without a warrant. Garcia filed a motion to suppress which was granted by the trial judge. The court of appeals reversed.¹⁶⁸ On discretionary review, the Texas Court of Criminal Appeals’ ruling turned on the trial judge’s findings of historical fact and the amount of deference those findings are entitled to if supported by the record.¹⁶⁹ Under that reasoning, the court reversed the court of appeals and found that the trial judge did not abuse his discretion in his ruling.¹⁷⁰ The court rejected a per se rule that any time a person suspected of committing a drunk-driving offense is taken to a hospital, exigent circum-

157. *Id.* at 2537.

158. *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

159. *Id.* at 152–53.

160. 384 U.S. 757 (2019).

161. *Mitchell*, 139 S. Ct. at 2537.

162. *Id.*; but see *Mitchell*, 139 S. Ct. at 2543–44 (Sotomayor, J., dissenting).

163. *Id.* at 2539 (Thomas, J., concurring).

164. *Id.* (plurality opinion).

165. 569 S.W.3d 142 (Tex. Crim. App. 2018).

166. Elizabeth G. Rozacky & The Honorable Michael E. Keasler, *Criminal Procedure: Confessions, Searches, and Seizures*, 5 SMU ANN. TEX. SURV. 115, 127 (2019).

167. *Garcia*, 569 S.W.3d at 145.

168. *Id.* at 147.

169. *Id.* at 157.

170. *Id.* at 144, 157.

stances exist for a warrantless search.¹⁷¹ However, the court left open the possibility that “if an officer is actually aware of facts from which an objectively reasonable officer could conclude that an evidence-destroying medical treatment is imminent, the Fourth Amendment allows the officer to take any reasonable steps to preserve the integrity of the imperiled evidence.”¹⁷²

2. *Implied Consent*

The unaddressed issue in *Mitchell*, implied consent as an exception to the warrant requirement, found its way back to the forefront of Fourth Amendment jurisprudence, this time before the Texas Court of Criminal Appeals, in *State v. Ruiz*.¹⁷³ Jose Ruiz was charged with driving while intoxicated after the State drew his blood while he was unconscious and tested it without a warrant. Ruiz filed a motion to suppress, the trial judge granted the motion, and the court of appeals affirmed.

The Texas Court of Criminal Appeals was presented with the issue of whether implied consent is a valid exception to warrant requirement for a blood draw in these circumstances.¹⁷⁴ The State argued that Ruiz gave his implied consent to alcohol-related testing “when he drove on Texas roadways, and because that consent was never limited, withdrawn, or revoked, his consent remained in full effect at the time of the blood draw.”¹⁷⁵ As stated previously, voluntariness is a key component of consent that the State must prove.¹⁷⁶ The State argued, under *Fienen v. State*, that the fact that Ruiz was unconscious should not be held against the State because Ruiz’s medical condition was not caused by the State.¹⁷⁷ The court rejected this argument because *Fienen* relied on *Schneckloth*, which requires the totality of the circumstances evaluation to consider “the characteristics of the accused” as well.¹⁷⁸ The court found Ruiz’s unconsciousness to be a characteristic that must be considered, and stressed that it rendered Ruiz unable to make choice one way or the other.¹⁷⁹ Thus, the theory of implied consent did not operate as a valid exception to the warrant requirement.¹⁸⁰ However, the court left open the possibility that the reasoning offered in *Mitchell* may be applicable here and remanded to the lower court to consider exigent circumstances.¹⁸¹

171. *Id.* at 159.

172. *Id.* at 155.

173. 581 S.W.3d 782 (Tex. Crim. App. 2019).

174. *Id.* at 784.

175. *Id.* at 785; see TEX. TRANSP. CODE ANN. §§ 724.011, 724.014.

176. *Ruiz*, 581 S.W.3d at 786 (citing *Bumper v. North Carolina*, 291 U.S. 543, 548 (1968)).

177. *Id.* (citing *Fienen v. State*, 390 S.W.3d, 328, 333 (Tex. Crim. App. 2012)).

178. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

179. *Id.* at 786–87.

180. *Id.* at 787.

181. *Id.* (citing *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2525 (2019)).

3. *Private-Party Search Doctrine*

In *State v. Ruiz*, students reported to school officials that a substitute teacher, Lauro Eduardo Ruiz, was taking photos underneath students' skirts with his cell phone.¹⁸² "The dean and vice principal summoned [Ruiz] to the office and questioned him about the allegations."¹⁸³ Ruiz began fidgeting with his phone during the questioning, so Ruiz was asked to place his phone on the desk. Ruiz complied. Principal Saenz eventually joined the meeting, and Ruiz admitted he "had a problem."¹⁸⁴ Saenz viewed photos on Ruiz's phone and saw images of girls' legs in their school uniforms. Saenz allowed Ruiz to retrieve some information off his phone and then placed it in an envelope to give to the police. The police obtained search warrants for the phone and "found incriminating images taken from underneath students' skirts."¹⁸⁵ Ruiz filed a motion to suppress the evidence from his phone arguing that Saenz's warrantless search of the phone violated the Fourth Amendment and should be suppressed under Article 38.23.¹⁸⁶ The trial judge granted the motion.¹⁸⁷ The court of appeals reversed the trial judge's decision, stating that the Fourth Amendment does not apply to private individuals and Ruiz did not prove Saenz violated any law in searching and seizing the phone.¹⁸⁸

The Texas Court of Criminal Appeals addressed the applicability of the Fourth Amendment and Article 38.23 to the facts.¹⁸⁹ The court rejected Ruiz's argument because "(1) the Fourth Amendment does not apply to the actions of private individuals"; (2) Article 38.23 was inapplicable under these facts; and (3) *Miles*'s holding does not support Ruiz's claim.¹⁹⁰

The court reiterated that the Fourth Amendment is only a restraint on government.¹⁹¹ The court then acknowledged that Article 38.23(a) does include an "other person" provision regarding who may obtain evidence, but stated that it is limited by requiring that the other person obtain the evidence by violating either the constitutions or laws of the United States or Texas.¹⁹² The court recognized that its opinion in *Miles* could create confusion as to whether a private individual can violate the Constitution and clarified that to the extent that *Miles* supported that theory, it was unnecessary to the holding in *Miles*.¹⁹³ The court explained that the hold-

182. *State v. Ruiz*, 577 S.W.3d 543, 545 (Tex. Crim. App. 2019).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*; U.S. CONST. amend. IV.; TEX. CODE CRIM. PROC. ANN. art. 38.23.

187. *Ruiz*, 577 S.W.3d at 545.

188. *Id.* (citations omitted).

189. *Id.* at 545-46; TEX. CODE CRIM. PROC. ANN. art. 38.23; *Miles v. State*, 241 S.W.3d 28, 36 (Tex. Crim. App. 2007).

190. *Ruiz*, 577 S.W.3d at 546.

191. *Id.* (citing *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)); see also *Gillett v. State*, 588 S.W.2d 361, 363 (Tex. Crim. App. 1979).

192. *Ruiz*, 577 S.W.3d at 546.

193. *Id.* at 547.

ing in *Miles* relied on violations of criminal laws by private individuals, not violations of the Constitution.¹⁹⁴

Lastly, Ruiz argued that Saenz violated Section 33.02(a), so the requirements of Article 38.23(a) were still not met.¹⁹⁵ The court found that the trial judge determined that Saenz accessed Ruiz's phone without his consent, but that no finding regarding Saenz's intent was made, and the evidence showed that the phone was looked through for the purpose of handing it to the police.¹⁹⁶ Therefore, the statutory defense in Section 33.02(e) had not been overcome.¹⁹⁷ Accordingly, Ruiz failed to meet his burden of showing that a statutory violation occurred.¹⁹⁸ Because none of Ruiz's arguments were applicable the court of appeals' judgment was affirmed.¹⁹⁹

IV. CONCLUSION

The most notable cases during this Survey period were *Sims*, *Ruiz*, and *Martinez*.²⁰⁰ In *Sims*, the Texas Court of Criminal Appeals used *Carpenter* as a guide to further develop the law regarding police use of CSLI data. *Sims* provided a framework that expands the protections afforded by the Fourth Amendment, and the lower courts in Texas can now look to *Sims* for guidance when determining whether a reasonable expectation of privacy has been violated concerning CSLI data. That framework also allows the lower courts a fair amount of flexibility based on its case-by-case approach. In *Ruiz*, the Texas Court of Criminal Appeals addressed the issue the U.S. Supreme Court side-stepped in *Mitchell* and has helped provide additional guidance for the lower courts on how the factors of an implied-consent analysis should be considered. In *Martinez*, the Texas Court of Criminal Appeals found that cooperation supported the application of the collective-knowledge doctrine but rejected that a "hive thinking" approach was endorsed. The amount of cooperation necessary for the application of the collective-knowledge doctrine will be important for the courts to determine. Undoubtedly, these will be areas of the law worth monitoring as the lower courts begin analyzing unique scenarios.

194. *Id.*

195. See TEX. PENAL CODE ANN. § 33.02(e).

196. *Ruiz*, 577 S.W.3d at 548.

197. See TEX. PENAL CODE ANN. § 33.02(e).

198. *Ruiz*, 577 S.W.3d at 548.

199. *Id.*

200. *Sims v. State*, 569 S.W.3d 634, 637–38 (Tex. Crim. App. 2019); *State v. Ruiz*, 581 S.W.3d 782, 787 (Tex. Crim. App. 2019); *State v. Martinez*, 569 S.W.3d 621, 623 (Tex. Crim. App. 2019).

