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Kimberly S. Keller

PRIVACY LOST: COMPARING THE ATTENUATION OF TEXAS'S ARTICLE I, SECTION 9 AND THE FOURTH AMENDMENT

KIMBERLY S. KELLER*

I. INTRODUCTION

Recent events, including the tragedy of September 11, 2001, have pushed privacy rights to the forefront of public debate. Both the federal and Texas constitutions include explicit language regulating the government's right to intrude on a person's privacy, demonstrating that at the heart of this country is a specific intent to protect privacy rights.[1] Nonetheless, recent holdings by the federal and state judiciary have begun to erode the shield that protects citizens from intrusive governmental action.

The invocation of privacy rights is seen most often in criminal cases, where a criminal defendant seeks shelter under both applicable state and federal constitutional guarantees against unreasona-

* Asst. Prof. of Criminal Law, University of Texas at San Antonio; J.D., St. Mary's University School of Law.

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

ble search and seizure.[2] Law professors often teach this concept to first-year law students by referring to a metaphorical building, explaining that the federal protection under the Fourth Amendment establishes the floor of protection while the state constitution sets the ceiling.[3] The Texas Court of Criminal Appeals recently renovated this structure, holding that Article I, Section 9 of the Texas Constitution can and does provide less protection than the United States Constitution.[4]

When it comes to interpreting state constitutional protections, some Texas judges have expressed dismay at relying solely upon federal case law. For years, these members of the Texas judiciary balked at interpreting Article I, Section 9 in harmony with the similarly worded Fourth Amendment.[5] The Supreme Court of the United States, in interpreting the Fourth Amendment in the past, focused on the Warrant Clause and developed a legal framework centering on a general "warrant requirement" to ensure the rea-

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2. *See* George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1369 (1990) (indicating state court's power to construe identically worded provisions in state constitutions more broadly that the Supreme Court would permit for analogous federal provisions).

3. Hulit v. State, 982 S.W.2d 431, 449-50 (Tex. Crim. App. 1998) (en banc) (Baird, J., dissenting); Autran v. State, 887 S.W.2d 31, 34 (Tex. Crim. App. 1991) (en banc).

> [S]tate constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens. The decisions of the Supreme Court represent the *minimum* protections which a state must afford its citizens. "The federal constitution sets the floor for individual rights; state constitutions establish the ceiling."

Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc) (quoting LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986)).

4. *See Hulit*, 982 S.W.2d at 436 (rejecting the "warrant requirement" argument raised by Hulit and holding Article I, Section 9 requires only "reasonableness" when it comes to searches and seizures).

5. *See* Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (en banc) (Teague, J., dissenting) (suggesting that the purpose of an independent state appellate judiciary is not to mimic Supreme Court decisions regarding constitutional interpretation), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc). *Compare* Eisenhauer v. State, 754 S.W.2d 159, 164 (Tex. Crim. App. 1988) (en banc) (concluding that the court would follow the Supreme Court "to stay in step with the federal constitutional model"), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc), *with id.* at 166 (Duncan, J., concurring) (objecting to using the federal model as the basis for decision and asserting state court authority to diverge on the basis on differing interpretation), *and id.* at 167 (Clinton, J., dissenting) (arguing that accepting the federal interpretation for the state provision based merely on similar language precludes consideration of other principles and policies).

sonableness of the search or seizure.[6] Recognizing the United States Supreme Court's warrant requirement, Texas courts interpreted Article I, Section 9 in similar fashion, oftentimes addressing the two provisions simultaneously in the opinion.

After years of criticism from dissenting judges, the Texas Court of Criminal Appeals diverged from the era of lockstep analysis and called for the independent interpretation of the Texas Constitution in *Heitman v. State*.[7] The *Heitman* court held that Texas courts should examine Texas constitutional provisions independently of similar federal provisions.[8] Nearly ten years later, the Court of Criminal Appeals took independent interpretation to a whole new level in *Hulit v. State*,[9] holding that an independent interpretation of Article I, Section 9 indicates that Texas's guarantee against unreasonable search and seizure provides less protection than the Fourth Amendment.[10] The *Hulit* court held that although the Supreme Court generally has required a warrant to ensure reasonableness under the Fourth Amendment, Article I, Section 9 does not require a warrant.[11] Ironically, applying the "building analogy" to the *Hulit* holding, the federal floor seemed to rest higher than the state ceiling of protection, and accordingly, the *Hulit* court rejected the building analogy previously relied on by it and the Texas Supreme Court.[12] A defendant invoking only the Texas protection

6. *See Hulit*, 982 S.W.2d at 436 (discussing the Fourth Amendment's general warrant requirement). *See generally* Katz v. United States, 389 U.S. 347, 357 (1967) (emphasizing prior Court determinations that searches conducted without prior judicial approval in the form of a warrant violate the Fourth Amendment); Johnson v. United States, 333 U.S. 10, 14 (1948) (stating that Fourth Amendment protection from government searches comes from the decision of a neutral and detached magistrate).

7. *See* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (making it an express holding of the court that it will no longer be bound by United States Supreme Court interpretation of the Fourth Amendment).

8. *Id.*

9. 982 S.W.2d 431 (Tex. Crim. App. 1998) (en banc).

10. *See* Hulit v. State, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998) (holding that Article I, Section 9 of the Texas Constitution has no warrant requirement while recognizing that the Fourth Amendment to the United States Constitution has been interpreted by the United States Supreme Court to have a warrant requirement). "We understand that our holding means that Section 9 of our Bill of Rights does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection." *Id.*

11. *Id.*

12. *See id.* at 437 (claiming the metaphor is now wrong).

against unreasonable search and seizure will receive less protection than a defendant involving the Fourth Amendment.[13]

By distinguishing the state and federal privacy guarantees based on differing levels of protection, the *Hulit* court revisited its *Heitman* mandate requiring Texas courts to conduct an independent analysis of Texas and federal provisions; however, a recent holding from the United States Supreme Court may permit Texas courts to again rely on lockstep interpretation of the privacy guarantees. In *United States v. Knights*,[14] the Court emphasized its trend to shift focus from the "warrant requirement" to the requirement of "reasonableness," mirroring Texas's similar shifting in *Hulit*.[15] Comparing both cases, the message is the same. Whether the defendant invokes federal or state constitutional rights, so long as the search is "reasonable" under the circumstances, the fact that it was conducted without a warrant or that it fails to fit within an exception to the requirement is irrelevant.[16] The Supreme Court and Texas continue to follow the path to privacy lost, leaving all citizens exposed to the arbitrary rulings of state and federal judges reviewing warrantless searches and seizures.

This Article examines how the focus on Texas and federal courts on the Reasonableness Clause of the privacy protections has affected a loss of overall privacy rights. Part II discusses the language of the Fourth Amendment and Article I, Section 9 in detail, noting the Supreme Court's historical interpretation of the Fourth Amendment requires a warrant to ensure reasonableness. Part III analyzes *Heitman v. State*, which formally rejected the "harmonious interpretation" rule and transitioned Texas courts from lockstep analysis to independent interpretation of Article I, Section 9. Part IV critically examines *Hulit v. State*, which officially dispensed with the need for a warrant to ensure constitutionality. Part V discusses the Supreme Court's continued movement away from the

13. *See id.*; Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. 931, 937 (2000) (stating that "in cases in which the issue is whether the police should have secured a warrant prior to arresting or searching, the implication in *Hulit* is that defendants need not bother to make claims based on the Texas Constitution; they should rely exclusively on the Fourth Amendment").

14. 534 U.S. 112 (2001).

15. *See* United States v. Knights, 534 U.S. 112, 118-19 (2001) (stating that "[t]he touchstone of the Fourth Amendment is reasonableness").

16. *See id.* at 121-22 (finding constitutional sufficiency under condition of probation is satisfied when the search is supported by reasonable suspicion).

warrant requirement toward a focus on reasonableness. An analysis of the precedent established by the Texas Court of Criminal Appeals and the United States Supreme Court finds that the parallels in judicial rationale result in an attenuation of privacy rights.

II. CONSTITUTIONAL PROVISIONS PROTECTING AGAINST UNREASONABLE SEARCH & SEIZURE

The Fourth Amendment to the United States Constitution requires that all searches and seizures be reasonable. Article I, Section 9 of the Texas Constitution mirrors its federal counterpart, requiring reasonableness in intrusive governmental action.[17] In examining the text, both the federal and state provisions are comprised of two independent clauses: (1) the Reasonableness Clause, which prohibits unreasonable searches and seizures; and (2) the Warrant Clause, which provides that warrants may issue only upon a showing of probable cause.[18] While some academic scholars maintain that the Warrant Clause was intended to define the term "reasonableness," these scholars call for the interpretation that a warrantless search is per se unreasonable.[19] Others contend the clauses are separate and distinct, arguing that a warrantless search or seizure may be reasonable and thus constitutional.[20] In all, "A small forest has been pulped by legal scholars debating whether the two clauses of the Fourth Amendment stand alone, or whether the

17. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9 (stating a right of the people in both provisions against unreasonable searches and seizures).

18. *Compare* U.S. CONST. amend. IV, *with* TEX. CONST. art. I, § 9. "An examination of these provisions reveals clear textual similarities between the Fourth Amendment and art. I, § 9." Autran v. State, 887 S.W.2d 31, 38 (Tex. Crim. App. 1994) (en banc).

19. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994) (explaining the reasoning behind the "per se" approach); Michael E. Brewer, Comment, Chandler v. Miller: *No Turning Back from a Fourth Amendment Reasonableness Analysis*, 75 DENV. U. L. REV. 275, 279-80 (1997) (emphasizing that the conjunctive theory, where the two clauses are read together, is favored by academics); Darren K. Sharp, Note, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 DRAKE L. REV. 149, 152-55 (1997) (describing historical evidence suggesting the drafters intended a conjunctive interpretation of the two clauses).

20. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994) (arguing that the disjunctive approach that views the two clauses as distinct is proper); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999) (describing historical events leading to the separation of the two clauses); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 791-92 (1999) (examining the "conjunctive" and "disjunctive" interpretation of the two clauses).

second Warrant Clause modifies the first Reasonableness Clause by defining a reasonable search."[21]

A. *The Fourth Amendment to the United States Constitution*

The language of the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no *Warrants* shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[22]

Federal precedent has historically focused on the Warrant Clause as providing either a partial or complete definition of the term "unreasonable" in the Reasonableness Clause.[23] When law enforcement officials intrude on an individual's privacy, federal courts, including the Supreme Court, generally require the search be conducted pursuant to a warrant based upon probable cause:

> "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 [1967] (footnotes omitted)."[24]

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21. Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 529 (1997); *see also* George M. Dery, III, *Are Politicians More Deserving of Privacy than Schoolchildren? How* Chandler v. Miller *Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 75 (1998) (discussing the ongoing debate regarding the interaction of the two clauses).

22. U.S. CONST. amend. IV (emphasis added).

23. *See* Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989) (reiterating an often emphasized position that a search be supported by a warrant).

24. United States v. Ross, 456 U.S. 798, 825 (1982) (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)); *accord* Camara v. Mun. Court, 387 U.S. 523, 528-29 (1967); Johnson v. United States, 333 U.S. 10, 13-14 (1948); *see also* Maryland v. Buie, 494 U.S. 325, 331 (1990) (stating that a warrant issued on probable cause is the general rule, but noting that exceptions exist); Almeida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973) (reiterating previous holdings that the Fourth Amendment's minimum requirement is probable cause); Schneckloth v. Bustamonte, 412 U.S. 218, 219, 248-49 (1973) (addressing the voluntary consent exception); Katz v. United States, 389 U.S. 347, 357 (1967) (equating an unreasonable search with a lack of warrant). *See generally* Leslie Carr, *The Warrant Requirement*, 90 GEO. L.J. 1112, 1112-17 (2002) (discussing the warrant requirement in detail); Charles W. Chotvacs, *The Fourth Amendment Warrant Requirement: Constitu-*

To balance the effects of the general warrant requirement, the Supreme Court crafted many exceptions.[25] Currently, these exceptions are many in number, including consent searches, searches under the plain view doctrine, inventory searches, border searches, searches conducted during exigent circumstances, searches of automobiles and boats, searches of airports, searches incident to arrest, administrative searches of businesses, and the judicially-crafted "special needs" doctrine, which permits a warrantless search for a noninvestigatory purpose when the government has a special need justifying the search.[26] In addition to the recognized exceptions, the Supreme Court has interpreted the Fourth Amendment to permit actions constituting minor intrusions, such as "pat downs" and "stop and frisks," to be performed without warrants in certain circumstances.[27]

Texas courts interpreting the Fourth Amendment have criticized the Court's "general rule and exception" method:

> There are so many exceptions to the warrant requirement that most searches and seizures are conducted without warrants and justified under one of the exceptions. Such a model of the Fourth Amendment not only makes a mockery of the supposed requirement, it in-

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tional Protection or Legal Fiction?, 79 DENV. U. L. REV. 331, 331-32 (2001) (discussing warrantless searches based on probable cause).

25. *See Buie*, 494 U.S. at 335 (describing a protective sweep); United States v. Watson, 423 U.S. 411, 414 (1976) (permitting the warrantless search of an individual in a public place); Hulit v. State, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998) (en banc) (discussing the exceptions to the federal warrant requirement); *see also* Reasor v. State, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000) (restating previous holdings that there are well-delineated exceptions to the warrant requirement).

26. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 509 (1978) (listing valid reasons for warrantless searches); *Schneckloth*, 412 U.S. at 222 (finding consent searches permissible); Chimel v. California, 395 U.S. 752, 762-63 (1969) (explaining search incident to an arrest); Harris v. United States, 390 U.S. 234, 235-36 (1968) (upholding the search of a vehicle in police custody); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (delineating over twenty exceptions to either the warrant requirement or probable cause).

27. *See* Michigan v. Long, 463 U.S. 1032, 1049 (1983) (permitting police officers to frisk individuals upon a suspicion of weapons possession); Terry v. Ohio, 392 U.S. 1, 24 (1968) (allowing pat downs because of "the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest"); *see also Buie*, 494 U.S. at 327 (authorizing protective sweeps that are "quick and limited search[es] of premises, incident to an arrest and conducted to protect the safety of police officers or others").

> terferes with a more fine-tuned assessment of the competing interests at stake.[28]

Although Texas applied the Supreme Court's method for many years, it eventually moved to its own interpretation of the word "reasonableness" when examining Texas's Article I, Section 9.

B. *Article I, Section 9 of the Texas Constitution*

The language of Texas's protection against unreasonable search and seizure, Article I, Section 9, mirrors the language of the Fourth Amendment:

> The people shall be secure in their persons, houses, papers and possessions, from all *unreasonable* seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.[29]

The Court of Criminal Appeals has historically recognized the language of Article I, Section 9 and the Fourth Amendment as "the same in all material aspects."[30] Although many states interpreted their similarly worded provisions as providing protection above and beyond the federal protection,[31] Texas, interpreting Article I, Section 9 in harmony with the Fourth Amendment, held Article I,

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28. *Hulit*, 982 S.W.2d at 436. "Supreme Court cases which have held that the Fourth Amendment was intended to impose a warrant requirement are not well founded in historical fact." *Id.*

29. TEX. CONST. art. I, § 9 (emphasis added).

30. Heitman v. State, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991) (en banc). In support of this statement, the *Heitman* court cited to several previous holdings of the Court of Criminal Appeals. *See id.* (citing Gordon v. State, 801 S.W.2d 899 (Tex. Crim. App. 1990) (en banc); Johnson v. State, 803 S.W.2d 272 (Tex. Crim. App. 1990) (en banc); Bower v. State, 769 S.W.2d 887 (Tex. Crim. App. 1989) (en banc); Eisenhauer v. State, 754 S.W.2d 159 (Tex. Crim. App. 1988) (en banc), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc); Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (en banc), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc); Crowell v. State, 147 Tex. Crim. 299, 180 S.W.2d 343 (1944)).

31. *See* State v. Daniel, 589 P.2d 408, 416 (Alaska 1979) (upholding the state constitution as providing "an even broader guarantee against unreasonable searches and seizures than is found in its federal counterpart"); *accord* People v. Brisendine, 531 P.2d 1099, 1111-12 (Cal. 1975) (in bank); People v. Hillman, 834 P.2d 1271, 1273 (Colo. 1992); State v. Oquendo, 613 A.2d 1300, 1308-09 (Conn. 1992); State v. Kaluna, 520 P.2d 51, 58 (Haw. 1974); State v. Guzman, 842 P.2d 660, 666-67 (Idaho 1992); State v. Parms, 523 So. 2d 1293, 1303 (La. 1988); State v. Brown, 755 P.2d 1364, 1370 (Mont. 1988); State v. Pellicci, 580 A.2d 710, 729 (N.H. 1990); State v. Hempele, 576 A.2d 793, 799 (N.J. 1990); People v. Johnson, 488 N.E.2d 439, 445 (N.Y. 1985); State v. Caraher, 653 P.2d 942, 947 (Or. 1982)

Section 9 provided protection equal to that conferred by the Fourth Amendment.[32]

As early as 1944, the Court of Criminal Appeals began noting the linguistic similarities between Article I, Section 9 and the Fourth Amendment. In *Crowell v. State*,[33] the defendant challenged the search of his house on federal and state constitutional grounds.[34] The *Crowell* court reviewed the federal constitutional claim first, conducting an extensive analysis to conclude that the search was constitutional under the Fourth Amendment.[35] When addressing the state constitutional claim, the court noted that Article I, Section 9 is virtually identical to the Fourth Amendment and consequently "sustain[ed] the same conclusion under Art. I, Sec. 9 of our State Constitution."[36]

Following *Crowell*, the Court of Criminal Appeals continued its harmonious interpretation approach to Article I, Section 9. In *Evers v. State*,[37] a panel of the court expanded the lockstep nature of its interpretation when addressing the constitutionality of a vehicle

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(in banc); State v. Opperman, 247 N.W.2d 673, 674-75 (S.D. 1976); State v. Jackson, 688 P.2d 136, 140 (Wash. 1984) (en banc).

32. *Bower*, 769 S.W.2d at 903-04; *Eisenhauer*, 754 S.W.2d at 164; *Brown*, 657 S.W.2d at 799; *see also* Shirley S. Abrahamson, *Criminal Law & State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1166-67 (1985) (discussing the Texas judiciary's longterm decision to follow federal interpretation); Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. 75, 106 (1993) (noting that prior to *Heitman*, Texas courts followed a lockstep approach to interpreting the state search and seizure provision). In areas other than search and seizure, Texas does provide its citizens with protections greater than those guaranteed by the United States Constitution. *See* TEX. CONST. art. I, § 10 (requiring that criminal defendants charged with a felony be indicted by grand juries even though the Fifth Amendment to the United States Constitution requiring indictments by grand juries does not apply to the states); *see also* Whisenant v. State, 557 S.W.2d 102, 105 (Tex. Crim. App. 1977) (holding that the Texas protections against the unreasonable revocation of probation provide greater protection than that conferred upon citizens by the Fourteenth Amendment to the United States Constitution); Butler v. State, 493 S.W.2d 190, 197-98 (Tex. Crim. App. 1973) (finding that Texas law is stricter than federal law concerning the gaining and admissibility of oral confessions).

33. 147 Tex. Crim. 299, 180 S.W.2d 343 (1944).

34. Crowell v. State, 147 Tex. Crim. 299, 180 S.W.2d 343, 345 (1944).

35. *Id.* at 345-47.

36. *Id.* at 347. In making this determination, the *Crowell* court noted that "Art. I, Sec. 9, of the Constitution of this State, and the 4th Amendment to the Federal Constitution are, in all material aspects, the same." *Id.* at 346.

37. 576 S.W.2d 46 (Tex. Crim. App. [Panel Op.] 1978).

inventory search.[38] After noting the comparable policies underlying the Fourth Amendment and Article I, Section 9,[39] the *Evers* court focused on the Supreme Court's holding in *South Dakota v. Opperman.*[40] Relying solely on the federal analysis, the *Evers* court concluded the search violated neither the Fourth Amendment nor Article I, Section 9.[41] The entire Court of Criminal Appeals later recognized that the *Evers* court, by relying solely on federal case law, impliedly held that the Texas right provided equal protection and should be interpreted consistently with the federal protection.[42] In cases following *Evers*,[43] the court continued to express its intent to maintain a harmonious interpretation of the state and federal provisions: "[T]his Court has opted to interpret our Constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment. We shall continue on this path until such time as we are statutorily or constitutionally mandated to do otherwise."[44] However, even during this era of harmonious interpretation, there existed underpinnings of resentment by a minority of Texas judges.

Through stray comments within dissenting and concurring opinions, Texas judges foreshadowed the divergence in *Hulit v. State*,

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38. *See* Evers v. State, 576 S.W.2d 46, 49-50 (Tex. Crim. App. [Panel Op.] 1978) (discussing a proper vehicle search incident to an arrest).

39. *See id.* at 48 n.1 (commenting that the United States and Texas Constitutions both serve the same purpose, to protect the privacy of citizens).

40. *See id.* at 50 (citing South Dakota v. Opperman, 428 U.S. 364 (1976)).

41. *See id.* (holding that the inventory search following the arrest was valid).

42. *See* Heitman v. State, 815 S.W.2d 681, 683 (Tex. Crim. App. 1990) (en banc) (noting that "[b]y implication, the [*Evers*] Court treated inventory law in Texas consistently with the protections afforded that subject under federal law").

43. *See* Gill v. State, 625 S.W.2d 307, 318-19 (Tex. Crim. App. [Panel Op.] 1981) (stating that "[i]n short, the expression, 'inventory search,' is not a talisman in whose presence the Fourth Amendment or Art. I, Sec. 9, of the Texas Constitution fades away and disappears"). The court maintained its analogous interpretation of Article I, Section 9 during other inventory search cases as well. *See* Gauldin v. State, 683 S.W.2d 411, 415 (Tex. Crim. App. 1984) (en banc) (holding after an analysis of federal and state case law that the evidence collected during a search was "unconstitutionally obtained" without referring to either constitutional provision); Ward v. State, 659 S.W.2d 643, 646 (Tex. Crim. App. 1983) (en banc) (relying upon the United States Supreme Court's holding in *South Dakota v. Opperman*, 428 U.S. 364 (1976) to find that the police action in question did not violate the Texas Constitution).

44. Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (en banc), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc). In so stating, the *Brown* court refused to find that Article I, Section 9 places more restrictions on police officers than those imposed by the Fourth Amendment. *Id.* at 798.

exhibiting an analysis independent of federal law in cases involving state constitutional provisions. In 1983, the dissenting Judge Teague reprimanded the court for relying primarily on federal precedent when interpreting the Texas Constitution.[45] Judge Teague likened the Court of Criminal Appeals judges to "mimicking court jesters" of the United States Supreme Court Justices.[46]

Judge Teague was not alone in his disdain for lockstep analysis. In *Eisenhauer v. State*,[47] the court's adoption of the federal "totality of the circumstances" test triggered criticism from concurring and dissenting judges.[48] Then Presiding Judge McCormick authored the opinion and reasoned that the holding was "made to stay in step with the federal constitutional model for probable cause determinations."[49] Although a majority of the court joined the holding, many did not support the reasoning, resulting in a concurring opinion from Judge Duncan and a scathing dissent from Judge Clinton.[50] Judge Duncan independently interpreted the Texas provision and distanced himself from the majority's harmonious approach by stating, "there is nothing inherently improper in state court opinion diverging from Supreme Court authority" and "[t]he United States Supreme Court is not the infallible institution that this Court on occasion has assumed it to be."[51]

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45. *See id.* at 807 (Teague, J., dissenting) (maintaining that the Court of Criminal Appeals' opinion does not "come to grips" with whether it will abdicate to the United States Supreme Court when interpreting the Texas Constitution concerning criminal law).

46. *Id.* at 810 (Teague, J., dissenting).

47. 754 S.W.2d 159 (Tex. Crim. App. 1988) (en banc).

48. *See* Eisenhauer v. State, 754 S.W.2d 159, 166 (Tex. Crim. App. 1988) (en banc) (Duncan, J., concurring) (finding no requirement for the Texas courts to adopt the federal holding in *Illinois v. Gates*, 462 U.S. 213 (1983)); *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc); *Eisenhauer*, 754 S.W.2d at 170-71 (Clinton, J., dissenting) (declaring the Court of Criminal Appeals capable of making its own decision and not accepting the totality of the circumstances approach wholesale); *id.* at 182-83 (Teague, J., dissenting) (finding fault with the Supreme Court holding in *Gates* and with the reason for its adoption in Texas).

49. *Id.* at 164.

50. *See id.* at 166 (Duncan, J., concurring) (joining this concurrence were Judges Miller and Campbell); *id.* at 166-76 (Clinton, J., dissenting); *see also* M.P. Duncan III, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 812 (1988) (reporting an emerging trend for state courts to break from relying completely on United States Supreme Court interpretations).

51. *Eisenhauer*, 754 S.W.2d at 166. Judge Duncan disagreed with the Judge McCormick's comment that the majority's holding was reached in order to comply with the federal standard for determinations of probable cause. *Id.* Asserting that "there is no reason for this Court to feel compelled to 'stay in step with the federal constitutional model for

Judge Clinton vigorously objected to the "federal-state uniformity" reasoning for adopting the totality of the circumstances test, beginning his dissent with a virtual call-to-arms to Texas independents. Judge Clinton stated that "'Texas is a free and independent State'" and that the case dealt "with the very sovereignty of The State of Texas and the basic integrity of this Court as a repository and keeper of that sovereignty in criminal law matters."[52] Judge Clinton went on to argue for an independent analysis of Article I, Section 9.[53] Ironically, to support his proposal for independent analysis, Clinton relied on federal case law, referring to the comments made by Supreme Court Justice Frankfurter in *Harris v. United States*.[54] Bootstrapping Justice Frankfurter's opinion that proper analysis of the Fourth Amendment required an examination of its history and function, Judge Clinton urged that Article I, Section 9 too should be analyzed in light of its own history and function, rather than according to its resemblance to the Fourth Amendment.[55]

To support his argument, Judge Clinton reminded the court that Article I, Section 9 was drafted when Texas was a republic independent of the United States. During that time, the Framers of the Texas Constitution were influenced by two bodies of law: (1) the Fourth Amendment; and (2) the declarations established by other states and territories similar to Texas. Judge Clinton noted Article I, Section 9's drafters were more likely to draw from other state

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probable cause determinations,'" Judge Duncan insisted that he was "unwilling to be so arbitrarily submissive." *Id.*

52. *Eisenhauer*, 754 S.W.2d at 166-67. "Unless otherwise prohibited, this Court is, of course, always 'free to follow the lead' of the Supreme Court, but not mindlessly, wildly abandoning years of jurisprudence and statutory law of this State, as the majority would have this Court do today." *Id.* at 175. Judge Clinton also reiterated that "'as to the true scope of the Texas Constitution, we must ultimately follow our own lights.'" *Id.* at 167 (quoting Olson v. State, 484 S.W.2d 756 (Tex. Crim. App. 1972)).

53. *See* Eisenhauer v. State, 754 S.W.2d 159, 171 (Tex. Crim. App. 1988) (en banc) (finding the court "free now, if not duty bound" to make such a determination), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc).

54. *Id.* at 170 (referring to Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting)).

55. *See id.* (relating to Justice Frankfurter's statement that "'one's views regarding [given circumstances in a case] ultimately depend upon one's understanding of the history and the function of the Fourth Amendment'" and concluding himself that there "is needed a similar understanding of [Article I, Section] 9").

declarations than from the language or policy reasons supporting the Fourth Amendment:

> Texans had no reason to have more than a civil interest in the Fourth Amendment: It could not provide any protection whatever to citizens of The Republic of Texas; even after Texas joined the Union, the Fourth Amendment remained a restriction alone on the federal government until long after the present Constitution of 1876 was adopted.[56]

Noting that the Fourth Amendment did not apply to state action at the time the drafters were constructing Article I, Section 9, Judge Clinton concluded: "[C]orrectly comprehended, that [Section] 9 reads like the Fourth Amendment is merely a coincidence of historical facts."[57] Despite the sentiment expressed by Judge Clinton, Texas courts continued to enforce the harmonious interpretation rule until its 1991 holding in *Heitman v. State.*

III. New Federalism: Independent Interpretation of Article I, Section 9 in *Heitman v. State*

Heitman v. State marked the Texas judiciary's departure from the harmonious interpretation rule into the era of independent interpretation of state constitutional protections. In *Heitman*, the defendant appealed his drug conviction, claiming violations of Texas's Article I, Section 9 and the Fourth Amendment.[58] Although the court ultimately determined that Article I, Section 9 and the Fourth Amendment provide the same level of protection, the significance of the opinion lies in how the court reached that conclusion.[59] Rather than analyzing the two provisions in harmony, the

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56. *Id.*

57. *Id.*

58. Heitman v. State, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991) (en banc). The intermediate appellate court summarily disposed of Heitman's state constitutional challenge by construing Article I, Section 9 "in harmony with the Fourth Amendment." *Id.* The Court of Criminal Appeals, however, disapproved of the cursory treatment of Article I, Section 9 and held that appellate courts should conduct state constitutional challenges independent of federal constitutional challenges. *See id.* (declaring that "[t]oday we reserve for ourselves the power to interpret our own constitution").

59. *See id.* at 690 (holding that "we now expressly conclude that this Court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue").

court traversed down a new line of analysis, relying solely on state precedent to interpret the limitations of Article I, Section 9.[60]

The *Heitman* court emphasized that a state provision's linguistic similarity to its federal counterpart does not necessitate a harmonious ruling. Texas courts are "free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections."[61] Importantly, the court, despite its call for independent analysis, maintained the metaphorical "floor-ceiling" analogy representing the interaction between Article I, Section 9 and the Fourth Amendment.[62] In formally rejecting the harmonious interpretation rule, the court stated that precedent for the requirement of harmony "is based neither on stare decisis nor legal reasoning (save the observation concerning similarity of wording)."[63] The court gave voice to the many dissenting opinions throughout the era of the harmonious interpretation rule, emphasizing that many Texas judges "were not willing to march lock-step with federal court interpretations of constitutional rights."[64]

The *Heitman* court justified its transition to independent analysis by relying on the following legal premises:

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60. *See id.* (analyzing the Texas Constitution and the Framers' intent).

61. *Heitman*, 815 S.W.2d at 682.

62. *See id.* at 690 (stating that "we recognize that state constitutions cannot subtract from the rights guaranteed by the United States Constitution, but they can provide additional rights to their citizens"). "'The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.'" *Id.* (quoting LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986)). *But see* Matthew W. Paul & Jeffrey L. Van Horn, Heitman v. State*: The Question Left Unanswered*, 23 ST. MARY'S L.J. 929, 935-36 (1992) (challenging the argument that the Texas Constitution differs discernibly from the Fourth Amendment).

63. *See Heitman*, 815 S.W.2d at 683 (citing *Crowell v. State*, 147 Tex. Crim. 299, 180 S.W.2d 343 (1944) as the seminal case). The court noted that it first announced the "federal friendly" interpretation of Section 9 in *Crowell*. *Id.* However, the *Heitman* court noted that the *Crowell* court, in disposing of the state constitutional claim after a detailed analysis of federal case law, cited to four cases as authority that did not support the "federal friendly" interpretation. *See id.* (citing Taylor v. State, 120 Tex. Crim. 268, 49 S.W.2d 459 (1932); Hunter v. State, 111 Tex. Crim. 252, 12 S.W.2d 566 (1928); Eversole v. State, 106 Tex. Crim. 567, 249 S.W. 210 (1927); Stach v. State, 97 Tex. Crim. 280, 260 S.W. 569 (1924)). "None of these cases held Art. I, § 9, was to be interpreted in conformance with the Supreme Court's interpretations of the Fourth Amendment." Heitman v. State, 815 S.W.2d 681, 683 (Tex. Crim. App. 1991) (en banc).

64. *See id.* at 685 (referring to the disagreement within the opinions of Judges Duncan, Miller, Campbell, Clinton, and Teague in earlier cases holding that Section 9 should be interpreted harmoniously with Fourth Amendment analysis). *See generally* Katrina S. Patrick, Autran v. State*: Fourth Amendment Judicial Independence—Et Tu Texas?*, 20 T. MARSHALL L. REV. 385, 400-02 (1995) (discussing the decision in *Heitman*).

1. While states are prohibited from infringing on federal constitutional protections, states have complete authority to provide citizens greater constitutional guarantees.[65]
2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[66]
3. "In ordaining and establishing the Constitution in the name of the People of the United States, the genius of the Framers was in maintaining sovereignty of the government of the United States of America while preserving integrity of each constituent State."[67]
4. "That 'constitutional policy' has come to be called 'federalism.' In its criminal law aspect States may not abridge federal constitutional rights, guarantees and protections, but they are free to enlarge them."[68]
5. The two provisions, Article I, Section 9 of the Texas Constitution and the Fourth Amendment to the United States Constitution, provide an umbrella of protection to safeguard an individual from unwarranted government intrusion.[69]
6. When members of the court criticized fellow members for employing a harmonious interpretation, they did so to ensure Texas citizens receive the added protections intended by the Texas Bill of Rights.[70]

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65. *See* Milton v. State, 549 S.W.2d 190, 192 (Tex. Crim. App. 1977) (asserting that state constitutions and legislatures can place additional restrictions on police conduct as long as they do not violate Fourth Amendment protections).

66. U.S. CONST. amend. X.

67. Eisenhauer v. State, 754 S.W.2d 159, 167 n.2 (Tex. Crim. App. 1988) (en banc) (Clinton, J., dissenting) (citing Fry v. United States, 421 U.S. 542, 547 n.7 (1975)), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc).

68. *Id.* (Clinton, J., dissenting) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)).

69. *See* Heitman v. State, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991) (en banc) (citing Evers v. State, 576 S.W.2d 46 (Tex. Crim. App. [Panel Op.] 1978) and Kolb v. State, 532 S.W.2d 87 (Tex. Crim. App. 1976)).

70. *See* Brown v. State, 657 S.W.2d 797, 799-800 (Tex. Crim. App. 1983) (en banc) (Clinton, J., concurring), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc). After the *Brown* court expressly stated that it would interpret Article I, Section 9 consistently with the United States Supreme Court's interpretation of the Fourth Amendment, Judge Clinton opined that the *Brown* court may be ignoring the additional protections intended by Section 9. *Id.* Judge Clinton asserted that by parallel interpretation, "citizens of this State [are deprived] of protections against invasion of privacy reasonably flowing from Article I, § 9, and other guarantees in our own Bill of Rights." *Id.* at 800.

After *Heitman*, the Texas Court of Criminal Appeals consistently followed the "independent interpretation" framework when considering parallel constitutional protections.[71] This holding further affects the practice of criminal appellate law regarding the defendant's appeal. Following *Heitman*, where a defendant alleges that an error violates both the state and federal provisions, but fails to argue each provision separately, the challenge inadequately briefed is waived.[72] Criminal defendants who fail to provide independent arguments on both Article I, Section 9 and the Fourth Amendment

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71. *See* Bauder v. State, 921 S.W.2d 696, 697 (Tex. Crim. App. 1996) (en banc) (stating that Supreme Court interpretations of the United States Constitution do not govern interpretations of the Texas Constitution). The *Bauder* court compared the federal Double Jeopardy Clause with the parallel protection provided by the Texas Constitution. *See id.* (finding this an issue of first impression). The court found that the Fifth Amendment is not violated by the second prosecution of a defendant unless the termination of the first prosecution was triggered by the intentional introduction of prejudicial evidence by the prosecutor. *See id.* (citing Oregon v. Kennedy, 456 U.S. 667 (1982)). Instead, the *Bauder* court held that Article I, Section 14 of the Texas Constitution prohibits the second prosecution of a defendant if the actions of the prosecutor were either intentional or reckless in introducing the prejudicial evidence that triggered the motion for mistrial by the defendant. *See id.* at 699 (denying that "the prosecutor's specific intent is a relevant aspect of the inquiry"). The court concluded the Texas Double Jeopardy Clause provided more protection than the Fifth Amendment to the United States Constitution. *See id.* (phrasing this decision as providing "slightly more expansive conditions than those allowed by the United States Supreme Court"). Thus, although the court conducted an independent analysis, it maintained the ceiling-floor metaphor by holding the state provision could provide more, but not less protection than the similar federal right. Judge McCormick disagreed with the majority's position, arguing the court should never interpret the Texas Constitution to provide more protections than the federal constitution. *See Bauder*, 921 S.W.2d at 703 (McCormick, J., dissenting) (asserting that the majority's interpretation amounts to an imposition of their personal views). "[W]hat *Heitman* really boils down to is an attempt by those who, having lost their ability to persuade American majorities and a majority of the 'archconservative' Supreme Court, to expand the sway of state appellate judges by judicially legislating what they consider to be socially desirable results." *Id.* at 708 n.6. Presiding Judge McCormick emphasized that the interpretation of the constitution is not a political process, and *Heitman*, which stood for the proposition that courts should conduct an analysis of the state constitution independent of the federal constitution, was merely a vehicle by which courts could provide more protection to criminal defendants when the Supreme Court chose not to through its interpretation of the relevant federal constitutional provision. *See id.* at 707 n.6 (referring to his previous dissent in *Autran v. State*, 887 S.W.2d 31 (Tex. Crim. App. 1994) (en banc) and Judge Teague's dissent in *McCambridge v. State*, 778 S.W.2d 70 (Tex. Crim. App. 1989) (en banc)).

72. *See* Balentine v. State, 71 S.W.3d 763, 766 n.2 (Tex. Crim. App. 2002) (declining to address the defendant's Article I, Section 9 claim because it was not briefed separately from his Fourth Amendment claim); *accord* Etheridge v. State, 903 S.W.2d 1, 5 n.1 (Tex. Crim. App. 1994); Fain v. State, 986 S.W.2d 666, 681 n.19 (Tex. App.—Austin 1999, pet. ref'd).

risk having an "unbriefed" state constitutional challenge summarily overruled by the appellate court.[73]

IV. *HULIT V. STATE*: REJECTING THE WARRANT REQUIREMENT & DEMOLISHING THE FLOOR-CEILING ANALOGY

Until 1998, the Court of Criminal Appeals juxtaposed the independent interpretation rule with the floor-ceiling analogy, holding that the Texas Constitution provided equal or more protection than the United States Constitution.[74] In *Hulit v. State*, the court took the further step of holding that the Texas Constitution can provide less protection than the United States Constitution.[75] The court addressed the issue of whether Article I, Section 9 required a warrant to ensure the reasonableness of a search or seizure.[76]

In *Hulit*, a police officer responded to a call regarding a driver in need of medical attention.[77] Upon arriving, he found a man inside

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73. *See In re* A.B., No. 04-01-00546-CV, 2002 WL 31375188, at *1 (Tex. App.—San Antonio Oct. 23, 2002, no pet. h.) (not designated for publication) (applying a Fourth Amendment analysis because the defendant argued only that his detainment was "in violation of his constitutional rights"). Courts continue to summarily overrule arguments that the defendant has failed to raise an independent argument demonstrating that the state and federal provisions should be treated differently. In this case,

> A.B. also has waived his argument under Article I, section 9 because he has offered no arguments or authority concerning the protection provided specifically by the Texas Constitution or how that protection differs from federal constitutional protection. State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground.

See id. at *1 n.1 (citing Muniz v. State, 851 S.W.2d 238, 251-52 (Tex. Crim. App. 1993) and *Heitman*, 815 S.W.2d at 690 n.23).

74. *See Autran*, 887 S.W.2d at 42 (holding the Texas Constitution provides greater protection than the federal constitution concerning inventory searches); State v. Comeaux, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991) (en banc) (noting that the Texas Constitution is at least as extensive in its search and seizure protection as the Fourth Amendment).

75. *See* Hulit v. State, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998) (en banc) (explaining that the Texas Constitution can have ceilings that are lower than the floor of the United States Constitution). The majority opinion was written by Judge Womack and joined by Presiding Judge McCormick, a dissenter in *Heitman*, and Judges Mansfield, Keller, and Holland. *Id.* at 432. In addition to joining the majority opinion, concurring opinions were written by Presiding Judge McCormick, Judge Meyers, and Judge Keller. *Id.* at 438. Although Judge Price did not join in the majority opinion, he also wrote a concurring opinion. *Id.* Judge Baird wrote a dissenting opinion in which Judge Overstreet joined. *Id.*

76. *See Hulit*, 982 S.W.2d at 434 (deciding whether law enforcement officers who detained the defendant without a warrant violated the state constitutional provision).

77. *Id.* at 432.

a truck slumped over the steering wheel, apparently passed out or asleep.[78] Concerned for the man's safety, the officer tried to rouse him by yelling loudly and rapping upon the vehicle's window.[79] The driver woke up and opened the truck door; immediately, the officer smelled alcohol and asked him to step out of the vehicle.[80] The officer began an investigation at that point, leading to the indictment of the man for driving while intoxicated.[81]

Hulit filed a motion to suppress the evidence of intoxication, alleging the officer's actions violated Article I, Section 9.[82] The trial court denied the motion and Hulit was eventually convicted.[83] The Fort Worth Court of Appeals affirmed the trial court's suppression ruling and conviction.[84]

The Court of Criminal Appeals granted Hulit's petition to review the question of whether Texas recognized a "community caretaking" exception to the general warrant requirement[85] Hulit raised three arguments, relying solely on federal precedent: "There is a warrant requirement in the constitution; there are recognized exceptions to the warrant requirement; [and] warrantless searches are per se unreasonable if they do not fall within a recognized exception."[86] The court summarily dismissed the arguments,

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Hulit*, 982 S.W.2d at 432-33.

82. Hulit v. State, 982 S.W.2d 431, 433 (Tex. Crim. App. 1998) (en banc). Interestingly, Hulit withdrew an earlier motion that had invoked both the state and federal constitutional protections, and as a result his motion to suppress rested solely upon Article I, Section 9 of the Texas Constitution. *Id.* At the hearing on the motion to suppress, Hulit "told the trial court that 'the Texas Constitution and law . . . are the only issues that are before the Court in this motion.'" *Id.* As a result, the Fourth Amendment was never directly implicated in this case.

83. *See id.* (reciting that Hulit waived trial, pled guilty, and received a sentence of five years imprisonment along with a fine of $1,250).

84. *Id.*

85. *See Hulit*, 982 S.W.2d at 434 (identifying this as the precise issue before the court). The court stated the issue as "whether Article I, Section 9 of the Texas Constitution was violated by the officers' detaining the appellant without a warrant to determine if he needed first aid, a seizure which the officers made in performance of a community caretaking function, unrelated to the detection or investigation of crime." *Id.* The court immediately pointed out that it would not review the determination by the trial court of when the seizure began. *Id.* at 433. The court assumed that Hulit had been seized when the officers asked him to step out of the vehicle. *Id.*

86. Hulit v. State, 982 S.W.2d 431, 434 (Tex. Crim. App. 1998) (en banc). The court found that it did not need to decide whether Hulit's assertions complied with United States

emphasizing that this case was purely a matter of state law, and as a result, the court was not bound by United States Supreme Court decisions.[87]

Examining the text of Article I, Section 9, the Court of Criminal Appeals set aside the federal precedent calling for a warrant requirement and conducted an independent analysis of the state constitutional provision.[88] While noting the textual similarities to the Fourth Amendment, the *Hulit* court critically analyzed the linguistic structure of Article I, Section 9:

> Neither clause requires a warrant or even authorizes a warrant. The warrant clause does not say when a warrant must issue, or when it may issue; it says only when warrants may not issue. It is cast in the negative ("*no* warrant . . . shall issue"). And even if a warrant met the minimum requirements of the warrant clause (description, probable cause, and affidavit), the warrant still would be unlawful if the seizure or search that it authorized were unreasonable.[89]

The court's "natural reading" of Article I, Section 9 did not lend itself to the interpretation that Texas's provision requires a warrant to ensure reasonableness.[90] The *Hulit* court emphasized that the Court of Criminal Appeals had not previously found a "warrant requirement," citing its 1912 decision in *Hughes v. State* where the court held, "'It is not every search that our Constitution inhibits. It

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Supreme Court precedence. *Id.* Instead, the *Hulit* court immediately distinguished this case from the cases relied on by Hulit by stating that Hulit had raised a state, not a federal constitutional question. *See id.* (denying the application of the Supreme Court's decision in *Harris v. United States*, 331 U.S. 145 (1947) to the instant case). Accordingly, the *Hulit* court emphasized its holding in *Heitman* that state constitutional interpretation would be conducted independent of federal law. *See id.* (asserting that Fourth Amendment analysis was not binding).

87. *See id.* (maintaining that "we must decide whether his assertions are true for the Texas Constitution").

88. *See Hulit*, 982 S.W.2d at 434 (refusing to affirm Hulit's assertion that a federal warrant requirement existed). "We need not decide at this point whether these assertions are the actual holdings of the Supreme Court . . . or whether they have been altered by the jurisprudence of the past 50 years, or even the relevance of a holding about searches in a case about seizures." *Id.*

89. *Id.* at 435. Although Article I, Section 9 is one sentence, it is commonly broken down into two distinct clauses. The portion of the provision reading that "[t]he people shall be secure . . . from all unreasonable seizures or searches" is referred to as the Reasonableness Clause. TEX. CONST. art. I, § 9. The portion of the provision reading that "no warrant . . . shall issue . . . without probable cause" is referred to as the Warrant Clause. *Id.*

90. *Hulit*, 982 S.W.2d at 435.

is only *unreasonable* searches.'"[91] The *Hulit* court went on to criticize the Fourth Amendment's warrant requirement as "unworkable," rejecting the bright line rule because: (1) although the Fourth Amendment has a warrant requirement for searches, it does not have a warrant requirement for seizures of a person outside his home;[92] (2) the Supreme Court has imposed a warrant requirement but has also stated that the central inquiry is "reasonableness;"[93] (3) historical research contradicts the proposition that the Fourth Amendment was intended to create a warrant requirement;[94] and (4) the Supreme Court's decision to impose a warrant requirement has resulted in a "jurisprudential mare's nest."[95] Accordingly, the Court of Criminal Appeals concluded Article I, Section 9, unlike the Fourth Amendment, does not require a warrant to ensure reasonableness.[96]

Inherent in the holding is the notion that the Texas Constitution provides less protection than the United States Constitution regarding searches and seizures.[97] Recognizing this, the *Hulit* court argued its *Heitman* holding did not stand for the proposition that the Texas Constitution could not provide less protection than the

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91. *Id.* (citing Hughes v. State, 67 Tex. Crim. 333, 149 S.W. 173, 184 (1912)).

92. *See* Hulit v. State, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998) (en banc) (citing United States v. Watson, 423 U.S. 411 (1976)).

93. *See id.* & n.5 (referring to Katz v. United States, 389 U.S. 347 (1967) and Johnson v. United States, 333 U.S. 10 (1948)). In addition, to support its proposition that reasonableness is the central inquiry of the validity of searches, the court points to cases involving "Terry stops" or temporary detention such as *Terry v. Ohio*, 392 U.S. 1 (1968) and *United States v. Rabinowitz*, 339 U.S. 56 (1950). *See id.* & n.6.

94. *See id.* & n.7 (referring not to federal case law, but rather to secondary sources); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969) (stating that the Framers were concerned about "overreaching warrants" rather than "warrantless searches"); *see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 10-13 (1997) (showing a mistrust of warrants even during the American Revolutionary period); CHARLES H. WHITEBREAD & CHRISTOPHER SLOGBOGIN, CRIMINAL PROCEDURE 130 (3d ed. 1993) (finding support for the Framers' concern to avoid "general warrants" that allowed the government to conduct "fishing expeditions" inside homes).

95. *See Hulit*, 982 S.W.2d at 436 (referring to the many exceptions that exist to the general requirement of a warrant). The *Hulit* court claimed that "[s]uch a model of the Fourth Amendment not only makes a mockery of the supposed requirement, it interferes with a more fine-tuned assessment of the competing interests at stake." *Id.*

96. *See id.* (finding that a warrantless seizure or search may be constitutional if otherwise reasonable).

97. *See id.* (acknowledging the impact of their holding).

federal constitution.[98] Rather, the *Hulit* court emphasized that to conduct an independent analysis of the state constitution and remain "faithful to the Constitution which our people have adopted," it may interpret the Texas Constitution to provide less protection than the federal constitution.[99] The court rejected the historical floor-ceiling metaphor which the Texas Supreme Court espoused,[100] and which had been recently affirmed by the Court of Criminal Appeals in *Heitman*.[101] In rejecting the floor-ceiling metaphor, the court stated:

> With all respect to our Sister Court, we think its metaphor is wrong. The state constitution and the federal constitution are not parts of one legal building; each is its own structure. Their shapes may be different, as may their parts. Each may shield rights that the other does not. The ceiling of one may be lower than the floor of the other.[102]

Predicting a Supremacy Clause challenge, the *Hulit* court went further, addressing the constitutionality of modifying the historical metaphor used to illustrate the interaction between state and federal constitutional protections:

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98. *Id.* at 437. The *Hulit* court, however, seriously misinterpreted the express language of *Heitman*. "Under our system of federalism, however, the states are free to reject federal holdings as long as state action *does not fall below the minimum standards provided by federal constitutional protections.*" Heitman v. State, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991) (en banc) (emphasis added).

99. *See* Hulit v. State, 982 S.W.2d 431, 436-37 (Tex. Crim. App. 1998) (en banc). "Heitman does not mean that the Texas Constitution cannot be interpreted to give less protection than the federal constitution. It only means that the Texas Constitution will be interpreted independently. . . . Its protections may be lesser, greater, or the same as those of the federal constitution." *Id.* at 437.

100. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986) (stating in dictum that the floor for individual rights is set by the federal constitution and the ceiling is set by the state).

101. *See Hulit*, 982 S.W.2d at 437; Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. 931, 938-39 (2000) (arguing that *Hulit* "stood [*Heitman*] on its head").

102. *Hulit*, 982 S.W.2d at 437. In her concurring opinion, Judge Keller argues further that the Court of Criminal Appeals has "long recognized its ability to interpret the state constitution as providing less protection than its federal counterpart." *Id.* at 439 (Keller, J., concurring). To support her assertion, Judge Keller points to the concurring opinion of Judge Clinton in *Bauder v. State* which referred to the state-federal constitutional interpretation as a "two-way street" where state constitutions can have more or less protection than the federal constitution. *See id.* (Keller, J., concurring) (citing Bauder v. State, 921 S.W.2d 696 (Tex. Crim. App. 1996) (en banc) (Clinton, J., concurring)).

> Because of the Supremacy Clause of the United States Constitution, a defendant who is entitled to claim . . . the protection of a federal provision may receive a greater protection from that floor than the greatest protection that the ceiling of the Texas Constitution would give him. But that does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution.[103]

To support its new metaphor, the court relied on a 1922 case, *Welchek v. State*,[104] which held that although the Fourth Amendment contains an exclusionary rule, Article I, Section 9 does not.[105]

The *Hulit* court explained that although a defendant has the right to seek shelter under both the "federal building" and the "state building," Hulit chose to seek shelter only from the state building.[106] Unfortunately for Hulit, the state building did not provide the shelter sought.[107] However, because both buildings are available to individuals, an interpretation that the Texas Constitution provides less protection than the federal constitution does not violate the Supremacy Clause.[108]

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103. Hulit v. State, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998) (en banc); *see also* Matthew Klakulak, Note, *Michigan's Plain Feel Exception to the Warrant Requirement: A Failure Under the Supremacy Clause*, 44 WAYNE L. REV. 1579, 1582 (1998) (arguing that the decision in *People v. Champion*, 549 N.W.2d 849 (Mich. 1996) violates the Supremacy Clause because less protection was provided to Michigan citizens than required by the United States Supreme Court's interpretation of the Fourth Amendment).

104. 93 Tex. Crim. 271, 247 S.W. 524 (1922).

105. *See* Welchek v. State, 93 Tex. Crim. 271, 247 S.W. 524, 529 (1922) (finding that Article I, Section 9 does not exclude oral testimony of physical facts in a criminal case that are allowed under the applicable rules of evidence).

106. *See Hulit*, 982 S.W.2d at 437 (opining that Hulit may not have been "able to fit his facts under the federal ceiling"). Expanding on this argument, Judge Keller, in her concurrence emphasized the difference between two distinct concepts: "(1) the possession of fewer rights by a state's citizenry than the United States Constitution confers, and (2) the recognition that a state constitutional provision confers less protection than a counterpart federal constitutional provision." *Id.* at 440 (Keller, J., concurring). Keller opines that although concept (1) is a violation of the Supremacy Clause, concept (2) is not. *Id.* (Keller, J., concurring).

107. *Id.* at 437.

108. *See Hulit*, 982 S.W.2d at 437 (advising that the Supremacy Clause remains to provide a greater right for a person to seek). The concurring Judge Keller also argues that possession of the greater right afforded by the federal counterpart does not obligate the state to provide similar protections. *See id.* at 440 (Keller, J., concurring). "Citizens must possess the rights guaranteed by the United States Constitution, but the state constitution is not (and need not be) the vehicle for conferring those rights. Instead, the United States Constitution itself confers those protections upon a state's citizenry." *Id.* (Keller, J., concurring).

Holding that the government's action did not violate Article I, Section 9, the court concluded that it need not reach the issue of whether Texas recognizes a community caretaking function, maintaining Texas's distance from the federal "general rule and exceptions" structure.[109] "For the first time, the court not only questioned the premise that a warrant requirement exists in Article I, Section 9, but actually found that there is no such requirement."[110] Lower courts readily applied *Hulit's* "totality of the circumstances" analysis to assess the reasonableness of warrantless searches and seizures.[111] The Fourteenth Court of Appeals has even gone so far as to cite *Hulit* for the proposition that "[t]he only requirement for a valid search under Texas law is probable cause."[112]

To ensure the maximum level of protection, Texas criminal defendants must invoke the Fourth Amendment to surpass the protection afforded by Article I, Section 9. This is because *Hulit* recognized a set of facts where the state provision provides less protection than the Fourth Amendment. On a practical level, *Hulit* raised the stakes for a defendant's failure to raise both state and federal constitutional challenges.[113] Even assuming the defendant

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109. *See id.* at 438 (reaching their decision under a totality of the circumstances test).

110. Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. 931, 935 (2000).

111. *See* State v. Arriaga, 5 S.W.3d 804, 805 (Tex. App.—San Antonio 1999, pet. ref'd) (stating that *Hulit* "set forth the totality of the circumstances test as the current reasonableness standard for reviewing warrantless arrests"). The *Arriaga* court acknowledged that intermediate courts of appeals "interpreting *Hulit* recite the same reasonableness standard of totality of the circumstances for examining warrantless arrests." *Id.* at 806 (citing State v. Ross, 999 S.W.2d 468, 470-71 (Tex. App.—Houston [14th Dist.] 1999), *aff'd*, 32 S.W.3d 853 (Tex. Crim. App. 2000) (en banc) and Sanders v. State, 992 S.W.2d 742 (Tex. App.—Amarillo 1999, pet. ref'd)); *see also* State v. Bartow, No. 03-97-00672-CR, 1999 WL 332698, at *3 n.1 (Tex. App.—Austin May 27, 1999, no pet.) (not designated for publication) (stating "[w]e read *Hulit* to adopt a broad reasonableness standard for all warrantless stops"). The *Bartow* court held that the police officer's "actions were reasonable under the totality of the circumstances test established by the court of criminal appeals in *Hulit*." *Id.* at *3.

112. Jones v. State, No. 14-01-345-CR, 2002 WL 220625, at *2 (Tex. App.—Houston [14th Dist.] Feb. 14, 2002, pet. ref'd untimely filed) (not designated for publication) (citing *Hulit*, 982 S.W.2d at 436-37).

113. *See* Stewart v. State, 22 S.W.3d 646, 650 (Tex. App.—Austin 2000, pet. ref'd). The *Stewart* court held that an anonymous tip was insufficient to support a roadside stop. *Id.* In addition to other authority, the State relied upon *Hulit*, which the *Stewart* court distinguished from its own Fourth Amendment analysis by stating that "*Hulit* also was decided solely on the basis of article I, section 9 of the Texas Constitution. It is not precedent for determining whether a warrantless seizure was lawful under the United States

raises both challenges, *Hulit* opens the door to ineffective assistance of counsel claims. Defense counsel's failure to separately and adequately brief a federal constitutional challenge is an error that could result in the affirmance of an otherwise reversible conviction.[114] On a grander scale, *Hulit* symbolizes the fruition of the historical resentment manifested by Texas judges, who had been pressured to interpret the Texas Constitution in lockstep fashion with federal courts' interpretation of the United States Constitution.[115]

V. *UNITED STATES V. KNIGHTS*: REVIVING LOCKSTEP INTERPRETATION

After *Hulit*, Texas courts approached cases differently depending upon the constitutional provisions relied upon by the defendant and the extent of argumentation he provided. However, the Supreme Court's recent holding in *United States v. Knights,* which marks a sharp turn in federal constitutional interpretation, will likely serve as a catalyst to dilute the Fourth Amendment's protection to a level resembling Article I, Section 9.[116] *Knights* involved

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Constitution." *Id.* at 650 n.1 (citation omitted). The *Stewart* court similarly distinguished other Texas cases to conclude, "We are mindful of the public danger posed by intoxicated drivers. But we are also mindful of our obligation to follow established Fourth Amendment precedent." *Id.* at 650.

114. *See* Torrez v. State, 34 S.W.3d 10, 14 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (emphasizing that Torrez invoked his rights under both the U.S. and Texas Constitutions repeatedly, unlike the defendant in *Hulit*). The *Torrez* court discussed the separation of protections between the federal and state constitutions:

> It is, however, legally and logically impossible for a state to suffer its citizens less than the minimum guarantees of the U.S. Constitution . . . . The unnecessary departure from precedent by the court's majority opens the door to a plethora of ineffective counsel allegations; any defense lawyer who does not now object on the basis of both the United States and Texas Constitutions surely is ineffective as a matter of law. It would be jurisprudentially wise if all of our Texas courts would reiterate the most fundamental and conservative tenet of our law, *stare decisis*.

Id. at 14 n.1 (citing Dickerson v. United States, 530 U.S. 428 (2000)).

115. *See* Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (en banc) (Teague, J., dissenting) (adopting the rule of the South Dakota Supreme Court in *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976), which found no compulsion to use the United States Supreme Court's interpretations on search and seizure), *overruled in part*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc).

116. United States v. Knights, 534 U.S. 112, 121 (2001) (holding that since reasonable suspicion can satisfy the constitutional requirement for conducting a search under these circumstances, a warrant is not necessary).

the warrantless search of a probationer's home.[117] After he was sentenced to probation for a drug offense, Knights agreed to a probationary term that required him to submit his "'person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.'"[118] A police officer, suspecting Knights of several incidents of vandalism, used this probation term to conduct a warrantless search of Knights's home.[119] The search revealed evidence connecting Knights with the incidents of vandalism.[120]

Knights moved to suppress the evidence on the ground that the warrantless search violated the Fourth Amendment.[121] The trial court found that the search was unconstitutional because it was conducted for investigatory, not probationary purposes, and unsupported by a warrant or probable cause.[122] The Ninth Circuit Court of Appeals affirmed the ruling,[123] and the Supreme Court granted the application for writ of certiorari.[124]

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117. *Id.* at 115.

118. *Id.* at 114.

119. *See Knights*, 534 U.S. at 115 (relating that the law enforcement officer believed a warrant was unnecessary due to the terms of the probation order). The investigation centered around the repeated vandalism of property owned by Pacific Gas & Electric (PG&E) and Pacific Bell. *Id.* at 114. Local authorities suspected Knights and a friend had committed the vandalism in retaliation for PG&E's recent criminal filing of theft-of-services charges against Knights for failure to pay his electrical bill. *Id.* at 114-15. The occurrences of vandalism coincided with the dates Knights appeared in court regarding the PG&E criminal charges. *Id.* at 115. On the night of the most recent act of vandalism, a sheriff's deputy tracked the friend's truck from Knights's residence to another location, where he discovered "a Molotov cocktail and explosive materials, a gasoline can, and two brass padlocks that fit the description of those removed from the PG&E transformer vault" in the truck. *Id.*

120. *See Knights*, 534 U.S. at 115 (discovering "a detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock stamped 'PG&E'"). Knights was arrested and indicted for conspiracy to commit arson and for possession of ammunition as a felon. *Id.* at 116.

121. *See* United States v. Knights, 534 U.S. 112, 116 (2001) (discussing the search of the apartment).

122. *See id.* (noting that the trial court granted the motion to suppress the evidence).

123. *Id.*; *see also* United States v. Knights, 219 F.3d 1138, 1142 (9th Cir. 2000), *rev'd*, 534 U.S. 112 (2001) (condemning the practice of avoiding the Fourth Amendment under the guise of enforcing probation). The Court of Appeals held that Knights's consent to the probationary search condition should be interpreted as "limited to probation searches, and must stop short of investigation searches." *Id.*

124. United States v. Knights, 532 U.S. 1018 (2001).

In addressing the Fourth Amendment challenge, the Supreme Court looked first to the language of Knights's probationary term.[125] Knights argued the applicability of *Griffin v. Wisconsin*,[126] where the Court upheld a Wisconsin statute that permitted probation officers to search probationers' homes if there were "reasonable grounds" to suspect the presence of contraband.[127] Although the Wisconsin statute eliminated the protection afforded by a neutral magistrate who confirms the evidence suspected by the probation officer, the Court upheld the provision because the operation of a probation system presents states with a "special need" to supervise and ensure that probationary terms are complied with.[128] The special needs doctrine, which serves as an exception to the general warrant requirement, permits a warrantless search only if the search is not conducted for general criminal investigatory purposes, but rather to serve a noninvestigatory, special need of the government.

Accordingly, Knights argued that the warrantless search of a probationer is constitutional only if it constitutes a special need as articulated by *Griffin*. Because the detective searched Knights apartment for criminal investigatory purposes, rather than to monitor his probation, Knights argued the search fell outside of the special needs exception and was unconstitutional.[129] The government argued that Knights consented to the search when he accepted the probationary terms, and therefore, the search was constitutional.[130]

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125. *Knights*, 534 U.S. at 116 (examining the search condition). "Certainly nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more." *Id.*

126. 483 U.S. 868 (1987).

127. *See* Griffin v. Wisconsin, 483 U.S. 868, 871 (1987) (intending to look for items that would violate probation conditions). The provision examined in *Griffin* was not a probationary term, but rather, was a statute enacted after Griffin was sentenced to probation. *Id.* at 871 n.1 (declaring the statute in effect as of January 1, 1982, although Griffin was placed on probation in 1980).

128. *See id.* at 873-74 (finding that probationers do not enjoy the liberties of the average citizen).

129. *See Knights*, 534 U.S. at 117 (arguing that a probationer search is limited to issues related only to probationers compliance with terms of probation).

130. *See id.* at 118 (relying upon the California Supreme Court's holding in *People v. Woods*, 981 P.2d 1019, 1027 (Cal. 1999) to support its argument). The government analogized the probationer's consent to search a criminal defendant's voluntary waiver of his right at trial to accept a plea bargain. *Id.* Recognizing that the "consent" argument raises the unconstitutional conditions doctrine, the government argued that the doctrine was not a bar, but rather a limitation on what a probationer may voluntarily consent to under a

The Court, however, rejected both arguments and employed a general Fourth Amendment analysis: "We need not decide whether Knights' acceptance of the search condition constituted consent . . . because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance."[131] To define "reasonableness," the Court stated it must balance the privacy interests of the person searched against the governmental interest involved.[132]

In assessing Knights's privacy rights, the Court focused on two things: (1) Knights's status as a probationer; and (2) his notice of the impending search. First, "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'"[133] The law distinguishes probationers from other citizens and limits the guarantees and rights provided by the Constitution.[134] Second, the Court emphasized that Knights was well aware of the search term of his probation, noting that the probation order "clearly expressed" the condition and "unambiguously informed [Knights] of it."[135] As such, the Court categorized Knights's privacy rights as "significantly diminished."[136]

When the Court looked to the governmental interest side of the balancing test, it found that states have a "dual concern" with probationers: "On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community."[137] Administrative searches by probation officers that help the State ensure probationers are complying with the

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probation order. *Id.* at 118 n.4. "The Government argues that the search condition is not an unconstitutional condition because waiver of Fourth Amendment rights 'directly furthers the State's interest in the effective administration of its probation system.'" *Id.*

131. United States v. Knights, 534 U.S. 112, 118 (2001) (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)).

132. *See id.* at 118-19 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

133. *See id.* at 119 (citing *Griffin*, 483 U.S. at 874 which quotes G. KILLINGER ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 14 (1976)).

134. *See id.* (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

135. *Knights*, 534 U.S. at 119.

136. *Id.* at 119-20.

137. *Id.* at 120-21.

terms of probation serve the first concern. Investigative searches serve the second concern.[138] Considering both concerns are equally legitimate, the Court refused to "require the State to shut its eyes to the latter concern and concentrate only on the former."[139]

After setting out the balance of interests involved, the Court addressed the two factors governing the reasonableness of searches: (1) the requirement of individualized suspicion; and (2) the warrant requirement and applicable exceptions.[140] Normally, for a search to be reasonable, the law enforcement authority must have individualized suspicion rising to the level of probable cause that criminal activity is afoot. In addition, the law enforcement authority must obtain a valid warrant from a neutral magistrate before conducting the search. In this case, the detective searching Knights's apartment had neither.[141] The trial court that considered Knights's motion to suppress found that the detective collected evidence rising to a "reasonable suspicion" that contraband was present in Knights's apartment;[142] however, reasonable suspicion is a lower level requirement than probable cause.

In examining the general requirement for probable cause, the Court discussed the policy reasons behind the individualized suspi-

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138. *See* United States v. Knights, 534 U.S. 112, 120 (2001) (assessing the legitimate government interest). By focusing on recidivism studies by the Department of Justice, the Court acknowledged that probationers are much more like to violate the law than ordinary citizens. *See id.* (citing Griffin v. Wisconsin, 483 U.S. 886, 880 (1987)). The court referenced reports that showed statistics that 43% of 79,000 felons placed on probation in 17 States were rearrested for a felony within three years while still on probation, and that 23% of prisoners in state institutions were probation violators. *See id.* (citing studies by the U.S. Department of Justice in 1992 and 1995 concerning recidivism of felons and parole violations). Further proving the "special need" for searches, the Court stated:

> Probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.

Id.

139. *Id.* at 121.

140. *See Knights*, 534 U.S. at 121 (discussing the standard required for the search of a probationer's house).

141. *See id.* at 115, 122 (showing that the detective's belief that he did not need a warrant was ultimately sustained by the Court on a lower standard than probable cause).

142. *See id.* at 116 (finding specifically that the detective had a justifiable suspicion that he would find incendiary materials).

cion requirement: "The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable."[143] Noting that the Court has generally interpreted the Fourth Amendment to require individualized suspicion rising to the level of probable cause, the Court recognized it had found a lower level of suspicion adequate when the balance between private and governmental interests renders the standard "reasonable."[144]

In balancing Knights's "significantly limited" privacy interest and the governmental interests involved in properly supervising probationers, the Court held that reasonable suspicion is sufficient to justify a search of a probationer's home. "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable."[145] Further, the Court held that a probationer's diminished expectation of privacy permits law enforcement authorities to forgo the warrant requirement.[146]

Knights stands for the proposition that the Fourth Amendment centers on "reasonableness" and not on the procurement of a valid warrant.[147] *Knights*'s reasonableness analysis mirrors the *Hulit*

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143. *Id.* at 121 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981) for its emphasis on probabilities when dealing with individualized suspicion).

144. *See id.* (citing Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975)).

145. United States v. Knights, 534 U.S. 112, 121 (2001).

146. *See id.* (relying upon Illinois v. McArthur, 531 U.S. 326, 330 (2001) for its analogous justification for excepting the warrant requirement). The *Knights* court was careful to limit the scope of its holding:

> We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

Id. at 120 n.6 (citations omitted).

147. *See id.* at 122 (holding that reasonable suspicion can be enough in some cases to satisfy the meaning of the Fourth Amendment); Jonathon T. Skrmetti, Recent Development, *The Keys to the Castle: A New Standard for Warrantless Home Searches in* United States v. Knights, *122 S. Ct. 587 (2001)*, 25 HARV. J.L. & PUB. POL'Y 1201, 1208 (2002)

court's emphasis on reasonableness in interpreting the boundaries of Article I, Section 9. Even more disturbing, *Knights* focuses on the fact that the individual searched had notice of the impending search, which weighed in favor of the reasonableness of the search. This focus on notice implicates the rights of all United States citizens, not only the rights of probationers. Although in Knights's case, "notice" was given by virtue of a probationary term, in theory, notice could be given by a sign posted on a building, warning that all individuals entering the building may be subject to governmental search. According to the Court, such notice would help justify a search conducted without a warrant or individualized suspicion.

Clearly the U.S. Supreme Court in its holding in *Knights* has implied a direction similar to that taken by the Texas Court of Criminal Appeals. Although the judges of the Court of Criminal Appeals fought for many years to distinguish Texas's constitutional protections from federal protections, their independent interpretation has led to a distinction in theory, but ultimately no distinction in the practical application of the two protections. Privacy rights continue to shrink in both state and federal precedent.

Knights illustrates the Supreme Court's continuing divergence from the "warrant requirement" toward "reasonableness." But will *Knights* contribute to a regression in Texas courts to a lockstep analysis of the two protections? In the most recent Texas case dealing with the issues involved in *Knights*, the Beaumont Court of Appeals relied almost exclusively upon federal case law to determine whether police action violated the state and federal protections against unreasonable search and seizure.[148] Whether the interpretation is independent or lockstep, so long as it focuses on reasonableness and continues to dispense with the requirements of a warrant and probable cause, the court, whether federal or state,

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(stating "*Knights* suggests a willingness to streamline Fourth Amendment jurisprudence by supplanting a test riddled with exceptions with a straightforward balancing test").

148. Douglas v. State, No. 09-00-484-CR, 2002 WL 538859, at *8-11 (Tex. App.—Beaumont Apr. 10, 2002, no pet.) (not designated for publication) (conducting an extensive analysis of probable cause based exclusively on United States Supreme Court decisions to conclude that search warrant cases always require deference to probable cause as determined by a magistrate while warrantless searches must only defer to a trial court ruling when the credibility of a witness is involved).

is permitted to consistently attenuate the privacy rights afforded by the United States and Texas Constitutions.

VI. CONCLUSION

Although Texas judges fought for years to separate Texas constitutional protections from federal protections, recent jurisprudence surrounding the Fourth Amendment and Article I, Section 9 have rendered the two provisions nearly identical. In *Hulit*, the Texas Court of Criminal Appeals reconstructed the floor-ceiling analogy to help explain the differences between state and federal constitutional guarantees. The *Hulit* court emphasized that "reasonableness" is the central inquiry for whether a search is valid under the Texas Constitution, distinguishing Article I, Section 9 from the Fourth Amendment and declaring that the Texas Constitution provides less protection than the U.S. Constitution. A few years later, however, the Supreme Court of the United States brought the Fourth Amendment down to Texas's level, holding that reasonableness, not the warrant requirement, governs whether a search is valid under the Fourth Amendment.

Therefore, the federal building and the state building are separate, but identical—both buildings lie on the amorphous foundation of "reasonableness." This foundation allows the federal and state courts to determine the validity of searches on a case-by-case basis and provides no bright line guidance to law enforcement officials regarding whether a search will be upheld or found unconstitutional. Moreover, these buildings, which serve as the sole protection of privacy rights, will continue to shrink, story by story, as courts continue to focus on "reasonableness."