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Criminal Procedure: Confessions, Searches, Seizures & Suppression Issues

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ABSTRACT

This Article analyzes and discusses the most impactful Texas Court of Criminal Appeals cases involving the law of criminal procedure decided during this Survey period. Broadly, this Article addresses two of criminal procedure's main subject areas—confessions and searches and seizures.

I. CONFESSIONS

A. Corpus Delicti Rule Does Not Bar Conviction of Defendant Who Confesses to Indecency with a Child Against 17-Month-Old, Non-Verbal Infant that Resulted in No Apparent Injury

1. Legal Background

The *corpus delicti* rule requires "evidence independent of a defendant's extrajudicial confession showing that the 'essential nature' of the charged crime was committed by someone."[1] It is a rule of evidentiary sufficiency and is intended to prevent convictions for imaginary crimes that are based on false confessions.[2] In *Miller v. State*, the Texas Court of Criminal Appeals held strict application of the *corpus delicti* rule is unnecessary if a defendant confesses to committing multiple temporally connected criminal offenses, provided the connection between the crimes is close enough so as not to violate the purpose of the rule.[3]

2. Shumway v. State

In *Shumway*, the appellant confessed to two different people that he sexually assaulted his friends' pre-verbal, seventeen-month-old infant.[4] He said during both confessions that he touched the infant's genital area with his hands, mouth, and penis.[5] By the time the appellant confessed, there was no physical evidence that could be collected.[6]

The appellant was charged with two counts for aggravated sexual assault of a child and indecency with a child.[7] The confessions were the only

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1. Miller v. State, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015) (punctuation omitted).

2. *Id.* The *corpus delicti* rule does not protect a person who falsely confesses to a real crime from conviction; typically, if a crime was committed, there is sufficient evidence to satisfy the *corpus delicti* rule. *Id.*

3. *See id.* at 927.

4. *See* Shumway v. State (*Shumway II*), 663 S.W.3d 69, 71 (Tex. Crim. App. 2022).

5. *Id.*

6. *Id.* at 71–73.

7. *Id.* at 73.

evidence that the assaults occurred.[8] The State presented evidence that the appellant had the opportunity and motive to assault the infant and that he had a guilty conscience.[9]

After the State closed its case-in-chief, the appellant moved for a directed verdict.[10] He claimed that the *corpus delicti* of the offenses—the touchings—remained unproven because there was no evidence independent of his confessions.[11] The trial court denied the motion.[12] The appellant then requested a *corpus delicti* jury instruction, which the trial court denied.[13]

The jury acquitted the appellant of aggravated sexual assault but convicted him of the lesser-included offense of indecency with a child by contact.[14] It also convicted him of a separate count for indecency with a child by contact.[15] The appellant was sentenced to two consecutive sentences of twenty years' imprisonment and assessed two consecutive $5,000.00 fines.[16]

On appeal, the appellant alleged in a single point of error that he was entitled to an acquittal because the evidence was legally insufficient.[17] He again argued that the *corpus delicti* of the crimes had not been proven.[18] The State argued that there was sufficient evidence independent of the appellant's confessions to corroborate those confessions.[19] The State argued, in the alternative, that the Court of Appeals for the Ninth District of Texas at Beaumont should adopt an exception when the suspect makes a trustworthy admission to sexually assaulting a victim incapable of outcrying.[20] The court of appeals held the rule had been satisfied by other evidence and affirmed the ruling of the trial court.[21] It did not have to address whether an exception to the *corpus delicti* rule applied.[22]

In finding the evidence sufficient, the court of appeals relied on testimony from C.S., who was the appellant's wife, and Bishop Thad Jenks, the people to whom the appellant confessed.[23] It also relied on the testimony of the victim's mother.[24] C.S. testified that she and the appellant babysat their friends' children one weekend, and she remembered the appellant

8. *Id.* at 71.
9. *Id.*
10. *Id.* at 73.
11. *Id.*
12. *Id.*
13. *Id.* at 73 n.5.
14. *Id.* at 73.
15. *Id.*
16. *Id.*
17. *See* Shumway v. State (*Shumway I*), No. 09-18-00218-CR, 2020 WL 86780, at *4 (Tex. App.—Beaumont Jan. 8, 2020, pet. granted) (mem. op., not designated for publication).
18. *Id.* The appellant did not allege that the trial court erred in denying the oral motion for directed verdict or the *corpus delicti* jury instruction.
19. Shumway II, 663 S.W.3d 69, 74 (Tex. Crim. App. 2022).
20. *Id.* at 71.
21. *See id.* at 83.
22. *See generally id.*
23. *Id.* at 71.
24. *Id.* at 74.

spending time with the victim alone.[25] She then said that, "after that weekend[,] [the appellant] fasted a lot and was somewhat withdrawn."[26] C.S. also "remembered [the appellant] going to speak with the bishop in September 2016 . . . ."[27] Jenks testified that the appellant "contacted him in September 2016," and the victim's mother testified about C.S. and the appellant babysitting her children.[28] She also testified that "she first learned of what had happened when the[] bishop told them what the [appellant] said happened."[29] According to the court of appeals, the testimony tended to corroborate the appellant's confession because the testimony made "it more probable that the crimes occurred than without" the testimony.[30]

The appellant filed a petition for discretionary review.[31] He argued in four grounds for review that the court of appeals erred in its application of the *corpus delicti* doctrine.[32] The State argued that the court of appeals' analysis was correct and that, even if it was wrong, the Texas Court of Criminal Appeals should adopt an exception to the rule under the facts of this case.[33]

The court of criminal appeals began by reviewing the *corpus delicti* rule.[34] It explained that "[t]he corpus delicti rule is a judicial rule of evidentiary sufficiency 'affecting cases in which there is an extrajudicial confession,'" and that a defendant's extrajudicial confession "does not constitute legally sufficient evidence of guilt without corroborating evidence independent of that confession showing that the essential nature of the offense was committed."[35] The court noted that the corroborating evidence need only make it more probable that the crime occurred; it need not prove the offense nor prove who committed the offense, so long as it shows that someone did.[36]

The court then reviewed its decision *Miller v. State*,[37] in which the Texas Court of Criminal Appeals adopted an exception to strict application of the *corpus delicti* rule called the "closely related crimes" exception.[38] The court explained that its decision to adopt an exception in *Miller* turned on weighing the policy underlying the *corpus delicti* rule and the State's compelling interest in protecting society's most vulnerable victims, like infants, young children, and people who are mentally infirm.[39]

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25. Shumway I, No. 09-18-00218-CR, 2020 WL 86780, at *2 (Tex. App.—Beaumont Jan. 8, 2020, pet. granted) (mem. op., not designated for publication).
26. *Id.* at *6.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Shumway II, 663 S.W.3d 69, 69 (Tex. Crim. App. 2022).
32. *See id.* at 74.
33. See *id.* at 74–75.
34. *Id.* at 75.
35. *Id.*
36. *Id.*
37. 457 S.W.3d 919, 927 (Tex. Crim. App. 2015).
38. *Shumway II*, 663 S.W.3d at 76.
39. *Id.*

In its analysis, the court noted that strict application of the *corpus delicti* rule would render the evidence insufficient, but the court adopted an "incapable of outcry" exception.[40] The court ruled that:

The victim in this case, a seventeen-month-old infant, was incapable of communication and the underlying criminal conduct was not the kind that would result in perceptible harm. At the same time, the State provided numerous pieces of evidence that corroborated contextual facts contained in Appellant's confessions sufficient to vindicate the underlying purpose of the rule to protect against false confessions. Such a situation illustrates the need for a discrete exception to the traditional application of the corpus delicti rule in Texas. [41] Applying the law to the facts, the court held the "incapable of outcry" exception applied.[42]

Judge Newell penned *Shumway*'s majority opinion, which seven judges joined in concurrence.[43] Judge Yeary concurred with a note, citing an opinion he authored in an earlier case, *Miranda v. State*,[44] in which he argued that the *corpus delicti* rule should be abolished.[45] Judge Slaughter joined the majority and filed a concurring opinion.[46] Judge Slaughter argued the court should abolish the corpus delicti rule because it "no longer serves any legitimate purpose and has never been legislatively adopted."[47]

II. SEARCHES & SEIZURES

A. Fourth Amendment Particularity Requirement is Satisfied Even if Warrant Identifies Place to be Searched Only as a Fraternity House

1. Legal Background

The Fourth Amendment states that "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."[48] The particularity requirement "'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his powers to search.'"[49] As explained by the Texas Court of Criminal Appeals in *Bonds v. State*, "a warrant is sufficiently

40. *Id.* at 79.
41. *Id.*
42. *Id.* at 83.
43. *Id.* at 70.
44. 620 S.W.3d 923, 930–31 (Tex. Crim. App. 2021).
45. *See Shumway II*, 663 S.W.3d at 87 (Yeary, J., concurring).
46. *See id.* at 84 (Slaughter, J., concurring).
47. *Id.*
48. U.S. Const. amend. IV.
49. Bonds v. State, 403 S.W.3d 867, 874 (Tex. Crim. App. 2013) (citing Groh v. Ramirez, 540 U.S. 551, 561 (2004)).

particular if it enables the officer to locate the property and distinguish it from other places in the community."[50]

2. Patterson v. State

In *Patterson*, there was an overdose at the Texas A&M Sigma Nu fraternity house.[51] Numerous people called 911 about the overdose and said that the fraternity members did not want the police involved because drugs were in the house.[52] When police arrived, they discovered the body of the fraternity member who appeared to have overdosed.[53] Officers wanted to account for everyone in the house and to determine whether anyone needed medical attention, so they conducted three protective sweeps of the house.[54] Officers saw narcotics and paraphernalia in plain view in bedrooms and common areas.[55] On the third sweep, an investigator accompanying the officers saw contraband in Room 216, the appellant's room.[56] The investigator drafted a search warrant.[57]

In the search warrant, he described the outside of the fraternity house but did not describe the specific room.[58] The affidavit, however, also identified the appellant as the suspect, described the contraband as "two small plastic baggies with white colored residue, white powdery substance arranged in a line," and identified the appellant's room number.[59] A magistrate found

50. *Id.* at 875.
51. *See* Patterson v. State (*Patterson II*), 663 S.W.3d 155, 156 (Tex. Crim. App. 2022).
52. *See id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 157. The incorporated affidavit stated:

A multi-story, multi-wing residence building located at 550 Fraternity Row, College Station, Brazos County, Texas. The residence is known as the Sigma Nu Fraternity house and sits on the northeast corner of the Fraternity Row and Deacon Drive intersection. The exterior consists of light beige siding and light beige colored brick. The main wing consists of a two story structure, with an open balcony with a wrought iron railing running the full length of the front of the building. There is a doorway located in the center. There are two large sized, multi-paned windows to both the right and left side of this doorway. Each window is further described as having dark brown shutters to either side. The lower level holds the main entrance, also centered in the building, with two large sized, multi-paned windows to both the right and left side of this doorway. The front of the residence building has six, individual, brick pillars which reach from the ground to the top of the second story. These pillars are made of beige colored brick. The two center most pillars are adorned with lighting sconces which are positioned near the center of the pillar, height wise. Centered on the second level and attached to the wrought iron railing are the two large, Greek letters for Sigma and Nu, which are dark brown in color surrounded by a white outline. Directly below these letters, the numbers "550" are affixed. The main entrance into the residence building faces towards the southwest and consists of two wooden doors which open outwards. The doors are painted maroon in color; with the right side door having a brown metal, latch style door knob with an attached electronic key pad positioned on the left side of the door. Above the door latch is a brown metal keyhole for a deadbolt style locking mechanism. The attached wing is also two storied and made up of beige colored brick. It is positioned on the northwest side of the

probable cause and issued the warrant, and the investigator seized the drugs.[60]

The defendant was charged with two counts for possession of a controlled substance.[61] He filed a motion to suppress (and later an amended motion to suppress), which the trial court denied.[62] He then pled guilty and was sentenced to two concurrent two-year sentences of confinement, both of which were probated for five years.[63] Appellant appealed the denial of his motion to suppress.[64]

On appeal, the appellant argued that the description in the warrant did not meet the "particularity" requirement of the Fourth Amendment.[65] He emphasized that the description of his room was not listed under the part of the warrant titled, "suspected place," and he complained that only the description of the fraternity house appeared under that section.[66] The State argued that the appellant did not have standing to challenge the search because the room he lived in was not a private one, and each fraternity member was on a lease for the entire property.[67] The Court of Appeals for the Tenth District of Texas at Waco held that the appellant had standing.[68] It reasoned that a person's privacy interest in a dormitory room is no different than a person's privacy interest in a particular room in a fraternity house.[69] It then turned to the merits and agreed with the appellant that the warrant and affidavit were deficient because they failed to adequately identify the appellant's room.[70] Finding the Fourth-Amendment violation harmful, the court of appeals reversed the trial court's denial of the motion to suppress and remanded for further proceedings.[71]

The State filed a petition for discretionary review.[72] The Texas Court of Criminal Appeals granted review for one of the issues: whether a search warrant was facially valid because it incorporated the warrant affidavit,

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main building. The southwest facing side of the attached wing holds four individual windows, two on each level, which consist of multi-paned windows and dark brown colored shutters to each side. Said Suspected Place also includes locations outside of the residence, such as garages, outbuildings, boxes, and other vehicles parked within the curtilage of Said Suspected Place.

Patterson v. State (*Patterson I*), No. 10-19-00243-CR, 2020 WL 7257069, at *6 (Tex. App.—Waco Dec. 9, 2020).

60. *Patterson II*, 663 S.W.3d at 157.

61. *Id.*

62. *See Patterson I*, 2020 WL 7257069, at *2. The appellant challenged the search on multiple bases. After his motion was denied, he requested findings of fact and conclusions of law. However, none are in the record.

63. *Patterson II*, 663 S.W.3d at 157.

64. *Id.*

65. *Patterson I*, 2020 WL 7257069, at *7.

66. *Id.*

67. *Id.* at *5.

68. *Id.* at *4.

69. *Id.* at *6.

70. *Id.* at *7.

71. *Id.* at *8.

72. *See* Patterson II, 663 S.W.3d 155, 155 (Tex. Crim. App. 2022).

which listed the appellant's room as containing narcotics.[73] The State argued the affidavit sufficiently described the appellant's room as the place to be searched, as the affidavit identified the appellant's room number.[74] The State also argued that it is constitutionally irrelevant that the description of the appellant's room did not appear under the "suspected place" section of the warrant and affidavit.[75]

The court of criminal appeals agreed with the State.[76] It reasoned that an affidavit incorporated into a search warrant is part of the search warrant for all purposes, including as an aid in meeting the Fourth Amendment "particularity" requirement, and that it does not matter where the particularity information appears, so long as it appears somewhere in the warrant and/or affidavit.[77] The court pointed out that a different part of the affidavit, as the State argued, stated, "Said Suspected Party #22" and "Room #216 belonging to Said Suspected Party #22–coffee table: two small plastic baggies with white colored residue, white powdery substance arranged in a line."[78] The Court held that a common-sense reading showed that those descriptions were "'sufficiently specific to apprise the officers of where they were to conduct the searches.'"[79]

Presiding Judge Keller authored this opinion for a unanimous Court.

B. Article 18.01(B) of the Code of Criminal Procedure Permits Anticipatory Search Warrants if Warrant is Supported by Probable Cause and No "Present Possession" Requirement

Based on its reasoning, the Court of Criminal Appeals held that anticipatory search warrants are lawful, so long as the warrant is supported by probable cause, and that there is no "present possession" requirement.[80]

1. Legal Background

Chapter 18 of the Texas Code of Criminal Procedure deals with search warrants in Texas.[81] Article 18.01(b) states, in relevant part, that "[n]o search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance."[82] Search warrants can be issued for many reasons under Chapter 18.[83] Chapter 18 addresses many types of warrants;

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73. *Id.* at 156.
74. *See id.* at 157–58.
75. *Id.* at 158.
76. *Id.*
77. *See id.* at 158–59.
78. *Id.* at 157.
79. *Id.* at 159 (quoting Affatato v. State, 169 S.W.3d 313, 316 (2005)).
80. *See* Parker v. State (*Parker II*), 663 S.W.3d 766, 768–70 (Tex. Crim. App. 2022).
81. *See* Tex. Code Crim. Proc. Ann. art. 18 (West).
82. *Id.* at art. 18.01(b).
83. *See, e.g.*, *id.* at art 18.02. It states, in relevant part:
(a) A search warrant may be issued to search for and seize: (1) property acquired by theft or in any other manner which makes its acquisition a penal offense; (2) property specially

anticipatory search warrants, however, are not one of them.[84] Magistrates issue anticipatory search warrants based on probable cause to believe that evidence of a crime *will* be located at a particular place in the future.[85] At least one court has suggested that Article 18.01(b) authorizes so-called anticipatory search warrants.[86] The Court of Criminal Appeals resolved this issue last year in *Parker*.[87]

2. Parker v. State

In *Parker*, a UPS store in Oregon received two packages to be delivered to "Silas Parker c/o Scott Cove," at an address in San Marcos, Texas.[88] Silas Parker, the appellant, was identified on the paperwork as both the shipper and the recipient.[89] The appellant told a UPS employee that the packages contained chanterelle mushrooms (an edible mushroom often used in cooking).[90] After he left, a UPS employee asked a UPS security supervisor to open a package because it smelled like marijuana.[91] The supervisor found what he thought were psilocybin mushrooms and called police.[92] A detective from the Oregon State Police found twenty bags of psilocybin mushrooms in the packages.[93] The detective contacted the San Marcos Police Department and told him about the packages and that he was returning the packages of mushrooms to UPS to be delivered to the appellant in San Marcos.[94] Police in San Marcos determined that the

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designed, made, or adapted for or commonly used in the commission of an offense; (3) arms and munitions kept or prepared for the purposes of insurrection or riot; (4) weapons prohibited by the Penal Code; (5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia; (6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law; (7) a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state; (8) any property the possession of which is prohibited by law; (9) implements or instruments used in the commission of a crime; (10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense; (11) persons; (12) contraband subject to forfeiture under Chapter 59 of this code; (13) electronic customer data held in electronic storage, including the contents of and records and other information related to a wire communication or electronic communication held in electronic storage; or (14) a cellular telephone or other wireless communications device, subject to Article 18.0215.

Id.

84. Parker II, 663 S.W.3d 766, 774, n.1 (Tex. Crim. App. 2022) (Yeary, J., concurring); State v. Toone, 872 S.W.2d 750, 752 (Tex. Crim. App. 1994).

85. *Parker II*, 663 S.W.3d at 770.

86. Mahmoudi v. State, 999 S.W.2d 69, 72 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

87. *Parker II*, 663 S.W.3d at 770.

88. *Id.* at 768.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

appellant lived at the recipient address and was the manager of a business on the same property, Thigh High Gardens.[95]

San Marcos police sought an anticipatory search warrant to search the packages and the recipient property for "writings, photos, currency, weapons, and more."[96] The detective asked the magistrate to issue a warrant to be executed a few days later once delivery of the packages was confirmed.[97] The magistrate issued the warrant, and the warrant was executed two days later.[98] When police executed the warrant, they discovered multiple bags of psilocybin mushrooms.[99] Following the search, the investigator sought and obtained a search warrant for the appellant's cell phone data "to prove that he was in Oregon on the date the packages were shipped."[100]

The appellant filed two motions to suppress: one challenging the search of the packages and property, and one challenging the search of his cell phone data.[101] (Only the packages/property warrant is relevant to this case.) In his motion, the appellant argued the search of his home was unlawful because Article 18.01 does not authorize the issuance of anticipatory search warrants.[102] The trial court denied both motions to suppress, and the appellant pled guilty pursuant to a plea bargain.[103]

On appeal, the appellant posited that anticipatory search warrants under Article 18.01(b) are invalid because they are predicated on the belief that probable cause will exist in the future, but to be lawful, probable cause must exist when the search warrant is issued.[104] The Court of Appeals for the Third District of Texas at Austin rejected this argument.[105] It reasoned that the text of Article 18.01(b) does not prohibit magistrates from issuing a search warrant that is ineffective until conditional facts in the future are satisfied (in this case, the future conditional fact was the confirmed delivery of the packages).[106] Accordingly, it merely requires that the affidavit include sufficient facts to show that probable cause exists to issue a warrant.[107] The court of appeals also observed that while the legislature had expressly prohibited anticipatory search warrants in parts of Chapter 18, it did not do so in Article 18.01(b), and it noted that the United States Supreme

95. *Id.* at 769 (The business billed itself as "a Permaculture design based farm located on the outskirts of San Marcos, TX"); *see also* Thigh High Gardens, FACEBOOK, https://facebook.com/ThighHighGardens [https://perma.cc/HK7E-TZU2].

96. *Parker II*, 663 S.W.3d at 769.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* Parker v. State (*Parker I*), No. 03-19-00293-CR, 2021 WL 1567882, at *2 (Tex. App.—Austin Apr. 22, 2021, pet. granted) (mem. op., not designated for publication), *aff'd*, 663 S.W.3d 766 (Tex. Crim. App. 2022).

103. *Id.* at *1–2.

104. *See id.* at *3.

105. *See id.* at *2.

106. *Id.* at *3.

107. *Id.* at *3 (citing TEX. CODE CRIM. PROC. Ann. art. 18.01(b) (West 2021)).

Court has held that anticipatory search warrants are permissible under the Fourth Amendment.[108] The court of appeals held that a magistrate could issue an anticipatory search warrant under Article 18.01(b) upon a showing of "a 'fair probability' that (1) certain items will be found at the designated location and (2) the triggering condition will occur."[109]

The appellant filed a petition for discretionary review, and the Texas Court of Criminal Appeals agreed to review the court of appeals' conclusion that Article 18.01(b) authorizes the issuance of anticipatory search warrants.[110] The appellant argued that even though anticipatory search warrants are permitted under the Fourth Amendment, they are not under Texas law because, in Texas, the evidence to be seized and searched must "be present at the designated location 'at the time the search warrant is issued.'"[111] For support, the appellant relied on *Mahmoudi v. State*, arguing that the Court of Appeals for the Fourteenth District of Texas at Houston has held that magistrates in Texas cannot issue anticipatory search warrants.[112]

The court of criminal appeals' analysis, like the court of appeals, hinged upon what the text of Article 18.01(b) allows.[113] The text reads as follows:

> No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that *probable cause does in fact exist* for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. Except as otherwise provided by this code, the affidavit becomes public information when the search warrant for which the affidavit was presented is executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.[114]

The court of criminal appeals began its analysis with the statutory phrase "probable cause does in fact exist."[115] According to the court, probable cause exists when there is "a 'fair probability that contraband or evidence of a crime will be found' at the specified location."[116] The court further referenced the U.S. Supreme Court's view that all warrants are anticipatory because they predict that evidence will still be located at the specified place at the time of the search.[117]

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108. *Id.* (citing United States v. Grubbs, 547 U.S. 90, 94–96 (2006)).
109. *Id.* (quoting Grubbs, 547 U.S. at 96).
110. *See* Parker II, 663 S.W.3d 766, 769–70 (Tex. Crim. App. 2022).
111. *Id.* at 770.
112. *Id.* (citing Mahmoudi v. State, 999 S.W.2d 69, 72 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)).
113. See *id.* at 770.
114. Tex. Code Crim. Proc. Ann. art. 18.01(b) (West 2021) (emphasis added).
115. *Parker II*, 663 S.W.3d at 770.
116. *Id.* at 771 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).
117. *See id.*

Second, the court of criminal appeals was not persuaded that the phrase "in fact exist" prohibits the issuance of anticipatory search warrants.[118] It characterized the question as whether the phrase creates a "present possession" requirement, meaning that probable cause must have existed when the warrant was issued.[119] The court noted that, in cases in which police seek an anticipatory search warrant, magistrates might be more confident in finding probable cause where, like here, police had already discovered the contraband and knew that it "was in the process of being transported to the designated location and would arrive on the date of the search."[120]

Third, the court of criminal appeals noted that the text of Article 18.01(b) does not indicate that there is a "present possession" requirement.[121] It reasoned that "there is no specific language [in Article 18.01(b)] requiring that the items sought be at the location when the affidavit is submitted, only that the affidavit establishes sufficient facts to support the requested search."[122] The court also compared the text of Article 18.01(b) with other search warrant provisions in Chapter 18, like Article 18.01(c), in which the legislature expressly included a "present possession" requirement.[123]

Fourth, the court of criminal appeals addressed the appellant's argument that Article 18.01(b) has a "present possession" requirement because the affidavit contained language used in Article 18.01(c) that does have a "present possession" requirement.[124] The court of criminal appeals disagreed with the appellant.[125] It explained that, while the text of Article 18.01(c) refers to evidence "located at or on the particular person, place, or thing to be searched,"[126] Article 18.01(c) deals with "mere evidentiary" warrants.[127] Therefore, the court concluded, Article 18.01(c) did not apply

118. *Id.*
119. *Id.* at 772.
120. *Id.* at 771.
121. See *id.* at 772.
122. *Id.*
123. See *id.*
124. See *id.*
125. *Id.* at 773.
126. *See id.* Tex. Code Crim. Proc. Ann. art. 18.01(c) (West 2021) The statute states:
A search warrant may not be issued under Article 18.02(a)(10) unless the sworn affidavit required by Subsection (b) sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. Except as provided by Subsections (d), (i), and (j), only a judge of a municipal court of record or a county court who is an attorney licensed by the State of Texas, a statutory county court judge, a district court judge, a judge of the Court of Criminal Appeals, including the presiding judge, a justice of the Supreme Court of Texas, including the chief justice, or a magistrate with jurisdiction over criminal cases serving a district court may issue warrants under Article 18.02(a)(10).
Id.
127. *See Parker II*, 663 S.W.3d at 772.

because this is not a "mere evidentiary" warrant and was issued under Article 18.02(a)(7).[128]

Finally, the court also found *Mahmoudi* distinguishable.[129] That case dealt with a federal search warrant, not a state search warrant, the court's discussion about the federal warrant being insufficient under Article 18.01 was dicta, and the court of appeals was analyzing Article 18.01(c)(3) and Article 18.02(a)(10), not Article 18.01(b).[130]

Ultimately, the court of criminal appeals held that anticipatory search warrants are lawful, so long as the warrant is supported by probable cause, and there is no "present possession" requirement.[131]

The decision was eight to one.[132] Judge McClure authored the majority opinion in which the presiding judge and six other judges joined.[133] Judge Yeary filed a concurring opinion.[134]

C. Evidence Obtained in Violation of Article I, Section 9 and Admitted in Violation of Article 38.23 Reviewed for Non-Constitutional Harm

1. Legal Background

The Fourth Amendment of the U.S. Constitution and Article I, § 9 of the Texas Constitution prohibit unreasonable searches and seizures.[135] The text of the Fourth Amendment does not refer to the suppression of evidence,[136] but the U.S. Supreme Court has held that there is an exclusionary rule "inherent" in the Amendment.[137] Consequently, error under the amendment is reviewed for constitutional harm.[138] Like the Fourth Amendment, Article I, § 9 of the Texas Constitution does not refer to suppression of evidence, but unlike the U.S. Supreme Court, the Texas Court of Criminal Appeals

128. *Id.* at 773; *see also* Tex. Code Crim. Proc. art. 18.02(a)(7) (West 2021) (Article 18.02(a)(7) allows for a warrant to be issued for "a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state").

129. *See Parker II*, 663 S.W.3d at 773 (citing Mahmoudi v. State, 999 S.W.2d 69, 72 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)).

130. *See id.*

131. *See id.* at 773–74.

132. *See id.* at 768.

133. *See id.*

134. *See id.* at 774.

135. *See* U.S. Const. amend. IV.; Tex. Const. art. I, § 9.

136. The Fourth Amendment states that,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.

U.S. Const. amend. IV.

137. Hernandez v. State, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (citing Smith v. Phillips, 455 U.S. 209, 221 (1982)).

138. *See id.*

has held that there is no suppression remedy inherent in Article I, § 9.[139] The court of criminal appeals has explained that the general suppression rule in Texas is statutory and is located in Article 38.23(a).[140] Nonetheless, in the past, a trial court's failure to suppress evidence under Article 38.23(a), because evidence was unlawfully seized in violation of Article I, § 9 of the Texas Constitution, has been reviewed for constitutional error.[141] That changed last session in *Holder*.[142]

2. Holder v. State

In *Holder*, the appellant, his girlfriend, Casey James, and her two children lived with her ex-stepfather.[143] While they lived there, the romantic relationship between the appellant and James ended, and the appellant moved into his tattoo shop in Irving.[144] Later, the appellant's ex-girlfriend asked him if he had seen any inappropriate behavior between her ex-stepfather and her children, and the appellant responded that he had.[145]

The next time that James spoke to the appellant, she told him that she was going out of town and that her kids were staying with a friend.[146] When James returned at the end of the weekend, she sensed that something was wrong, and she called police.[147] When police arrived, they found her ex-stepfather's body inside his home.[148] He had been killed by blunt-force trauma to the head and had been stabbed twenty times.[149] The police concluded that it was a crime of passion.[150] They found two black latex gloves at the scene, which were not there when James left for the weekend, but evidence showed that the appellant posted a picture on Facebook of him wearing similar black gloves while tattooing someone.[151]

As part of their investigation, police sought a court order under the federal Stored Communication Acts to obtain the appellant's call log and cell-site location information (CSLI) from the time around the murder.[152] Police eventually obtained the records and later interviewed the appellant.[153] Police asked the appellant where he was the weekend of the murder and if he had his cell phone during that time.[154] The appellant responded that

139. *See* Hulit v. State, 982 S.W.2d 431, 435, 437 (Tex. Crim. App. 1998) (citing Welchek v. State, 247 S.W. 524 (1922)).
140. *See* Sims v. State, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019).
141. *See* Love v. State, 543 S.W.3d 835, 845–46 (Tex. Crim. App. 2016).
142. *See* Holder v. State (*Holder III*), 639 S.W.3d 704, at 706 (Tex. Crim. App. 2022), *reh'g denied* (Mar. 9, 2022).
143. Holder v. State (*Holder I*), 595 S.W.3d 691, 694 (Tex. Crim. App. 2020).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.* at 695.
152. *See id.* at 693, 695.
153. *Id.* at 695.
154. *Id.* at 695–96.

he was in Irving at his tattoo shop and that he had his cell phone.[155] He was then confronted with records showing that the appellant's cell phone pinged multiple towers near the victim's home in Plano that weekend.[156] The appellant changed his story and claimed that he was in that area to buy drugs but claimed that he never went to the victim's house.[157]

According to the records, the victim ended a phone call with his parents at 2:35 p.m. the day of the murder, and between 3:28 p.m. and 4:16 p.m. the same day, the appellant's cell phone pinged the tower that "best served" the victim's home.[158] They also showed that the appellant's cell phone began pinging the tower near the victim's home again just after midnight and that it pinged a tower near where the victim's abandoned pick-up truck was located at 2:11 a.m.[159]

Later, police learned that a person in custody claimed to know who committed the murder.[160] The person gave police information that only someone involved in committing the crime would know.[161] He told police that the appellant called him to buy drugs around 2:00 p.m. or 3:00 p.m. the day of the murder and that the appellant was "real hysterical."[162] The informant also said that the appellant called him again later that day to ask for help with "something," and the informant subsequently discovered that the appellant needed help with disposing of the victim's body.[163]

In an earlier opinion (*Holder I*), the Texas Court of Criminal Appeals held that the search of the appellant's historical CSLI data was unreasonable under Article I, § 9 of the Texas Constitution, which prohibits unreasonable searches and seizures, and that admission of the CSLI evidence violated Article 38.23 because it should have been suppressed.[164] The court remanded for the Court of Appeals for the Fifth District of Texas at Dallas to determine whether the appellant was harmed by the erroneous admission of the evidence.[165] On remand, the court of appeals undertook a constitutional harm analysis, following the lead of the Texas Court of Criminal Appeals' analysis in *Love v. State*,[166] and concluded that the appellant was harmed.[167] It reversed the judgment of the trial court and remanded the case for further proceedings.[168]

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155. *Id.* at 696.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 696–97.
162. *Id.* at 696.
163. *Id.*
164. See *id.* at 704.
165. See *id.*
166. *See* Love v. State, 543 S.W.3d 835, 845–46 (Tex. Crim. App. 2016).
167. Holder v. State (*Holder II*), No. 05-15-00818-CR, 2020 WL 7350627, at *3, *7 (Tex. App.—Dallas Dec. 15, 2020, pet. ref'd) (mem. op.), *vacated*, 639 S.W.3d 704 (Tex. Crim. App. 2022).
168. *Id.* at *8.

In the instant case (*Holder III*), the State filed a petition for discretionary review, arguing that the Court of Appeals for the Fifth District of Texas at Dallas applied the wrong harm standard on remand from *Holder I*.[169] Citing a concurring opinion from Judge Hervey and a dissenting opinion from Presiding Judge Keller in earlier cases, the Texas Court of Criminal Appeals agreed with the State.[170] The court of criminal appeals explained that admitting evidence in violation of Article 38.23 should be reviewed only for non-constitutional error.[171] Accordingly, the court vacated the judgment of the court of appeals and remanded for it to conduct a new harm analysis.[172]

Judge Yeary wrote the majority opinion for the unanimous Court.[173]

D. Defendant Entitled to an Article 38.23 Jury Instruction Upon Contradictory Evidence About Whether Vehicle Had a Rear License Plate

1. Legal Background

Article 38.23(a) of the Texas Code of Criminal Procedure requires evidence to be suppressed if it was obtained by an "officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America . . . ."[174] Often, motions to suppress are litigated pretrial. For example, in a drug possession case, if a defendant is not able to suppress evidence of the drugs, the defendant might choose to plead guilty (with or without a plea bargain) and appeal.[175] However, Article 38.23(a) also requires a jury instruction directing the jury to disregard the disputed evidence if the jury has a reasonable doubt about whether the evidence was unlawfully obtained under Article 38.23(a).[176] The Texas Court of Criminal Appeals has held that, to obtain a jury instruction under Article 38.23(a), a defendant must show that the evidence raises a fact issue, the evidence is affirmatively

169. *See* Holder v. State (*Holder III*), 639 S.W.3d 704, at 706 (Tex. Crim. App. 2022), *reh'g denied* (Mar. 9, 2022).

170. See *id.* at 707.

171. *Id.*

172. *Id.* at 708.

173. *Id.* at 705.

174. Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2021). In relevant part, Article 38.23(a) states that: "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." *Id.*

175. *See* Parker I, No. 03-19-00293-CR, 2021 WL 1567882, at *1 (Tex. App.—Austin Apr. 22, 2021, pet. granted) (mem. op., not designated for publication), *aff'd*, 663 S.W.3d 766 (Tex. Crim. App. 2022).

176. *See* Tex. Code Crim. Proc. art. 38.23(a).

contested, and the fact issue is material to whether the evidence was obtained lawfully.[177]

2. Chambers v. State

In *Chambers*, the appellant was pulled over by a Round Rock Police Sergeant around 10:45 p.m. because he believed that the appellant's pick-up truck did not have a rear license plate.[178] The appellant was pulled over after driving another one-quarter mile.[179] While he was still driving, the appellant was observed to have dropped something on the road.[180] Once he pulled over, the appellant immediately exited the vehicle, which the officer also found suspicious.[181] After waiting for backup, the officers approached the vehicle and saw the appellant lower his right hand.[182] Police discovered a loaded pistol in that area.[183] Police also found on the appellant "shards" of what a presumptive field test showed was methamphetamine, a bag of narcotics and another pistol in the pick-up truck, and a bag of narcotics on the ground outside the driver's side door.[184]

The appellant filed a motion to suppress.[185] He argued that the State failed to show that the appellant's pick-up truck did not have a rear license plate.[186] The trial court denied the motion to suppress.[187] At trial, the officer's dash-cam video and photos of the back of the pick-up truck were admitted.[188] Before the case was submitted to the jury, the appellant sought an instruction under Article 38.23(a).[189] The trial court denied the request, and the jury found him guilty and sentenced him to 20 years' imprisonment.[190]

The appellant raised multiple points of error on appeal, including arguments that he was entitled to a jury instruction under Article 38.23(a).[191] The Court of Appeals for the Sixth District of Texas at Texarkana disagreed.[192] It found that an instruction is "'mandatory only when there is

177. *See* Madden v. State, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007).

178. Chambers v. State (*Chambers I*), No. 06-18-00090-CR, 2019 WL 1412230, at *1 (Tex. App.—Texarkana Mar. 29, 2019, pet. granted) (mem. op., not designated for publication), *rev'd and remanded*, 663 S.W.3d 1 (Tex. Crim. App. 2022).

179. *Id.*

180. *See id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at *2.

185. *See* Chambers v. State (*Chambers II*), 663 S.W.3d 1, 3 (Tex. Crim. App. 2022), *reh'g denied* (Sept. 14, 2022).

186. *See id.*

187. *Id.*

188. *Id.*

189. *See id.*

190. *Id.*

191. *See* Chambers I, No. 06-18-00090-CR, 2019 WL 1412230, at *2–7 (Tex. App.—Texarkana Mar. 29, 2019, pet. granted) (mem. op., not designated for publication), *rev'd and remanded*, 663 S.W.3d 1 (Tex. Crim. App. 2022).

192. *See id.* at *7.

a factual dispute regarding the legality of the search'" and that "even where an officer is mistaken about a historical fact, an Article 38.23 instruction is not necessarily required."[193] The court of appeals explained that, so long as an officer's mistake about the facts is reasonable (in this case, whether the pick-up truck had a rear license place), an Article 38.23(a) instruction is not required "unless 'there is a dispute about whether a police officer was genuinely mistaken or was not telling the truth . . . ,'" and the mistake relates to a historical fact material to the reasonable-suspicion or probable-cause analysis.[194] The court of appeals further decided that the "genuine mistake" exception applied.[195] It reasoned that, while there was a dispute about whether there was a rear license plate on the pick-up truck, there was no dispute about whether the officer was reasonably mistaken or lying about what he saw.[196] It observed that there was a glare on the dash-cam footage preventing the license plate from being seen, and photographs admitted into evidence of the rear license plate on the pick-up truck did not create a factual dispute because the photographs were taken in a different place and after the offense.[197] Based on this, the court of appeals concluded that there was no dispute about the reasonableness of the officer's conclusion that there was no rear license plate at the time of the stop. [198]

The court of appeals also concluded that there was no evidence that the officer testified untruthfully.[199] The appellant argued that the jury could have inferred that the officer lied because the photographs showed a rear license plate on the pick-up truck.[200] But the court of appeals explained that there was no factual dispute about the honesty of the officer because (1) the license plate was not visible on dash-cam footage; (2) the officer consistently testified that he never saw the rear license plate; and (3) the photographs were not probative of the issue, since they were taken later, and thus, were not evidence that there was a rear license plate on the truck when the officer initiated the traffic stop.[201]

On discretionary review, the Texas Court of Criminal Appeals held that the court of appeals erred.[202] The court's analysis tracked the three requirements for obtaining an Article 38.23(a) instruction.[203] First, the court of criminal appeals disagreed with the court of appeals' interpretation of the dash-cam footage.[204] According to the court, although the video was not high quality, the rear license plate was visible in the video, and it believed

193. *Id.* at *5.
194. *Id.*
195. *See id.*
196. *See id.* at *6.
197. *Id.*
198. *See id.*
199. *Id.*
200. *See id.*
201. *See id.*
202. *See* Chambers II, 663 S.W.3d 1, 5 (Tex. Crim. App. 2022), *reh'g denied* (Sept. 14, 2022).
203. *See id.* at 4.
204. *Id.*

that the photographs were probative because they showed a rear license plate on the pick-up truck.[205] This, the court said, was sufficient to raise a fact issue about what the officer saw before he initiated the traffic stop.[206] The court of criminal appeals also believed that the court of appeals erred because it erroneously appeared to require the appellant "to affirmatively prove the officer could see the license plate in order to get a 38.23 instruction."[207] It explained that the evidence need only raise a fact issue, not prove a fact issue.[208] The court of criminal appeals further explained that the fact issue was affirmatively contested because the dash-cam footage and photographs affirmatively contradicted the officer's assertion that he did not see a rear license plate.[209] Finally, the fact issue was material because "whether an objectively reasonable basis for the stop existed was a contested fact issue that was material to the lawfulness of the stop."[210]

The court of criminal appeals reversed the judgment of the court of appeals and remanded it for that court to conduct a harm analysis.[211] Judge Richardson wrote the majority opinion for the unanimous court.[212]

On the State's motion for rehearing, the State argued that other reasons justified the traffic stop, and thus whether a rear license plate was present was immaterial: "(1) the license plate was not properly illuminated; (2) the license plate letters and numbers were obscured or altered; and (3) the license plate was expired."[213] However, the court of criminal appeals disagreed.[214] It noted that (1) there was an affirmative factual dispute about whether there was a license plate light; and (2) the obfuscation of the license plate and the fact that it was expired could not have been bases for the stop because the officer did not notice either until the traffic stop was completed.[215]

205. *Id.*
206. *See id.*
207. *Id.*
208. *Id.*
209. *See id.* at 5.
210. *Id.*
211. *Id.*
212. *See id.* at 3.
213. *Id.* at 6.
214. *Id.* (explaining that "[n]one of these reasons impact the materiality of the contested issue of the displayed license plate").
215. *See id.*