

# ***WHAT WILL THE NEXT 50 YEARS LOOK LIKE?***

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## **Introduction**

This past year has seen significant developments in criminal jurisprudence. The following cases and issues represent one lawyer's view of important recent precedents and what we may expect in the future.

### **“Knock and Announce”- The New Majority** **Hudson v. Michigan, 547 U.S. 586(2006)**

Since the landmark case of *Mapp v. Ohio*, 376 U.S. 643 (1961), the “exclusionary rule” has functioned to remedy and discourage violations of individuals’ rights by state law enforcement officers by preventing evidence obtained by constitutionally offensive means from being introduced in a criminal prosecution. Following *Mapp*, in the context of the Fourth Amendment, an unreasonable search or seizure has almost necessarily mandated suppression of the tainted evidence.

This past term, the Supreme Court – in a significant opinion authored by Justice Scalia – determined that violations of the Fourth Amendment’s “knock-and-announce” requirement do not implicate the exclusionary rule.<sup>1</sup> The opinion seems to have three lines of reasoning justifying its conclusion. The first is that the social costs of the exclusionary rule (i.e. suppression of material evidence in a criminal prosecution) substantially outweigh the deterrent effect of the rule in knock-and-announce violations. Second, there now exist other means of deterring police actions that violate individual rights, including civil rights suits and civilian review boards. Finally, there is a substantially attenuated causal connection between the failure to announce entry and the recovery of evidence once inside.

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In *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), Justice Thomas, writing for a unanimous Supreme Court, held that the “[t]he common law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment,” however delaying entry for 15 seconds was later held sufficient to satisfy the knock-and-announce requirement in *United States v. Banks*, 530 U.S. 31 (2003).

The *Hudson* Court reasoned that whether the exclusionary sanction is appropriately imposed in a particular case, is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. Scalia writes:

“Suppression of evidence...has always been our last resort, not our first impulse. The exclusionary rule generates ‘substantial social costs’...which sometimes include setting the guilty free and the dangerous at large....We have...repeatedly emphasized that the rule’s ‘costly toll’ upon the truth-seeking and law enforcement objectives presents a high obstacle for those urging its application.”

In this new majority, consisting of Chief Justice Roberts, and Justices Scalia, Thomas Alito and Kennedy, *Hudson* is perhaps more disturbing for what it portends than what it holds. For many readers, the Court’s opinion foretells a future where constitutional rights are not substantively eroded by the Court’s holdings, but rather striped of what may be the only truly effective means of judicial enforcement. If the exclusionary rule does not function to enforce a right, does the right practically exist? Will police and executive policy makers truly be deterred from constitutionally offensive conduct by the threat of a civil rights lawsuit? And, what other constitutional rights will the Court deem unworthy of the severity of the exclusionary rule?

Post *Hudson*, we already are starting to see a retreat from the protections that the exclusionary rule has generally covered in the past. Almost every circuit has weighed in and will continue to do so post-*Hudson*. The Ninth Circuit has now held that under *Hudson*, an officer’s failure to leave a copy of the executed warrant on the premises does not warrant suppression, even if the requirements to serve a copy of the warrant is of a constitutional dimension. *See U.S. v. Hector*, 474 F.3d 1150 (9<sup>th</sup> Cir. 2007) In the Seventh Circuit, following a *Hudson* analysis, the Court held that the failure to create a written search warrant, required by the federal telephonic search warrant statute does not trigger the 4<sup>th</sup> Amendment’s exclusionary rule. *See U.S. v.*

*Cazares-Olivas*, No. 07-2080 (7<sup>th</sup> Cir. January 20, 2008). The Tenth Circuit refused to expand Hudson's exclusionary rule exception to consent obtained from someone who police mistakenly (and unreasonably) believed had the right to consent, reasoning, "in our view, the Supreme Court's holding in *Hudson* is based on considerations pertaining to the knock-and-announce requirement in particular rather than to other Fourth Amendment violations" *See U.S. v. Cos*, 498 F. 3d 1115 (10<sup>th</sup> Cir. 2007). The Fourth Circuit takes Hudson further as well when it holds that fingerprints taken following an illegal arrest are subject to suppression only if taken for an "investigative," rather than an "administrative" purpose. *See U.S. v. Oscar-Torres*, No. 06-5074 (4<sup>th</sup> Cir. November 8, 2007).

**THE EXCLUSIONARY RULE**  
**SUPPRESSION OF EVIDENCE PROTECTING THE CITIZENRY FROM ITS**  
**PROTECTORS.**

Despite recent attempts to malign its efficacy and efficiency, the Exclusionary Rule has remained the primary vehicle for enforcing compliance with the Fourth Amendment since 1961<sup>1</sup>. The prohibition on admitting illegally obtained evidence not only serves to deter illegal police conduct, but also maintains the "imperative of judicial integrity" by extricating courts from participation in police illegality.

"Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the Constitutional rights of citizens by permitting use of the fruits of such invasions." *Terry v. Ohio*, 392 U.S. 1, 13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Thus, courts stand as protection against our protectors.

"[Fourth Amendment rights] ... are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so

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<sup>1</sup>*Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government....

"But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the court." *Illinois v. Gates*, 462 U.S. 213, 274-75, 103 S.Ct. 2317, 76 L.Ed.2d 527, 572 (1983) [Brennan, J., dissenting, citing *Brinegar v. U.S.*, at 180-181 (1949) (Jackson, J., dissenting)].

However, in *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d at 677 (1984), a majority of the Supreme Court rejected any justification other than the deterrence rationale for excluding illegally obtained evidence from criminal trials, noting: "The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal right of the person aggrieved'...." *U.S. v. Leon*, 468 U.S. 897, 905 (1984). Thus the Court has held under some circumstances that the exclusionary rule does not apply because its deterrent effect is diminished by competing interests or by attenuation from the illegal police conduct. *See, INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) [refusing to apply the exclusionary rule to deportation proceedings because the *deterrent effect* was outweighed by the social costs involved in the context of "unique immigration proceedings" that are "preventative as well as punitive"]; *U.S. v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) [noting evidence illegally seized by state officers not excluded in federal civil tax proceeding as additional deterrence deemed outweighed by social costs]; *U.S. v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) [stating exclusionary rule not applicable to grand jury proceedings]; *Stone v. Powell*, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976) [suppression issues are not cognizable in writs of habeas corpus because the proceeding is so removed from the prior police illegality as to have lost its deterrent effect].

## THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

In *U.S. v. Leon*, 468 U.S. 897, 905 (1984) a majority of the Supreme Court established the most significant exception to the "exclusionary rule," allowing use of admittedly illegally obtained evidence where the officer acted in "objective good faith" reliance upon a warrant signed by a neutral and detached magistrate. *U.S. v. Leon*, 468 U.S. 897, 926 (1984).

*See, e.g., Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) [holding officer's reliance on warrant "reasonable", since it lacked particularity due to magistrate's clerical error *and* magistrate said *he* would edit the form to include objects sought by police who relied on magistrate's assertions]; *U.S. v. Gomez*, 652 F. Supp. 461 (E.D.N.Y. 1987) [holding a "reasonably well-trained officer" could not have determined that a magistrate-authorized search was illegal, under good-faith exception].

An officer can only rely on the decision of a neutral and detached magistrate, if the court has issued a warrant. Thus the "good faith" exception does not apply to warrantless searches. *U.S. v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (en banc). Nor does it apply where the magistrate has been misled by the officer who obtained the warrant. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667(1978) [good faith exception does not apply when determining whether officer obtained a warrant by making material misrepresentations to the magistrate in reckless disregard for the truth]. *See also, United States v. Fisher*, 22 F.3d 574, 578 (5th Cir. 1994) ["Warrants based on affidavits for lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable do not fall within this exception"]. In addition, courts do not consider the *Leon* "good faith" exception when deciding whether to suppress evidence pre-indictment, pursuant to a motion for return of seized property. *Ritchey v. Smith*, 515 F.2d 1239, 1245 (5<sup>th</sup> Cir. 1975); *Gurleski v. U.S.*, 405 F.2d 253 (5<sup>th</sup> Cir. 1968). The

rationale for non-application of the “good faith” exception here, is that the court is exercising its authority to correct the misconduct of the prosecutor and his agents.

Other circumstances under which the “good faith” exception does not apply include:

when the issuing magistrate wholly abandons his judicial role, when the warrant is based on an affidavit so lacking in indicia of probable cause that belief that probable cause exists is entirely unreasonable and when the warrant is so facially deficient particularizing the place to be searched and things to be seized that the executing officers cannot reasonably presume it to be valid. *U.S. v. Russell*, 960 F.2d 421, 423 (5<sup>th</sup> Cir.), *cert. denied*, 506 U.S. 953 (1992).

#### EXCEPTIONS TO OFFICER'S "GOOD FAITH" RELIANCE UPON WARRANT

##### "SUBJECTIVE" GOOD-FAITH INSUFFICIENT: OFFICER'S RELIANCE WAS NOT REASONABLY BASED UPON "OBJECTIVE" STANDARDS

"The officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable...and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, 468 U.S. at 922-23.

Moreover, this "objective reasonableness" standard must be applied to all officers involved, not merely those who executed the warrant, but also to those who obtained or provided information to secure it. *Leon*, 468 U.S. at 923 n.1. *See also U.S. v. DeLeon-Reyna*, 898 F.2d 486 (5<sup>th</sup> Cir. 1990).

##### **FRANKS<sup>2</sup>-TYPE MISREPRESENTATIONS IN OBTAINING WARRANT:**

The *Leon* Court "noted" that the deference accorded to a magistrate's finding of probable

cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Leon*, 468 U.S. at 317.

"Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923.

Furthermore, Material omissions from the officer's affidavit have been considered equivalent to misstatements. *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980). Furthermore, "recklessness can in some circumstances be inferred directly from the omission itself." *United States v. Tomblin*, 46 F. 3d 1369 (5th Cir. 1995).

*But see U.S. v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987) [holding a minor omission is not critical to a showing of probable cause]. Further, where the affiant lies regarding his representations and knowledge at the time he sought the warrant, courts take the strong remedial measure of dismissing the indictment. *See e.g. U.S. v. Browald*, 459 F. Supp. 321, 326-28 (W.D.N.Y. 1978).

#### MAGISTRATE NOT "NEUTRAL AND DETACHED":

The *Leon* Court also recognized the "good faith exception" to the exclusionary rule should not apply where the issuing magistrate wholly abandoned his role as a "neutral and detached" judicial officer. *Leon*, 468 U.S. at 923[citing *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) where a magistrate utilizing prepared form warrants, joined and led search].

*But see U.S. v. Orozco-Prader*, 732 F.2d 1076, 1088 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984) [judge was neutral and detached despite his statement at time of issuing the search warrant that government agents and U.S. Attorney "know proof and know significance ... and

therefore the court has to accept their representations without question"]; *U.S. v. Rome*, 809 F.2d 665 (10th Cir. 1987) [ the Magistrate's failure to follow letter of Rule in issuing telephonic warrant by neglecting the requirements of (1) a verbatim record (2) a "duplicate original warrant" (3) particularity and (4) his immediate signature of the "original warrant" did not abandon detached and neutral role]; *U.S. v. Breckenridge*, 782 F.2d 1317 (5th Cir. 1985), *cert. denied*, 479 U.S. 837 (1986) [stating a neutral and detached magistrate who failed to read warrant affidavit had not abandoned his judicial role and did not spoil officer's good faith reliance on warrant]; *U.S. v. Harper*, 802 F.2d 115 (5th Cir. 1986).

#### AFFIDAVIT TOTALLY LACKING IN PROBABLE CAUSE:

The *Leon* Court further indicated that the "good faith exception" to the exclusionary rule would not apply where the warrant affidavit was so totally lacking in probable cause as to make any reliance thereupon unreasonable. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

"Nor would an officer's manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'." *Leon*, 468 U.S. at 923.

*See People v. Mitchell*, 678 P.2d 990 (Colo. 1984) [Colorado "good faith" statute inapplicable where individual arrested and searched on strength of arrest warrant "totally devoid of factual support".]

"...The warrant was void not because the facts supporting it fell somewhat below the Constitutional threshold of probable cause, but so far as the record shows, because there were no facts at all to support its issuance. " *Mitchell*, 678 P.2d at 2004.

*See also U.S.v. Parker*, 722 F.2d 179 (5th Cir. 1983); *U.S. v. Cardall*, 773 F.2d 1128 (10th Cir. 1985) [a warrant should not be considered to be so deficient as to defeat an officer's "good faith" reliance upon it unless the underlying affidavit is totally devoid of factual support]; *Cassias v. State*, 719 S.W.2d 585 (Tex.Crim.App. 1986) [refusing to read into the lengthy affidavit material that does not appear on its face, court holds that, under the "totality of the circumstances", the "facts and circumstances presented ...are too disjointed and imprecise to warrant a man of reasonable caution in the belief that marijuana and cocaine would be found at the described residence"].

#### FACIALLY DEFICIENT WARRANT:

Particularity of place to be searched or items to be seized:

The Court in *Leon* also recognized that reliance may be unreasonable where the warrant is "facially deficient", such as failing to particularize the place to be searched or the things to be seized. *Leon*, 468 U.S. at 923.

#### TIMELINESS:

*U.S. v. Jones*, 640 F.Supp. 143 (S.D. W.Va. 1986), *rev'd*, 822 F.2d 56 (4th Cir. 1987) an executing officer could not have relied in objective good faith on a warrant that on its face reflects that it has not been executed on time]; *Herrington v. State*, 697 S.W.2d 899 (Ark. 1985). Most warrants require that they be executed within three days and during daylight hours.

#### RELIABILITY OF INFORMANT AND/OR INFORMATION:

*U.S. v. Stout*, 641 F. Supp. 1074 (N.D. Cal. 1986) [stating affidavit was totally lacking in any basis to determine either reliability of informant or dependability of his information].

#### ANYTIME IT WOULD BE "UNREASONABLE" TO RELY ON THE WARRANT:

All of the above exceptions enumerated by the Court appear to be based on

circumstances in which "manifest objective good faith"... would fail because "no reasonably well-trained officer should rely on the warrant". *Leon*, 468 U.S. at 923.

COLLECTIVE BAD FAITH (WHAT IS GOOD FOR THE GOOSE):

Just as courts may cumulate officers' knowledge to determine whether probable cause existed to justify a search, officers obtaining or executing a warrant may not insulate their knowledge or good intentions from fellow officers acting in bad faith.

One can cumulate an officer's "bad faith" in viewing the representations of even an "innocent" affiant. *Leon*, 468 U.S. at 923 n.24.

"It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search...." *Leon*, 468 U.S. at 923 n.24.

*Franks v. Delaware*, 438 U.S. 154, 163, 98 S.Ct. 2674, 57 L.Ed.2d 667, 677, n. 6 (1978):

"...[P]remise ... [-] police [can]not insulate once [sic] officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity."

*U.S. v. Cortina*, 630 F.2d 1207, 1212, 1217 (7th Cir. 1980)[the good faith exception would become a Maginot Line, laughingly circumvented by police if we are to insulate falsehoods in an affidavit from invalidating a warrant simply because the executing officer was unaware of the lies]; *U.S. v. Calists*, 838 F.2d 711, 714 (3d Cir. 1988) (en banc) [quoting *Franks* "'police [can] not insulate one officer's deliberate misstatement..."]; *U.S. v. Coplon*, 185 F.2d 629, 640 (2d Cir. 1950)[matters obtained through a violation of law by one official may not be introduced in evidence by the prosecution].

Furthermore, evidence on information which is the product of an illegal search cannot serve as probable cause for the issuance of a search warrant entitling the executing officers to good faith reliance. *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1981).

OTHER CASES:

-OVER BREADTH AND GENERAL SEARCH:

Warrants that fail to particularize the items to be seized are invalid because they would allow illegal general searches. Thus, officer's "good faith" reliance upon a warrant will not save a search where the warrant relied upon is facially overbroad. *Center Art Galleries-Hawaii v. U.S.*, 875 F.2d 747 (9th Cir. 1989).

*U.S. v. Medlin*, 842 F.2d 1194 (8th Cir. 1988) [allowing local law enforcement officers participating in search based on federal warrant that did not specify the items that were actually seized by the local officers, also called for suppression of items seized by federal agents that were expressly authorized by the warrant].

See also *U.S. v. Fuccillo*, 808 F.2d 173 (1st Cir. 1987); *U.S. v. LeBron*, 729 F.2d 533, 536-39 (8th Cir. 1984) [holding that a warrant for "other stolen property" or "any records which would document illegal transactions involving stolen property" lacks the requisite particularity].

A valid warrant should describe the things to be taken and the place to be searched with particularity such that it provides a guide to the exercise of informed discretion of the officer executing the warrant.... We recognize that, despite the dangers, a warrant may issue to search and seize records if there is probable cause to believe that records which are evidence or instrumentality of a crime will be there and the description is stated with sufficient particularity....

The warrant in the instant case, without more, authorized a search for 'any records which would document illegal transactions involving stolen property'. There is no attempt to particularize the description of the property or of the records themselves. The only limiting factor is the reference to 'stolen property'. As earlier discussed, this generic classification is not sufficient to provide any guidance to an executing officer. Absent as well is any explanation of the method by which the officers were to distinguish such records from any documents relating to legal transactions." *LeBron*, 729 F.2d at 539.

*U.S. v. Guarino*, 729 F.2d 864 (1st Cir. 1984) [striking down a warrant authorizing seizure of "obscene" films "of the same tenor" as certain enumerated items]; *U.S. v. Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ["This particularity requirement serves three related purposes: preventing general searches, preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis."]; *U.S. v. Spilotro*, 800 F.2d 959 (9th Cir. 1986) [items relating to loan sharking and bookmaking not described with sufficient particularity]; *U.S. v. LeBron*, 729 F.2d 533, 539 (8th Cir. 1984) [a search for any records that would show transactions in stolen property was too generic a classification and thus constituted an impermissible general search].

*Contra U.S. v. Gomez*, 652 F. Supp. 461 (E.D N.Y. 1987) [similar case with opposite result]; *U.S. v. Burke*, 718 F. Supp. 1130 (S.D.N.Y. 1989);

*U.S. v. Buck*, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, 484 U.S. 857 (1987) [even though warrant lacked sufficient particularity, same was not so apparent that executing officers could not rely on the warrant, especially in light of fact that officers searching in 1981 could not reasonably have anticipated developments in the law]; *U.S. v. Villegas*, 899 F.2d 1324 (2d Cir. 1990) ["sneak peak" warrant authorizing covert entry to take pictures was held constitutional].

Search warrant which utterly fails to describe the persons or things to be seized is *per se* invalid, even if the particularized description is provided in search warrant application [*Groh v. Martinez*, 540 U.S. 551 (2004)].

#### -NO NEXUS BETWEEN PROBABLE CAUSE AND THE PLACE TO BE SEARCHED

There must be sufficient "nexus" between probable cause and the place to be searched.

"For a probable cause determination to be meaningful there must be a nexus among (1) criminal activity, (2) the things to be seized, and (3) the place to be searched." W. LAFAVRE SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT ' 33.7(d) (1978). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974); *U.S. v. Freeman*,

685 F.2d 942, 949 (5<sup>th</sup> Cir. 1982); *U.S. Maestas*, 546 F.2d 1177, 1189 (5<sup>th</sup> Cir. 1977)

It also should be clear that an arrest at one location does not give sufficient particularized probable cause to believe evidence of that crime will be located at some distant location, even if same constitutes the arrestee's residence. *U.S. v. Gramlich*, 551 F.2d 1359 (5th Cir.), *cert. denied*, 434 U.S. 866 (1977)[“This fact alone is insufficient to justify the inference that incriminating evidence existed at that residence”]. This is because warrants are directed against evidence of crime and not against persons. Thus, the fact that there is probable cause to arrest a person for a crime does not automatically give police probable cause to search his residence or other area in which he has been observed for evidence of that crime." *U.S. v. Savoca*, 739 F.2d 220, 224 (6th Cir. 1984), *reh'g*, 761 F.2d 292 (6th Cir. 1985).

The affidavit in *Gramlich* stated that the defendant had been observed over a period of several weeks. During that time, he purchased a van, motorboat and radio equipment under an assumed name. The defendant was also known to possess a 23 foot motorboat named "Pronto" which, according to the affidavit had been docked at the pier outside of the defendant's residence. *Gramlich*, 551 F.2d at 1362 n.7. The affidavit went on to relate that on several occasions the defendant had been observed piloting "Pronto" out into the Gulf of Mexico in order to rendezvous with other boats. Based upon the surveillance described, in addition to the arrest of the defendant fifty miles away while he was unloading marijuana from a motorboat, the magistrate granted a search warrant for the defendant's house. The Fifth Circuit suppressed the evidence obtained as a result of that search because the information in the affidavit failed to establish an adequate connection between the residence searched and the alleged drug smuggling activities. *U.S. v. Gramlich*, 551 F.2d 1359 (5th Cir.), *cert. denied*, 434 U.S. 866 (1977).

Likewise, reliable information that a known felon has committed a burglary and was arrested with some of the proceeds some distance from his home, will not authorize a search of his residence. *U.S. v. Flanagan*, 423 F.2d 745 (5th Cir. 1970). *See also U.S. v. Bailey*, 458 F.2d 408 (9th Cir. 1972); *U.S. v. Whitlow*, 339 F.2d 975 (7th Cir. 1964); *Gillespie v. U.S.*, 368 F.2d 1 (8th Cir. 1966).

"The statement (in an affidavit), even if reliable, that a named person who is a known felon has committed a burglary, plus possession by the suspect of some of the proceeds when arrested, does not without more authorize the issuance of a warrant to search the residence of the accused miles away." *Flannagan*, 423 F.2d at 747.

In *U.S. v. Green*, 634 F.2d 1222 (5th Cir. 1981), the Fifth Circuit noted that while a "careful review of the affidavit reveals ample evidence from which the magistrate could conclude that (the defendant) was engaged in criminal activity in California," . . . "no evidence, other than residence, was set forth in the affidavit that connected the Key West, Florida, home to the criminal activity.... The motion to suppress should have been granted." *Green*, 634 F.2d at 1225-26.

Similarly, in *U.S. v. Lockett*, 674 F.2d 843 (11th Cir. 1982) the only statement evidencing a nexus between explosives and the residence to be searched, in an affidavit reciting numerous other events and activities of George Lockett, read:

"On July 11, 1980, this affiant observed these premises from the public county road and I saw no structures which would indicate proper storage facilities on the premises for storing high explosives. Record, Vol. 1 at 16. There follows a hand written statement by the affiant to the effect that he believes that dynamite is on the premises." *Lockett*, 674 F.2d at 845.

In the Eleventh Circuit's view, "such a conclusory statement, without more, of course has no probative value." As a result, the *Lockett* Court concluded that the affidavit set forth no facts

from which the magistrate could infer that dynamite was located at that particular place". *Lockett*, 674 F.2d at 846. *See U.S. v. Algie*, 721 F.2d 1039, 1042 (6th Cir. 1983) [fifteen phone calls from an apartment "which authorities knew to be used for gambling coupled with an affiant's belief that telephones are often used to make lay-off bets", is "insufficient to convince a reasonably prudent person that contraband or evidence of a crime would be found on the premises"].

Another court, however, has applied the good faith exception despite any lack of nexus between the house to be searched and the evidence seized. *U.S. v. Hendricks*, 743 F.2d 653 (9th Cir. 1984).

"Federal agents were in possession of a cocaine-bearing package from Brazil, which they anticipated would be picked up by the individual to whom it was addressed, ...the warrant stated that the package 'is now being concealed' at defendant's residence and added' the search warrant is to be executed only upon the condition that the above described box is brought to the aforesaid premises'."

The Court concluded the warrant lacked probable cause and explained the magistrate abdicated to the agents "an important judicial function - the determination that probable cause exists to believe that the objects are currently in the place to be searched". Nevertheless, the court determined that the agents acted in "reasonable reliance on the warrant and hence declines to order suppression of the fruits of the search". *Hendricks*, 743 F.2d at 655.

*See also U.S. v. Gant*, 759 F.2d 484 (5th Cir. 1985); *Commonwealth v. Way*, 492 A.2d 1151 (Pa. 1985) [holding lack of substantial nexus between the street crime and the premises to be searched renders the warrant facially invalid]; *U.S. v. Marriott*, 638 F. Supp. 333 (N.D. Ill. 1986). *But see U.S. v. Asselin*, 775 F.2d 445 (1st Cir. 1985) [ officers were found to have acted in "good faith" interpreting the word "premises" to include surroundings so as to authorize two searches of a disabled car adjacent to the carport and a birdhouse hanging from tree fifteen feet

from trailer steps]; *U.S. v. Kenney*, 595 F. Supp. 1453 (D.C. Ma. 1984) ["probable cause existed to search *safety deposit* box for cash "because officers had probable cause to believe defendant was engaged in trafficking", but there existed no nexus between the gold, silver and jewelry found in the box and suspected drug trafficking].

#### BURDEN OF PROOF ON PROSECUTION TO DEMONSTRATE "GOOD FAITH"

The Supreme Court in *Leon* appeared to place the burden upon the prosecution "*to establish objective good faith*".

"The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, *the prosecutions should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.*" *Leon*, 468 U.S. at 924.

*See also U.S. v. Gant*, 587 F.Supp. 128 (S.D. Tex. 1984), *rev'd on other grounds* 759 F.2d 484 (5<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 851 (1985). [allocating burden of proof upon the Government, "which if proved by the government, would save the evidence from the effects of the exclusionary rule"]; *U.S. v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984) ["The standard to be employed [in determining the officers' good faith reliance] is an objective one and the prosecution bears the burden of proof"].

#### GOOD FAITH RELIANCE ON SUMMONS

The good faith exception has also been employed in other areas where law enforcement officers are acting in reliance upon the issuance of process by a grand jury or prosecutor on its behalf. *U.S. v. Gluck*, 771 F.2d 750 (3d Cir. 1985) ["good faith" exception applies to IRS

summons based on facially valid grand jury disclosure order unauthorized under *U.S. v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983)].

"GOOD FAITH" EXCEPTION APPLIES TO WARRANTLESS ADMINISTRATIVE SEARCHES AUTHORIZED BY STATUTE LATER FOUND UNCONSTITUTIONAL

The Supreme Court has extended the good faith exception to a warrantless administrative search conducted in objectively reasonable reliance upon a statute later held unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 346 (1987). However, constraints similar to those set forth in *Leon* apply to such a search.

"A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.... [T]he standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers." *Krull*, 480 U.S. at 355 [citing *Leon*, 468 U.S. at 919 n.10].

The Court also recognized the risks involved in its holding.

"It is possible, perhaps, that there are some legislators who, for political purposes, are possessed with a zeal to enact a particular unconstitutionally restrictive statute, and who will not be deterred by the fact that a court might later declare the law unconstitutional. ...[W]e are not willing to assume ...legislators ... perform their legislative duties with indifference to the constitutionality of the statutes they enact. If future empirical evidence ever should undermine that assumption, our conclusions may be revised accordingly. *Krull*, 480 U.S. at 352 n.8 [citing *Leon*, 468 U.S. at 927-28.].

Four justices dissented against the majority's empirical assumptions.

"Providing legislatures a grace period during which the police may freely perform unreasonable searches in order to convict those who might have otherwise escaped creates a positive incentive to promulgate unconstitutional laws. . . . [i]t cannot be said that there is no reason to fear that a particular legislature might

yield to the temptation offered by the Court's good faith exception." *Krull*, 480 U.S. at 352 [O'Connor, J., dissenting].

LEON "GOOD FAITH" EXCEPTION DOES NOT APPLY TO OTHER WARRANTLESS SEARCHES

*U.S. v. Merchant*, 760 F.2d 963, 968-969 (9th Cir. 1985) [the "Good Faith" exception to the exclusionary rule does not apply to warrantless searches]; *U.S. v. Winsor*, 846 F.2d 830 (5<sup>th</sup> Cir. 1980); *U.S. v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984).

"GOOD FAITH" EXCEPTION DOES NOT APPLY TO STATUTORY SUPPRESSION REMEDIES

The "good faith" exception to the Fourth Amendment's exclusionary rule does not apply to Rule 41(e)'s statutory suppression remedy for *pre-indictment* return and suppression of illegally seized items.

*In re Motion for Return of Property Pursuant to Fed. R. Crim. P. 41(e)*, 681 F. Supp. 677 (D. Haw.) [while the judicially created post-indictment exclusionary rule contained in FED. R. CRIM. P. Rule 12(b)(3) is subject to judicially created exceptions such as Leon's "good faith" exception, the Congressionally created "explicit textual remedy" created statutorily by FED. R. CRIM. P. Rule 41(e) is not subject to *Leon's* Court created "good faith" exception].

Neither does the "good faith" exception apply to the suppression provision under wiretap law. 18 U.S.C. §2511.

However, a police officer's reasonable mistake as to whether a particular vehicle is covered by a statutory scheme authorizing warrantless stops and inspections of commercial vehicles undermines the constitutionality of the stop and requires suppression of evidence discovered during it. Unlike stops based on individualized suspicion of criminal activity, stops based on the Fourth Amendment's administrative search doctrine cannot be justified on the basis of an officer's objectively reasonable mistake of fact, the court stressed. It also ruled that the

good-faith exception to the exclusionary rule does not apply in these circumstances. *See United States v. Herrera*, 444 F.3d. 1238 (10<sup>th</sup> Cir. 2006)

### GOOD FAITH MUST BE OBJECTIVE

The standard for applying the "good faith" exception to the exclusionary rule is an "objective," not subjective one.

"We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. 'Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.' The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *U.S. v. Peltier*, 422 U.S. 531, 542 (1975) [quoting *Illinois v. Gates*].

As Professor Jerold Israel has observed: "The key to the [exclusionary] rule's effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the Fourth Amendment and emphasize the need to operate within those limits. [An objective good-faith exception] ...is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to Fourth Amendment limitations. Finally, [it] ...should not encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality."

In sum, the officer's good faith reliance on a warrant must be objectively reasonable. And whether the officer acted in good faith is a question of law which receives an independent

review in the courts of appeal. For example, the Supreme Court found that a mistake in the execution of a warrant might, under the circumstances of the case, warrant application of the “good faith” exception. However, the exception will not apply if officers are negligent in execution of a warrant and their mistake is unreasonable. Thus, the Court found the objective good faith standard was met where officers made a mistake conducting a search where the warrant did not authorize. The officers obtained a warrant for an apartment on the third floor of a building, but mistakenly thought the apartment named in the warrant covered the entire floor. The court held that the officers made a "good faith" mistake in searching the wrong apartment. *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). *But see U.S. v. Palacios*, 633 F. Supp. 113 (S.D. Tex. 1987) [stating evidence is not admissible under good faith exception when arrest warrant is negligently executed thereby arresting wrong person; mistake was not reasonable].

While the Supreme Court has voiced concern over the "substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights" it leaves no question as to the rule's continued viability. *U.S. v. Leon*, 468 U.S. 897, 907 (1984).

"The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern....

"...Nevertheless, the balancing approach that has evolved in various contexts - including criminal trials - forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *U.S. v. Leon*, 468 U.S. 897, 907 (1984).

Despite the Court’s concern, a study regarding the practical effect of the “good faith” exception on warrants indicates no increase in their quality and quantity. Rather, some studies suggest that the effect of the *Leon* decision has been to encourage prosecuting authorities to seek

warrants in situations where previously they would not. Police Executive Research Forum, *The Effects of United States v. Leon on Police Search Warrant Policies and Practice* (1988).

Texas' Statutory equivalent to the Federal Exclusionary Rule also provides for a good faith exception. TEX. CODE CRIM. P. Art. 38.23(b) (Vernon 1989). [where a defective warrant has been issued by a magistrate and the warrant was based on probable cause, if the executing officer believes in good faith the warrant is valid, the evidence is nevertheless admissible].

STATES ARE FREE TO PROVIDE GREATER PROTECTIONS FOR THEIR CITIZENRY  
UNDER STATE CONSTITUTION AND STATUTES

But since the Supreme Court sets a floor below which our constitutional rights cannot fall and the states set the ceiling, states are free to provide greater protections than afforded citizens under the federal system. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *Texas v. White*, 423 U.S. 67, 72, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975); *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

"[I]t is appropriate to observe that no state is precluded from adhering to higher standards under state law. Each state has the power to impose higher standards governing police practices under the state law than is required by the federal constitution." *Mosley*, 423 U.S. at 120.

For example, Pennsylvania has rejected the *Leon* good faith exception to the exclusionary rule. See *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (Pa. 1991) [finding that the exclusionary rule also protects the individual's right to privacy the Court rejected the *Leon* good faith exception]; *State v. Santiago*, 492 P.2d 657 (Haw. 1971) [rejecting *Harris v. New York*, 401 U.S. 222 (1971)]; *State v. Johnson*, 346 A.2d 66 (N.J. 1975) [rejecting waiver of constitutional right approach of *Schneekloth v. Bustamonte*, 412 U.S. 218 (1975)]; *Blue v.*

*State*, 558 P.2d 636 (Alaska 1977) [rejecting *Kirby v. Illinois*, 406 U.S. 682 (1972)[interpretation of right to counsel at pre-indictment lineups]; *State v. Kaluna*, 520 P.2d 51 (Haw. 1974) [rejecting Supreme Court's interpretation of right to search incident to an arrest in *U.S. v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973)]; *State v. Jackson*, 688 P.2d 136 (Wash. 1984) [rejecting the *Gates* "totality" test]; *State v. Sidebotham*, 474 A.2d 1377 (N.H. 1984) [Jones-type automatic standing held still available in New Hampshire]; *State v. Bolt*, 689 P.2d 519 (Ariz. 1984) [refusing to allow securing premises for purposes of obtaining warrant as per *Segura*]; *Sanchez v. State*, 707 S.W.2d 575 (Tex.Cr.App. 1986) [noting Independent State Constitution restricts use of even uncounseled silence]; *State v. Jewitt*, 500 A.2d 233 (Vt. 1985); *State v. Young*, 867 P.2d 593 (Wash. 1994).

"Since 1970 there have been over 250 cases in which state appellate courts have viewed the scope of rights under state constitutions as broader than those secured by the federal Constitution as interpreted by the U.S. Supreme Court.... 'A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice'. ...

One longs to hear once again of legal concepts, their meaning, and their origin. All too often legal argument consists of litany of federal buzz words memorized like baseball cards....

To paraphrase Jefferson, we might as well require a man to wear still the coat which fitted him as a boy as to educate a law student in this time of post-Warren counter-revolution as if there had been no resurrection of federalism and state judicial independence. It is small wonder that lawyers are confused or baffled when they decide to engage in independent interpretation of the Vermont Constitution.

This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the U.S. Supreme Court may ebb and flow. The development of state constitutional jurisprudence will call for the exercise of great judicial responsibility as well as diligence from the trial bar.

It would be a serious mistake for this court to use its state constitution chiefly to evade the impact of the decisions of the U.S. Supreme Court. Our decisions must be principled, not result oriented." *State v. Jewitt*, 500 A.2d 233 (Vt. 1985).

The Supreme Court dismissed as improvidently granted a writ of certiorari on the ground that the court below had rested its suppression decision "on independent and adequate state grounds". This was in spite of the fact that the Court had decided the same issue on the same day differently in a Federal case where the decision below rested solely on Federal Constitution standards, reaffirming that States are free to prescribe greater protections for their citizenry. *Florida v. Casal*, 462 U.S. 637, 103 S.Ct. 3100, 3103, 77 L.Ed.2d 277 (1983).

Even in *Gates*, the Supreme Court recognized that a different rule would attach if it were considering "actions of state officials under state Statutes".

"Due regard for the appropriate relationship of this Court to state courts, *McGoldrick v. Compagnie General*, 309 U.S. 430, 435-36 (1940); demands that these courts be given an opportunity to consider the constitutionality of the actions of state officials ...we permit a state court, even if it agrees with the state as a matter of federal law, to rest its decision on an adequate and independent state ground." *Gates*, 462 U.S. at 221.

In *California v. Ramos*, the Supreme Court, speaking through Justice O'Connor, reiterated that:

"It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3459-60, 77 L.Ed.2d 1171 (1983).

However, note that the Texas Court of Criminal Appeals, in an en banc opinion held that the Texas Constitution contains no requirement that a seizure or search must be authorized by a warrant, and any seizure or search that is otherwise reasonable will not be found to be in violation of Texas Constitution because it was not authorized by a warrant and that the Texas

Constitution does not offer greater protection than the Fourth Amendment and may offer less protection. *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998).

Additionally, the court added that it had “expressly conclude[d] 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,” quoting *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). *See also Polk v. State*, 704 S.W.2d 929, 934 (Tex.Cr.App. 5-Dist. 1986); *Oliver v. State*, 711 S.W.2d 442, 445 (Tex.App.-Ft. Worth, 1986) [the independent source and inevitable discovery exceptions to the judicially created exclusionary rule do not apply to article 38.23 and will not, short of an amendment]; *Commonwealth v. Upton*, 476 N.E.2d 548 (1985) [two-pronged *Aguilar-Spinelli* test retained for state law purposes instead of the *Gates* totality of the circumstances standard. Court cited that the *Aguilar* standard had been working well for twenty years, encouraged careful police work and tended to reduce the number of unreasonable searches]; *State v. Jackson*, 688 P.2d 136 (Wash. 1984).

#### SEVERAL STATES HAVE REJECTED ANY *LEON* "GOOD FAITH" EXCEPTION

A number of state courts have rejected the *Leon* "good faith" exception to the exclusionary rule on state constitutional grounds: *State v. Oakes*, 598 A.2d 119 (Vt. 1991).

"By treating the federal exclusionary rule as a judicially created remedy rather than a constitutional right, the Supreme Court's decision focuses, not on interpretation of the federal constitution, but on an attempted empirical assessment of the costs and benefits of creating a good faith exception to the federal exclusionary rule. This empirical assessment can inform this Court's decision on the good faith exception only to the extent that it is persuasive. If the assessment is flawed, this Court cannot simply accept the conclusion the Supreme Court draws from it. To do so would be contrary to our obligation to ensure that our state exclusionary rule effectuates [our State Constitutional provisions], and would deserve those rights.

"When the [United States Supreme] Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the `costs' of excluding illegally obtained evidence loom to exaggerated heights and where the `benefits' of such exclusion are made to disappear with a mere wave of the hand.

"The exclusionary rule's deterrent effect, however, does not rest primarily on `penalizing' an individual officer into future conformity with the Constitution. Rather, it rests on `its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.'...It creates an incentive for the police as an institution to train its officers to conform with the Constitution. Consequently, the important question is not whether it is of any benefit to `penalize' the objectively reasonable conduct of an individual officer, but rather whether failure to do so will lower the incentive for institutional compliance." *State v. Oakes*, 598 A.2d 119 (Vt. 1991).

*See also Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991).

"Indeed, we disagree with that Court's suggestion in *Leon* that we in Pennsylvania have been employing the exclusionary rule all these years to deter police corruption. We flatly reject this notion. We have no reason to believe that police officers or district justices in the Commonwealth of Pennsylvania do not engage in 'good faith' in carrying out their duties. What is significant, however, is that our Constitution has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirement of probable cause under Article 1, Section 8. Citizens in this Commonwealth possess such rights, even where a police officer in 'good faith' carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause. To adopt a 'good faith' exception to the exclusionary rule, we believe, would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years." *Commonwealth v. Edmunds*, 586 A.2d at 899.

*See State v. Carter*, 370 S.E.2d 553 (N. C. 1988); *State v. Marsala*, 579 A.2d 58 (1990), *remanded*, 620 A.2d 1293 (Conn. 1993).

"Initially, we note that the exclusionary rule, although primarily directed at police misconduct, is also appropriately directed at the warrant issuing process, and that >it is somewhat odd to suppose that the exclusionary rule was not designed to deter the issuance of invalid warrants. ... If we were to adopt the good faith exception, our practice of declining to address doubtful constitutional issues unless they are essential to the disposition of a case would preclude our consideration of probable cause beyond reviewing whether an officer had an

'objectively reasonable' belief in its existence. Absent a meaningful necessity to review probable cause determinations, we conclude that close cases will become 'both the hardest to decide and the easiest to dispose of under the good faith exception; in such cases the officer's objective good faith is clearest'...In short, we are simply unable to sanction a practice in which the validity of search warrants might be determined under a standard of 'close enough is good enough instead of under the 'probable cause' standard mandated by article 1 section 7, of our state constitution." *State v. Marsala*, 579 A.2d 58 (1990), *remanded*, 620 A.2d 1293 (Conn. 1993).

*See also State v. Guzman*, 842 P.2d 660, 672, 677 (Idaho 1992).

"In sum, the United States Supreme Court has abandoned the original purposes of the exclusionary rule as announced in *Weeks* and adopted by this Court in *Arregui*, in that the federal system has clearly repudiated any purpose behind the exclusionary rule other than that of a deterrent to illegal police behavior. Thus, the change in federal law has provided an impetus for a return by this Court to exclusive state analysis...The exclusionary rule unencumbered by the good faith exception provides incentives for the police department and the judiciary to take care that each warrant applied for and issued is in fact supported by probable cause. In addition to encouraging compliance with the constitutional requirement that no warrant shall issue but upon probable cause, it also lessens the chances that innocent citizens will have their homes broken into and ransacked by the police because of warrants issued upon incomplete or inaccurate information. We believe these are laudable effects of the exclusionary rule which appear to have gone unrecognized by the *Leon* majority." *State v. Guzman*, 842 P.2d at 672 , 677.

"The *Leon* good faith exception contemplates that appellate courts defer to trial courts and trial courts defer to the police. It fosters a careless attitude toward details by the police and issuing judicial officers and it even encourages them to attempt to get away with conduct which was heretofore viewed as unconstitutional...The decision in Leon represents a serious curtailment of the Fourth Amendment rights of the individual. But under the broader protection guaranteed the individual under our State Constitution, the State is not permitted to introduce evidence in its case in chief which has been seized without probable cause." *State v. Novembrino*, 491 A.2d 37, 45- 46 (N.J. 1985), *aff'd*, 519 A.2d 820 (1987).

"Whether or not the police acted in good faith here, however, the *Leon* rule does not help the People's position. That is so because if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future. We therefore decline, on

State constitutional grounds, to apply the good-faith exception the Supreme Court stated in *United States v. Leon*.” *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985).

Other state courts have come to the same conclusion on statutory grounds.

*See Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985); *Gary v. State*, 422 S.E.2d 426 (Ga. 1992), *aff’d*, *State v. Gary*, 432 S.E.2d 123 (Ga. 1993). *But see State v. Wills*, 524 N.W.2d 507 (Minn. App. 1994); *Gordon v. State*, 801 S.W.2d 899 (Tex. Cr. App. 1990).

Texas has a statutory exclusionary rule, TEX. R. CRIM. P. Art. 38.23(a) which provides 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." TEX. R. CRIM. P. Art. 38.23(a).

In 1987, the Texas legislature amended that statute, TEX. R. CRIM. P. Art. 38.23(b) to include a "good faith" exception:

"It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based upon probable cause." TEX. R. CRIM. P. Art. 38.23(b).

However, rather than creating a state statutory "good faith" exception, the Texas Court of Criminal Appeals has interpreted the language of this particular statute to constitute an express legislative rejection of any *Leon* "good faith" exception.

"We also note the appeals court was incorrect in finding the statute a codification of *United States v. Leon*,...because Art. 38.23(b) requires a finding of probable cause, while the exception enunciated in *Leon* appears more flexible in allowing a good faith exception if the officers's belief in probable cause is reasonable. Thus, we must direct our attention to the validity of the warrant and affidavit without recourse to any 'good faith' exception to the warrant requirement." *Gordon v. State*, 801 S.W.2d 899, 912-13 (Tex. Cr. App. 1990).

Still others have rejected the good faith exception on the basis of judicial opinion.

*State v. Grawien*, 367 N.W.2d 816 (Wisc.), *rev. denied*, 371 N.W.2d 375 (1985);  
*State v. Joyce*, 639 A.2d 1007 (1994).

### **What Quantum of Proof Necessary to Demonstrate Probable Cause?**

On appeal of a Suppression Order, the Fourth Circuit held that facts contained in Presentence Report and Sentencing proceeding may be considered in determining “probable cause” on appeal. Even though appeal was from a “conditional plea.” *US v. Gray*, 491 F.3d 138 (4<sup>th</sup> Cir. 2007).

### **Subjective Intent of Officers**

The Supreme Court has repeatedly held that the “motivations of individual officers,” their “subjective intentions play no role in ordinary probable cause Fourth Amendment analysis.” *Wren v. U.S.* 517 U.S. 806 (1996). Supreme Court reiterates that it will “not entertain Fourth Amendment challenges based on the actual motivations of individual officers.” “A traffic-violation arrest will not be rendered invalid by the fact that it was ‘a mere pretext for a narcotics search.’” *Arkansas v. Sullivan* 532 U.S. 769 (2001). Furthermore, in a unanimous opinion the Supreme Court held that Officers may enter a residence without a warrant, where there exists an emergency, regardless of the officers “subjective intent,” “[i]t therefore does not matter here...whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.” *Brigham City Utah v. Stuart*, 126 S.Ct. 1943 (2006). The distinction between an “inventory” and a “search” is “based on the principle that an inventory search must *not be a ruse* for a general rummaging in order to

discover incriminating evidence of crime.” *Florida vs. Wells*, 109 L.Ed.2d 1 (1990). In *City of Indianapolis v. Edmond* “[t]he primary purpose of the Indianapolis narcotics checkpoints is in the end to advance the general interest in crime control....We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes.” 531 U.S. 32 (2000). The Court held that it “cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”

However, in practice, Courts, of necessity, regularly look to an officers, purpose” or “subjective intent” when making such determinations. According to *Bond v. U.S.*, an officers purpose in squeezing a bag in a closed compartment was “exploratory.” 529 U.S.334 (2000).

But the Fifth Circuit in 2006 in *U.S. v. Pope* did not ever get to “subjective intent.” San Antonio Police officer Michael Baird made an undercover purchase of prescription drugs and then 78 days later officer Baird received “tip” that Pope was “cooking methamphetamine at his residence. That night officer Baird obtained a search warrant for Pope’s residence specifically for prescription drugs. There was no mention of methamphetamine. Under a *Franks vs. Delaware* analysis Judge Weiner wrote that the failure to disclose to the issuing magistrate “the true purpose for which the officer wanted to search Pope’s house: solely to look for and seize evidence of a meth lab,” rather than the “stale prescription drug buy,” rendered the search unconstitutional. “We know from Baird’s own lips that he lied to the magistrate.”

In *U.S. v. Green*, officers could not search the passenger compartment of a vehicle (pursuant to *N.Y. v. Belton*), Where Defendant was arrested some 6 to 10 feet away from his vehicle. “The principle behind *Belton* and *Chimel* is to protect police officers and citizens who may be standing nearby from the actions of an arrestee who might gain access to a weapon or

destructible evidence...Although he tried to flee, by the time the search occurred he was handcuffed and lying face down on the ground at least six feet from the car and surrounded by four police officers...Because none of the concerns articulated in *Chimel* and *Belton* regarding law enforcement safety and destruction of evidence are present in this case, the Government cannot justify the search of Green's vehicle under *Belton* or *Chimel*." Drivers license roadblocks used to enforce general criminal investigations are prohibited, in Texas."While the statute purports to give peace officers the right to stop and detain motorists for the limited purpose of checking their driver's or operator's licenses, it does not authorize *fishing expeditions*." *Meeks vs. State*, 692 S.W.2d 504 (1985).

### **Protective Sweeps**

Police officers who arrest a group of drug smugglers outside a gated fence surrounding an auto repair yard may not conduct a "protective sweep" of the yard without reasonable belief that shop harbored someone posing a danger to them. However, the Fifth Circuit found that such a reasonable belief based only on fact that arrest involved large sums of money and police could assume same would be guarded. *US v. Mata*, (5<sup>th</sup> Cir. February 11, 2008). Also, Police officers' initial warrantless entry of home to conduct a "protective sweep" did not taint the homeowner's subsequent consent to search the premises, because homeowner was not the target of police inquiry, the purpose of the exclusionary rule would not be served (*Hudson*). *US v. Delancy*, (11<sup>th</sup> Cir. October 3, 2007).

### **Search Incident to Arrest**

Police may conduct a *NY v. Belton* protective sweep of passenger compartment of vehicle, prior to the arrest of individuals urinating in the street nearby. *US v. Powell*, 483 F.3d

836 (DC App. 2007).

### **Arrest in One's Home**

“[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Payton v. NY* 455 US 573 (1980). Police must obtain a arrest warrant to arrest someone in their home, even where the suspect voluntarily opens the door and exposes himself to public view in response to police knocks, *Kyllo v. US*, 533 US 27 (2001). *Payton* establishes a bright-line rule that “any physical invasion of the structure of the home, ‘by even a fraction of an inch,’ is too much.” *McClish v. Nugent* (11<sup>th</sup> Cir., April 11, 2007).

### **Denial of Right to Counsel at Trial is a *Per Se* Violation of the 6<sup>th</sup> Amendment**

#### ***United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006)**

In *Gonzalez-Lopez*, the Supreme Court held that denying a defendant his counsel of choice in a criminal prosecution created a *per se* violation of his Sixth Amendment right to counsel. The defendant in the case faced federal drug charges in Missouri, and he retained counsel from California. The District Judge denied California counsel entry into the case *pro hac vice*, and the defendant proceeded to trial with another attorney. The Supreme Court – in another opinion authored by Justice Scalia – easily concluded that trial court erred in denying the defendant his counsel of choice where the Government conceded that the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.<sup>2</sup> The question before the Court then became, did the defendant have to show he

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<sup>2</sup>

In *Wheat v. United States*, 486 U.S. 153 (1998), the Supreme Court had held that a federal trial judge had discretion to deny a defendant his choice of counsel where there was a potential conflict

was prejudiced by the deficient representation of the substitute counsel? The Court answered that the deprivation of a defendant's counsel of choice pervades the entire trial and even the pretrial proceedings, and as such, a harm analysis would be speculative, futile, and unnecessary. "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" 126 S.Ct. 2557, 2564.

**Is the Second Amendment an Individual Right?**  
***Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir 2007)**

Last Spring, the Court of Appeals for the District of Columbia Circuit became the first federal appeals court to strike down a ban on firearm possession. In *Parker*, the D.C. Circuit reviewed a challenge by various residents to the gun control laws of the District of Columbia, some of the most restrictive in the nation. After disposing of issues of standing, the court addressed a substantive question of constitutional law that has divided citizens, scholars, and federal courts for many years: Does the Second Amendment create an individual right to gun ownership or a collective right calculated to ensure the operation of state militias? The D.C. Circuit answered that question by holding "that the Second Amendment protects an individual right to keep and bear arms." 478 F.3d 370, 395. The court then concluded that the challenged D.C. gun control laws placed too great a restriction on the individual Second Amendment right and were accordingly unconstitutional.

Last November, the Supreme Court granted certiorari to review *Parker* and oral

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of interest, even though all the parties waived any such conflict. Moreover, the Supreme Court has held that pretrial disqualification of one's counsel of choice is not appealable before trial and final judgment. See *Flanagan v. United States*, 465 U.S. 259 (1984).

arguments were heard in mid March of this year.<sup>3</sup> If the Court reaches a decision on the merits, it will be the Court's first opinion since 1939 directly addressing the scope of the Second Amendment.<sup>4</sup>

### **What Constitutes Custody?**

#### ***Brendlin v. California*, 127 S. Ct. 2400 (2007)**

In *Brendlin*, the Supreme Court finally confirmed that a passenger in a vehicle has standing to challenge a police stop of that vehicle. In doing so, the Court eschewed the legal fiction that a passenger is not detained during a traffic stop because law enforcement is only stopping the driver. The test employed is a familiar one: Would a reasonable person, as passenger of a vehicle stopped by police, have believed he or she was free to terminate the encounter with police? The Court answered in the negative, and noted what every lay person already knows:

“[T]he passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.” 127 S.Ct. 2400, 2407.

Of course, the Supreme Court was hardly charting new territory here. “Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question.” 127 S.Ct. at 2407-08. Nevertheless, it is refreshing when the application of a “reasonable person” standard comports with the thinking of an actual reasonable

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*Parker v. District of Columbia*, (07-335) is actually a cross-petition by a group of five D.C. citizens held to not have standing in the Circuit Court of Appeals decision. The actual appeal by the District of Columbia from the D.C. Circuit's opinion is styled *District of Columbia v. Heller*, (07-290).

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In its order granting certiorari, the Court framed the issue in the case as follows: “Whether the following provisions — D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 — violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?”

person.

**Physical Appearance in Court does not Violate 6<sup>th</sup> Amendment**  
**Wright v. Van Patten, S.Ct. , 2008 WL 59980 (2008)**

Is a defendant whose defense attorney appears by speakerphone at his no-contest plea to reckless homicide in state court deprived of his Sixth Amendment right to counsel? In *Wright*, Supreme Court held that an attorney's appearance by speakerphone is not a per se violation of a defendant's right to counsel. The actual physical presence of counsel is not what is meant by the right to have counsel present at adversarial proceedings. Thus, the Court held, a claim of this kind would be analyzed under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that the defendant was actually prejudiced by the deficient performance of counsel.

**ANTI-TERRORISM**

**Pending "Enemy Combatant" Cases**

**Boumediene v. Bush (06-1195) and Al Odah v. U.S. (06-1196).**

Our federal government's actions in the war on terror have generated no small amount of litigation concerning the limits of our Constitution's protections and processes. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court decided that Guantanamo prisoners may not be wholly denied the right to bring habeas corpus actions by the declaration of the executive. Since that case, the Detainee Treatment Act (DTA) has been passed, providing standards for the treatment of enemy combatants but stripping the federal courts of habeas corpus jurisdiction in their cases. The Court then decided *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), holding that the DTA did not invalidate already filed cases and that the President's military commissions scheme did not pass constitutional muster. The Military Commissions Act has been passed by Congress and

was signed into law by the President.

Two cases are presently pending review before the Supreme Court which challenge the constitutionality of detentions in the war on terror and the processes available to review those detentions. The issues presented by those cases are as follows:

(a) *Boumediene v. Bush*, (06-1195):

(1) Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.

(2) Whether Petitioners' habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits.

(b) *Al Odah v. U.S.* (06-1196)

(1) Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?

(2) Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law?

(3) Are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?

(4) Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?

**Confrontation**  
**Crawford v. Washington**

**The Pre-Crawford Era and the Reign of Roberts.**

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right... to confront the witnesses against him.” This clause was the embodiment of a right familiar at common law at the time of its ratification.<sup>1</sup> Its lineage can be traced to the infamous treason trial of Sir Walter Raleigh<sup>2</sup>, who was denied the opportunity to test in open court the veracity of the witnesses against him. In England, the development of the right of confrontation stood in contrast to the continental civil-law practice of allowing magistrates and prosecutors to interview witnesses *ex parte* and later offer their “testimony” against the accused by way of affidavit.

In the United States, the Supreme Court’s interpretation of the Constitution’s Confrontation Clause came to be intertwined with the evidentiary rule of hearsay and its accompanying exceptions. This view of the Clause as an evidentiary rule came to an apex with the Court’s decision in *Ohio v. Roberts*, 488 U.S. 56 (1980). In *Roberts*, Justice Blackmun wrote that reading the Confrontation Clause literally would lead to the abrogation of “virtually every hearsay exception, a result long rejected as unintended and too extreme.”<sup>3</sup> *Roberts* interpreted the Clause as one concerned primarily with the reliability of out-of-court statements, and the decision framed a test calculated to address this concern. Under *Roberts*, an unavailable witness’s out-of court statements would be admitted so long as those statements bear adequate indicia of reliability. To qualify as such, the statement would have to either (1) fall within a

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<sup>1</sup> See *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004).

<sup>2</sup> As Justice Scalia notes in the *Crawford* opinion, one of Sir Walter’s trial judges later lamented, “The justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 541 U.S. 36, 44.

<sup>3</sup> 488 U.S. 56, 63.

firmly rooted hearsay exception or (2) possess particular guarantees of trustworthiness.<sup>4</sup> The reign of the *Roberts* “reliability test” continued unimpeded until the Supreme Court’s decision in *Crawford v. Washington* dethroned such evidentiary analysis of confrontation and restored the Clause as a procedural guarantee against the government’s presentation of *ex parte* testimony.

**Crawford v. Washington and the Restoration of the Right of Confrontation.**

Michael Crawford was convicted of stabbing Kenneth Lee, a man who had allegedly attempted to rape Crawford’s wife, Sylvia. Crawford gave a statement to police in which he said Lee may have reached for a weapon before the stabbing. Sylvia was also interviewed at the police station, however her account was arguably different with respect to Lee’s reaching for the weapon. On trial for first degree assault and attempted murder, Crawford claimed self-defense. To rebut this claim, the state sought to introduce a tape recording of Sylvia’s statement.<sup>5</sup> Crawford’s objection that admission of the statement would violate his federal right to confrontation was overruled. The trial court found that Sylvia’s statements bore particularized guarantees of trustworthiness under the *Ohio v. Roberts* “reliability test.”<sup>6</sup> The Washington Court of Appeals reversed Crawford’s conviction, applying a nine factor test to determine Sylvia’s statement lacked the indicia of reliability required by *Ohio v. Roberts*. The Washington Supreme Court reinstated Crawford’s conviction, finding the statement did indeed bear the necessary indicia of reliability.

The United States Supreme Court granted certiorari and held that Crawford’s Sixth Amendment right to confront the witness against him was violated by the admission of Sylvia’s

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<sup>4</sup> 541 U.S. 36, 66.

<sup>5</sup> Sylvia did not testify due to the state’s marital privilege statute. *See* 541 U.S. 36, 40.

<sup>6</sup> Among the “particularized guarantees of trustworthiness” the trial court found were: (1) Sylvia was not shifting blame but corroborating her husband’s story, (2) she had knowledge as an eyewitness, (3) she described recent events, and (4) she was being questioned by a “neutral” law enforcement officer. *See* 541 U.S. at 40.

tape recorded statements. In doing so, the Court overruled the broad, expansive approach to admissibility it had taken in *Ohio v. Roberts*. Justice Scalia, writing for the majority, left for another day “any effort to spell out a comprehensive definition of ‘testimonial,’”<sup>7</sup> however the opinion did note “[r]egardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing,” and “[s]tatements taken by police officers in the course of an investigations are also testimonial even under a narrow standard.”<sup>8</sup>

Under *Crawford*, the Confrontation Clause serves to bar the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>9</sup> Notably, this reading of the Sixth Amendment removes evaluation of reliability from the analysis, at least in the context of testimonial statements. In fact, *Crawford* effectively divorces the long standing relationship between evidentiary hearsay and the Confrontation Clause. Whereas *Ohio v. Roberts* viewed the Confrontation Clause as an evidentiary rule concerned with judicial evaluation of the reliability of out-of-court statements, *Crawford v. Washington* envisions the clause as a prophylactic procedural rule designed to dissuade and prevent the government from gathering and using *ex parte* testimony against the accused.<sup>10</sup> Justice Scalia took considerable pain to make clear this distinction between prophylactic “procedural” and “substantive” protections:

“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>11</sup>

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<sup>7</sup> 541 U.S. 36, 68.

<sup>8</sup> 541 U.S. 36, 52. For further explication of what statements to police officers qualify as testimonial, see the recently decided *Davis v. Washington*, 126 S.Ct. 2266, (2006), and discussion *infra*.

<sup>9</sup> 541 U.S. 36, 53-54 [emphasis added].

<sup>10</sup> See W. Jeremy Counseller, “The Confrontation Clause After *Crawford v. Washington*: Smaller Mouth, Bigger Teeth,” 57 *Baylor L. Rev.* 1 (2005).

<sup>11</sup> 541 U.S. 36, 61.

Justice Scalia made clear the disconnection between the concerns of the hearsay rules and the Sixth Amendment Confrontation Clause.<sup>12</sup> To illustrate this distinction, Scalia notes that to say that evidence is so reliable as to satisfy the need for confrontation would be like saying someone is so guilty as to obviate the need for a trial.<sup>13</sup> While both hearsay law and the Confrontation Clause govern the admission of out-of-court statements, the Court has announced in *Crawford* that the two belong to entirely separate species if not separate and distinct genera.

**Davis v. Washington: “Testimonial” Statements in Police Interrogations**

In *Crawford*, Justice Scalia left for another day “any effort to spell out a comprehensive definition of ‘testimonial’.” The dawn of that day came recently when the Supreme Court handed down its decisions in two companion cases, *Davis v. Washington* and *Hammon v. Indiana*, 126 S.Ct. 2266, (2006). Although the opinion, also authored by Justice Scalia, failed to offer a “comprehensive definition” of “testimonial,” the Court did offer guidance in the context of statements made during “police interrogations<sup>14</sup>.” As it currently stands, *Davis* and *Hammon* are the only post-*Crawford* cases by the Court addressing the issue of what statements may qualify as testimonial. In sum, they hold that – applying an “objective standard” which examines the primary purpose of a police interrogation – statements recorded during an on-going emergency 911 call are nontestimonial (*Davis*), while statements made during an on-scene interrogation where the declarant is separated from her alleged assailant are testimonial (*Hammon*).

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<sup>12</sup> “[N]ot all hearsay implicates the Sixth Amendment’s core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.” 541 U.S. 36, 51.

<sup>13</sup> 541 U.S. 62.

<sup>14</sup> In *Crawford v. Washington*, the Court clarified that it used the term *police interrogation* “in its colloquial, rather than any technical legal sense.” 541 U.S. 36, 53, n. 4.

In *Davis*, the defendant's former girlfriend made the relevant statements in the course of a 911 call reporting an ongoing domestic disturbance. The 911 operator elicited specific answers from the declarant. The operator first asked whether Davis possessed weapons or had been drinking, then began to gather identifying information including Davis's name and birthday. Finally, the alleged victim related the context of the assault. Davis was convicted of felony violation of a no-contact order, after the trial court allowed the state to play a recording of the 911 call.

In *Hammon*, police arrived at the scene of a reported domestic disturbance. The police separated the defendant from his wife, the alleged victim, and proceeded to question them both independently. Police interviewed the defendant's wife and had her fill out and sign a domestic abuse affidavit which stated, "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house." During a bench trial for domestic battery, the state called the interviewing police officer to the stand to authenticate the affidavit and testify as to statements made by the alleged victim. Over the objections of defense counsel, the trial court admitted the affidavit as a present sense impression and the oral statements as excited utterances.

The Supreme Court expressly held what it had first alluded to in *Crawford*: that only testimonial statements implicate the Sixth Amendment's Confrontation Clause.<sup>15</sup> The Court next turned to the issue of whether each of the statements qualified as testimonial. Rather than offering a generally applicable definition of the term "testimonial statement," the Court confined holding to the facts of the cases before it.

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<sup>15</sup> "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 126 S.Ct. 2266, 2273 (2006)

“Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: **Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.**”<sup>16</sup>

Applying this standard, the Court held that the statements made during the 911 call in *Davis* were not testimonial. 911 calls, the Court reasoned, are not ordinarily initiated to establish or prove past facts, but to describe current circumstances and allow police to render assistance. The Court drew several distinctions between the call in *Davis* and the recorded interview in *Crawford*. First, the 911 caller was describing events as they were actually happening, while the interview in *Crawford* related events hours after the fact. Second, “any reasonable listener would recognize that [Davis’s ex-girlfriend] was facing an ongoing emergency.” Third, the questioning in *Davis*—when viewed objectively—“was such that the elicited statements were necessary to be able to *resolve* the present emergency,” rather than to simply gather past facts as in *Crawford*.<sup>17</sup> Finally, the Court contrasted the level of formality in the two interviews. Where the declarant in *Crawford* responded calmly to questions in a stationhouse, the caller in *Davis* offered “frantic answers” in an environment that was neither tranquil nor safe. All of this led Justice Scalia to conclude:

“that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not a weaker substitute for live testimony at trial. No ‘witness’ goes into court to proclaim an emergency and seek help.”<sup>18</sup>

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<sup>16</sup> *Id.*, [emphasis added].

<sup>17</sup> According to the Court, even the operator’s efforts to establish attacker’s identity were “so that dispatched officers might know whether they would be encountering a violent felon.”

<sup>18</sup> *Davis v. Washington*, 126 S.Ct. 2266, 2277 (2006) [emphasis supplied, internal quotations marks and citations omitted].

However, the Court did not hold that all emergency calls to 911 would be considered entirely nontestimonial. Justice Scalia left open the possibility that a call initiated for the purposes of emergency assistance could evolve so as to elicit testimonial statements. It will be left to the trial courts, through *in limine* procedure, to redact the testimonial portions of such a call. The opinion even noted that portions of the call in *Davis* might be considered testimonial. However, any concern over this was disregarded because the jury did not hear the complete call and any testimonial portions were harmless beyond a reasonable doubt.

The Court then turned to the statements at issue in *Hammon*, easily finding them to be testimonial and their admission violative of Hammon's constitutional right to confrontation. Looking to the factual circumstances of the case, Justice Scalia found an absence of any indications of an emergency in progress.

“There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.”<sup>19</sup>

When viewed objectively, the “primary, if not the sole, purpose of the interrogation was to investigate a possible crime...” Although the interrogation in *Crawford* was more formal, the statements were similar in that both declarants were separated from any danger, both recounted past facts, and both were “an obvious substitute for live testimony.” The Court held open the possibility that initial questioning by officers at the scene may produce nontestimonial answers, but where the statements made are “neither a cry for help nor the provision of information

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<sup>19</sup> *Davis v. Washington*, 126 S.Ct. 2266, 2278 (2006)

enabling officers to end a threatening situation, the fact that they were giving at an alleged crime scene and were initial inquiries is immaterial.”<sup>20</sup>

Finally, the Court took the opportunity to reiterate the validity of the rule of forfeiture by wrongdoing.<sup>21</sup> Under this rule, a defendant who obtains the absence of a witness by wrongdoing – such as “coercing or procuring silence from witnesses and victims” – forfeits the constitutional right to confrontation. Although the Court did not outline the procedures and standards by which the forfeiture rule may operate, it did allude to the federal courts’ use of F.R.E. 804(b)(6)<sup>22</sup>.

### **Application of the Confrontation Clause in the Age of *Crawford***

Although *Crawford* represents an exciting sea change in the Court’s interpretation of the Confrontation Clause, its fundamental transformation of the right to confrontation raises many questions regarding the application of the Sixth Amendment. This section will attempt to provide practitioners with guidance on several key issues surrounding the right to confrontation. Caveat: The right to confrontation is one of the most active and rapidly evolving fields of constitutional procedure, and counsel should be aware of any subsequent developments in state and federal confrontation law.

#### **a. The Rule in *Crawford*.**

The basic rule announced in *Crawford* can be stated as follows:

The Confrontation Clause of the Sixth Amendment will bar the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant was afforded a prior opportunity for cross-examination.<sup>23</sup>

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<sup>20</sup> *Id.* at 2279 [internal quotation marks omitted].

<sup>21</sup> The Court here seems to be responding to concerns expressed in various *amici* briefs regarding the practical effects of excluding the out-of-court statements of unavailable witnesses in domestic violence cases.

<sup>22</sup> Federal Rule of Evidence 804(b)(6): “Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”

<sup>23</sup> See *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

Thus, to determine if a witness's statements implicate the Sixth Amendment, ask:

1. Is the statement *testimonial*, and
2. Was the witness unavailable for cross-examination at trial?

If both of these questions are answered affirmatively, the Sixth Amendment is implicated. To determine if a defendant's Sixth Amendment right to confrontation is violated, ask:

1. Is the witness *unavailable* to testify, and
2. Was the defendant afforded the opportunity to cross-examine the witness at trial or on a prior occasion?

If either of these questions is answered negatively, the defendant's right to confront that witness is violated. Finally, on appeal, the violation is subject to a harmless error analysis.

a. Placement of Burden

The burden is on the proponent (i.e. the prosecution) to show an out-of-court statement is admissible under *Crawford*. 541 U.S. 36, 68; *see also Mason v. State*, 173 S.W.3d 105, 111 (Tex. App. – Dallas 2005, *pet. ref'd*).

b. Preservation of Error

To preserve a violation of the right to confront the witnesses against him, the defendant must object on constitutional grounds. An objection on the basis of hearsay will not preserve error on a Confrontation Clause claim. *See Neal v. State*, 186 S.W.3d 690, 691-692 (Tex. App. – Dallas 2006). “Hearsay objections and objections to violation of the constitutional right to confront witnesses are neither synonymous nor necessarily coextensive.” *Eustis v. State*, 191S.W.3d 879, 886 (Tex. App. – Houston [14<sup>th</sup> Dist] April 25, 2006, *no pet. h.*).

Moreover, a blanket objection will not preserve error if the issue is specific statements contained in a larger report; the objections must be specific to the statement. *See In re M.P.*, \_\_\_ S.W.3d \_\_\_, 2007 WL 417126 (Tex.App. – Waco, Feb. 7, 2007).

c. Testimonial and Nontestimonial Statements

The great unanswered question of *Crawford* is, what exactly constitutes a “testimonial statement” for purposes of the Confrontation Clause? In *Crawford* the Court quoted an early American dictionary definition of the word “testimony” as meaning: “A solid declaration or oath of affirmation made for the purpose of establishing or proving some fact”<sup>24</sup> However, the Court did not announce a comprehensive definition of *testimonial*, and it would seem the issue of what statements qualify as testimonial in various contexts will be decided case-by-case in the years to come. In the meantime, the Court’s discussion of the issue in *Crawford* and *Davis*, and the decisions by Fifth Circuit and Texas courts provide guidance to the rules application to specific types of statements.

i. *Prior Testimony*

“Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial...” *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

ii. *Police Interrogations*

*Crawford* held that police interrogations were among the “core class” of statements encompassed by the protections of the Confrontation Clause. 541 U.S. 36, 52-53. *Crawford* itself involved statements made by a declarant during a police interview at the stationhouse and

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<sup>24</sup> *Crawford v. Washington*, 541 U.S. 36, 51, citing N. Webster, *An American Dictionary of the English Language* (1828).

after *Miranda* warnings. The Court declared that statements under such circumstances qualify as testimonial “under any conceivable definition” of *interrogation*. 541 U.S. 36, 53 n. 4.

In the recent companion cases of *Davis v. Washington* and *Hammon v. Indiana*, 126 S.Ct. 2266, (2006), the Court revisited the issue of testimonial statements in the context of police interrogations.<sup>25</sup> The Court set forth an objective test that looks to the circumstances of the interrogation to determine its “primary purpose.” If the primary purpose of the interrogation is to enable police to render assistance in an ongoing emergency, the statements are nontestimonial. However, if the primary purpose of the interrogation is to “establish or prove past events potentially relevant to a later criminal prosecution,” the statements elicited are testimonial and implicate the Sixth Amendment. Applying this test, the Court held that statements elicited during a 911 call reporting an ongoing domestic disturbance were not testimonial (*Davis*). The Court then held that statements made during an on-scene police interview with an alleged victim of domestic abuse, after the parties were separated, were testimonial (*Hammon*).

### iii. *Statements by Confidential Informants*

The Fifth Circuit has held that statements made by confidential informants to the co-conspirators of a crime are not testimonial, because such statements “do not resemble in any of the ‘core class’ of statements articulated by the Court in *Crawford*.” *United States v. Crespo-Hernandez*, No. 05-10461, 2006 WL 1307562 (5<sup>th</sup> Cir. 2006) (unpublished). Surprisingly, a description of the defendant provided by a confidential informant and included in a search warrant affidavit introduced at trial was held by one Texas appellate court to be nontestimonial. *Ford v. State*, 179 S.W.3d 203, 208 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2005)<sup>26</sup>.

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<sup>25</sup> For a detailed summary and discussion of the holdings in *Davis* and *Hammon*, see IV., *supra*.

<sup>26</sup> The Houston Court of Appeals reasoned that the description contained in the search warrant “was not used to link appellant to the premises because appellant was found lying on a mattress in the apartment.” 179 S.W.3d 203, 208. Thus, the statement was not used for a testimonial purpose.

#### iv. *Casual and Informal Remarks*

Casual remarks are nontestimonial under *Crawford*, and their introduction does not implicate the Confrontation Clause. *Woods v. State*, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004) (casual remarks made by co-conspirator to acquaintances were nontestimonial); *see also Smith v. State*, 187 S.W.3d 186, 193 (Tex. App. – Fort Worth Feb. 14, 2006, *pet. filed*) (statements made by cohort at informal gathering of friends while drinking beer were nontestimonial); *King v. State*, 189 S.W.3d 347, 357-360 (Tex. App. – Fort Worth March 16, 2006, *no pet. h.*) (statements made by co-conspirator to friend regarding the disposal of a body were not testimonial). However, *see United States v. Acosta*, 475 F.3d 677 (5<sup>th</sup> Cir. 2007), where the court held that a “safety valve” statement to federal authorities – although obviously testimonial – was nevertheless admissible because the witness testified at trial and was subject to cross-examination, the statement was not offered for the truth of the matter asserted (but to rebut an allegation of recent fabrication) and was invited by defense counsel who alluded to the same in his attempt to impeach the witness’s credibility.

#### v. *Statements by Co-Conspirators*

Statements by co-conspirators made in furtherance of the conspiracy have been held to be nontestimonial in both Texas and federal courts nontestimonial. *See Wiggins v. State*, 152 S.W.3d 656, 659 (Tex. App. – Texarkana 2004, *pet. ref’d*); *see also United States v. Robinson* 367 F.3d 278, 292 (5<sup>th</sup> Cir. 2004). These cases seize on language in *Crawford* stating, “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” 541 U.S. 36, 56. However, this

portion of the opinion is a refutation of Justice Rehnquist's criticism of the majority's historical analysis, and it is arguably dicta.

vi. *Letters Accusation to Officials*

In Justice Scalia's historical analysis of the Confrontation Clause in *Crawford*, it is noted that a "letter" was introduced against Sir Walter Raleigh. By the decision's reasoning, based on Justice Scalia's interpretation of the original meaning of the Clause, such letters are testimonial. However, under this analysis, it would appear that to person to whom such statements are being transmitted to may be as important as the form that communication takes.

vii. *Disciplinary Reports by Corrections Officers*

Inmate disciplinary reports have been held to be testimonial in Texas. The Texas Court of Criminal Appeals has held that the admission of "incident reports" by county jail officials and TDCJ "disciplinary reports" at the punishment phase of trial violated the defendant's right to confrontation. *Rousseau v. State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005). "[T]he statements in the reports amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit." *Id.* at 881, citing *Crawford v. Washington*, 541 U.S. 36, 50 (2004), *Cf. Ford v. State*, 179 S.W.3d 203, 209 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2005, *pet. ref'd*) (holding jail records not containing observations by correctional officers to be public records and nontestimonial).

viii. *School Disciplinary Records*

Portions of school disciplinary records that contain statements by teachers specifically describing a defendant's behavior are testimonial and inadmissible unless the State shows that these teachers were unavailable to testify and at trial and the defendant had a prior opportunity

for cross-examination. *Grant v. State*, 218 S.W.2d 225 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2007, *pet. filed*).

ix. ***Chain of Custody Affidavits***

Evidentiary chain of custody affidavits are “testimonial.” However, to preserve error, a timely, written objection must be filed at least 10 days before trial. *Deener v. State*, 214 S.W.3d 522 (Tex.App. – Dallas, 2006, *pet. filed*).

x. ***Autopsy Reports***

It has been held that, under Texas caselaw, that autopsy reports are nontestimonial public records, and their admission does not implicate the Confrontation Clause. *See Mitchell v. State*, 2005 WL 3477857 at 1 (Tex. App. – San Antonio 2005, *pet. ref’d*); *Moreno Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App. – Corpus Christi 2005, *pet. ref’d*). Federal cases have also held that autopsy reports do not fit with in the core class of statements that the Supreme Court would deem testimonial. *United States v. Feliz*, 467 F.3d 227 (2<sup>nd</sup> Cir., 2006)

xi. ***Urinalysis Test Results***

One unpublished case in Texas has held that the results of urinalysis testing are not testimonial. *In re J.L.R.G.*, 2006 WL 1098944 (Tex. App. – Eastland April 27, 2006) (unpublished memorandum opinion in a juvenile probation disposition).

xii. ***Vehicle Registration Records***

Vehicle registration records are nontestimonial in nature and admissible as public records. *See Nieschwietz v. State*, 2006 WL 1684739 (Tex. App. – San Antonio June 21, 2006, *no pet. h.*) (unpublished); *Pendley v. State*, 2006 WL 2712109 (Tex. App. 2004, *pet. ref’d*) (unpublished) (vehicle registration admissible as public record).

xiii. ***Other Documents***

Other documents which record routine facts that would not be collected for the purposes of investigation will probably not be considered testimonial. Examples:

Receipts from a private business transaction are not testimonial. *United States v. Ramirez*, 479 F.3d 1229 (10th Cir., 2007). A photocopy of an identification card is not testimonial. *See United States v. Lopez-Moreno*, 420 F.3d 420, 436 (5<sup>th</sup> Cir. 2005). Postal records, as business records, are not testimonial. *United States v. Baker*, 458 F.3d 513 (6<sup>th</sup> Cir., 2006). A cell phone bill is not a testimonial statement. *See Miller v. State*, 208 S.W.3d 554 (Tex. App. – Austin 2006). A Certificate of Nonexistence of Record in an immigration hearing is not testimonial. *See United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005). And, Warrants of Deportation are not testimonial. *See United States v. Valdez-Maltos*, 433 F.3d 910 (5th Cir. 2006).

xiv. ***Identification in Photo Array***

Identification of a defendant in a photo array is testimonial, and admitting the identifying statements through the investigating officer violated the defendant's confrontation rights. *Walker v. State*, 180 S.W.3d 829, 833-835 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2005, *no pet.*).

d. **Application of the Confrontation Clause to Nontestimonial Statements**

Under *Roberts*, the Confrontation applied to nearly all forms of out-of-court statements offered against the defendant; no distinction was made between testimonial and nontestimonial statements. *Crawford* untangled the concepts of evidentiary hearsay from the procedural right of confrontation and announced a new analysis for the admission of testimonial statements under the Sixth Amendment. However, the decision left open the question of whether the

confrontation clause is still implicated by nontestimonial statements. Some subsequent lower court decisions held that nontestimonial statements are still subject to the *Roberts* reliability test. The Court's recent decision seems to put this issue to rest, stating that the Sixth Amendment is no longer implicated by the introduction of nontestimonial statements. See *Davis v. Washington*, 126 S.Ct. 2266, (2006).

e. Unavailability

In order for the government to introduce out-of-court testimonial statements, the defendant must have had a prior opportunity to cross-examine the witness *and* that witness must be unavailable at trial. *Crawford v. Washington*, 541 U.S. 36, 45 (2004).

i. ***General Unavailability***

The law regarding the unavailability of witnesses is set forth in Texas and Federal Rules of Evidence 804. Although, framed for hearsay, these rules are derived from those developed at common law<sup>27</sup>, and will likely continue to apply to Confrontation Clause issues. However, it should be noted that, unlike the hearsay unavailability requirement, the requirement of unavailability under the rule in *Crawford* would apply regardless of the particular category of hearsay the statement might fall into.

ii. ***Article 38.071 (Recorded Statement of Child Victim)***

In *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006), the trial court's determination that an six year old alleged victim of sexual assault emotionally unavailable to testify under Tex. Code Crim. Pro. Art. 38.071 § 8 was not an abuse of discretion, because the determination was within the zone of reasonable disagreement.

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<sup>27</sup> See 1972 Commentary to Federal Rule of Evidence 804(a).

f. Prior Opportunity to Cross-Examine

If the defendant was represented by counsel who had an adequate opportunity to cross-examine the witness and a similar motive for doing so, the Confrontation Clause is satisfied with regard to statements given at that time. *See Mancsi v. Snubs*, 408 U.S. 204, 213-216 (1972) (adequate where statement given at former trial on same charges); *California v. Green*, 399 U.S. 149, 165-168 (1970) (adequate when statement given at preliminary hearing where defendant was represented by counsel); *Cf. Pointer v. Texas*, 380 U.S. 400, 406-408 (1965) (inadequate when statement given at preliminary hearing where defendant was not represented by counsel).

In *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006), the defendant argued that the presentation of the alleged child-victim’s testimony by an *ex parte* videotaped interview conducted by a CPS officer violated his right to confrontation. The Fort Worth Court of Appeals held that, although the child’s testimony did not fit neatly into the core-class of testimonial statements, it was testimonial. However, the court went on to hold that the defendant’s right to confrontation was not violated, because “appellant had an opportunity to effectively cross examine [the alleged victim] through written interrogatories.” Because the defendant did not avail himself of the statutory interrogatory procedure, he waived his confrontation claim on appeal.

g. Exceptions to the Right

i. Forfeiture By Wrongdoing

The rule of forfeiture is an equitable doctrine that provides that a defendant who causes the unavailability of a witness forfeits his right to object to the admission of that witness’s out-of-court statements. The rule exists to allow courts to protect the integrity of their proceedings.

See *Reynolds v. United States*, 98 U.S. 145 (1879). Although the forfeiture doctrine has existed at common law since at least 1666 and was applied the right to confrontation in *Reynolds*, the rule saw major development as an exception to the hearsay evidentiary rule.<sup>28</sup>

This doctrine applies to the Confrontation Clause as stated in *Crawford v. Washington*, 541 U.S. 36, at 62 (2004), and reiterated in *Davis v. Washington*, 126 S.Ct. 2266, (2006). In the era of *Crawford*, prosecutors will likely seek to use the rule of forfeiture more frequently than in the past. As the Court noted in *Davis*, “[t]he *Roberts* approach to the Confrontation Clause made recourse to this doctrine less necessary, because prosecutors could show the ‘reliability’ of *ex parte* statements more easily than they could show the defendant’s procurement of the witness’s absence.”

In the recent case of *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006), the Texas Court of Criminal Appeals held that a defendant on trial for capital murder was precluded from objecting to the introduction of dying statements made by the woman he allegedly murdered. The court reasoned that,

“The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.” *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006).

ii. *Waiver*

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<sup>28</sup> The doctrine of forfeiture in the hearsay context is now codified in Federal Rule of Evidence 804(b)(6) and the last paragraph of Texas Rule of Evidence 804.

A defendant may waive the constitutional right to confrontation if such waiver is made intelligently, knowingly, and voluntarily. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966). Statements contained in a pre-sentence investigation report may be asserted at sentencing where the defendant waives his right to confrontation upon entering a plea of guilty. *See Stringer v. State*, 196 S.W.3d 249 (Tex. App. – Fort Worth May 4, 2006, *pet. granted.*)

**iii. *Not Offered for the Truth of the Matter Asserted***

The holding in *Crawford* makes clear that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004), *citing Tennessee v. Street*, 471 U.S. 409, 414 (1985). The Fifth Circuit affirmed this reading of *Crawford* in *United States v. Acosta*, 475 F.3d 677, 683 (5th. Cir. 2007). In that case the trial court admitted a “safety valve” statement made by a co-defendant who had testified at trial. Although the statement implicated the defendant, the Fifth Circuit found that its admission did not violate the Confrontation Clause because (1) it was not offered for the truth of the matter asserted but to rebut an allegation that the witness’s testimony was a recent fabrication and (2) its admission was accompanied by a limiting instruction to this effect. 475 F.3d 677, 683. Thus, it appears this vestige of hearsay law remains a part of the Confrontation Clause analysis.

**h. Other Issues**

**i. *Sentencing***

Texas courts have recognized a right to confrontation at the punishment phase of trial. *See Stringer v. State*, 196 S.W.3d 249 (Tex. App. – Fort Worth May 4, 2006, *pet. granted.*) (acknowledging the right by examining whether defendant waived it). However, the Fifth

Circuit does not recognize a right to confrontation at sentencing. *See United States v. Edwards*, 133 Fed. Appx. 960, 964-965 (5<sup>th</sup> Cir. 2005) (stating that nothing in *Crawford* created a right to confrontation at sentencing); *see also United States v. Fields*, 482 F.3d 313 (2007).

ii. ***Community-Supervision/Probation Revocation Hearings***

Texas and Federal Courts have held that the right to confrontation does not apply to community supervision and probation revocation hearings. *See Trevino v. State*, 218 S.W.3d 234, 239 (Tex. App. – Houston [14<sup>th</sup> Dist. 2007]; *Ash v. Reilly*, 431 F.3d 826, 830 (D.C.Cir.2005); *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir.2005); *United States v. Hall*, 419 F.3d 980, 985-86 (9th Cir.2005); *United States v. Kirby*, 418 F.3d 621, 627-28 (6th Cir.2005); *United States v. Aspinall*, 389 F.3d 332, 342-43 (2d Cir.2004); *United States v. Kelley*, 446 F.3d 688 (7th. Cir. 2006); *United States v. Martin*, 382 F.3d 840, 844 n. 4 (8th Cir.2004); *but see U.S. v. Jarvis*, 94 Fed.Appx. 501, 502 (9th Cir.2004) (not designated for publication) (“Due process mandates that at revocation proceedings, the releasee must be afforded the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause.”).

iii. ***Juvenile Transfer Hearing***

The right to confrontation does not apply to a hearing to transfer a juvenile from TYC to TDCJ under Tex. Fam. Code § 54.11. *See In the Matter of D.L.*, 198 S.W.3d 228 (Tex. App. – San Antonio March 8, 2006, *pet. ref’d*). “[A] transfer hearing it not a trial, because the juvenile is neither being adjudicated nor sentenced.” *Id.* at 2.

iv. ***Civil Commitment Proceedings***

The first words of the Sixth Amendment read “In all criminal prosecutions...” The Confrontation Clause of that amendment does not apply to civil commitment proceedings in Texas. *See In re Commitment of Polk*, 187 S.W.3d 550 (Tex. App. – Beaumont March 16, 2006, *no pet. h.*) (Note: Appellant did not assert rights (such as due process) under any other clause of the Constitution).

v. ***Crawford Not Retroactivity Applied in Collateral Appeals***

In *Whorton v. Bockting*, 127 S.Ct. 1173 (2007), the United States Supreme Court employed the *Teague* test to hold that *Crawford* created a procedural rule that was not a watershed rule and therefore not retroactively applied in cases on collateral appeal.

vi. ***Confrontation and the Texas Constitution***

Article I, section 10 of the Texas Constitution provides “In all criminal prosecutions the accused... shall be confronted by the witnesses against him...” Arguments made asserting a right to confrontation under the Texas Constitution similar to that of the Sixth Amendment of the United States Constitution have been “forfeited” by failure to cite authority. *See Shuffield v. State*, 189 S.W.3d 782, 788 (Tex. Crim. App. May 3, 2006); *see also Russeau v. State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005). This presents a frustrating quandary, allowing courts to avoid ruling on the Texas Confrontation Clause because they have not yet ruled on the confrontation clause. In light of these decisions, Texas-law confrontation claims are better brought under Art. 1.25 of the Code of Criminal Procedure.

The resurrection of the Right to Confrontation signaled by *Crawford* hailed a major victory for champions of civil liberties. But winning this battle opened up a new theater of warfare in the fight for constitutional rights, and, to serve their clients well, practitioners must be

well versed in the dynamic issues surrounding the Confrontation Clause.<sup>29</sup> In many respects, confrontation law remains uncharted territory, but an effective advocate will not find frustration in these uncertainties. Rather, he or she will see a new world of opportunities to present creative arguments and effect meaningful changes in an area that seems to have been resurrected and exhumed from an underground abode. After all, *Crawford* itself was won by an argument that seemed to have been long foreclosed by precise, on point, precedent.

**Racially Motivated Strikes Cannot be Cured by the Prosecution Once Bias is Shown**  
***Snyder v. Louisiana* U.S. (No. 06-10119, 3/19/08)**

The Supreme Court in *Snyder v. Louisiana* ruled that the State does not get the opportunity to justify a racially motivated strike once bias has been shown. Snyder was convicted of first degree murder and sentenced to death. During the voir dire the parties used peremptory strikes to strike jurors they initially accepted when the panels were called. Five of the thirty-six jurors who survived challenges for cause were black and all five were eliminated by peremptory strikes by the prosecution. The Court held that the prosecution discriminated in jury selection by striking an African American juror for reasons not supported by the evidence and that once discrimination is shown to be a substantial factor the burden does not shift back to the prosecution to show that the discrimination was not determinative. The Court held that the explanation listing two reasons given by the prosecution for striking the African-American juror was insufficient. Nervousness of the juror was insufficient as it was accepted by the judge

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<sup>29</sup> For further analysis of the evolving Right to Confrontation, see the following articles:

- Kelly Rutlan, "Procuring the right to an unfair trial: federal rule of Evidence 804(B)(6) and the due process implications of the rule's failure to require standards of reliability for admissible evidence." 56 Am.U.L.Rev. 177 (2006).
- Miguel A. Mendez. *Crawford v. Washington: A Critique.*" 57 Stan.L.Rev. 569 (2004).
- Andrew King-Ries. *Crawford v. Washington: The End of Victimless Prosecution?"* 28 Seattle U.L.Rev. 301 (2005).
- Myrna S. Raeder. "'Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over," 21 Q.L.R. 1013 (2003).

without explanation, and the fact that the juror would miss work as a student teacher was also insufficient as the college dean had offered to work with him. Other white jurors who were not eliminated expressed similar hardships and the trial itself was short.

The prosecution's pre-textual reasons create an inference of discriminatory intent under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court ruled that the burden did not shift back to the prosecution to show that the discriminatory effect was not determinative in the case. For "present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." Justice Alito wrote the seven to two opinion with Justices Thomas and Scalia dissenting.

**The States May Ignore International Court Rulings**  
***Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006).**

The *Medellin* case is one that stands at a fascinating juncture of federal, state, and international law. *Medellin* is a Mexican national who was convicted of capital murder and sentenced to death in Texas his participation in the gang rape and murder of two teenage girls. During the pendency *Medellin's* federal habeas corpus petition, the International Justice Court (IJC) issued an opinion (*Avena*) holding that the United States had violated the Vienna Convention by failing to advise detained Mexican nationals of their right to consult with the Mexican consular. The IJC's opinion directed the courts of the United States to review the convictions and sentences of Mexican nationals denied such rights. President Bush then issued a memorandum directing state courts to give effect to the IJC's decision.

The Texas Court of Criminal Appeals first held that *Medellin's* claims under the IJC decision were procedurally defaulted because they were not raised below. More significantly, the court went on to hold that it was not bound by the unilateral declaration of the President

directing the court to give effect to a foreign tribunal. “We hold that the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary.” 223 S.W.3d 315, 335.

The Supreme Court Held that the IJC decision was not binding because it had not been enacted into law by Congress and the signed Protocol was not self-executing. Under the Vienna Convention, Article 94 merely committed the United States to take further actions in its political branches and did not grant the ICJ with immediate legal effect. Additionally, the Presidential Memorandum is incompatible with the Congressional power because it attempted to convert a non-self-executing treaty into a self-executing treaty, and thus is not binding on the states. Therefore, neither the ICJ decision nor the Presidential Memorandum is enforceable against the Texas Court of Criminal Appeals judgment denying the writ.