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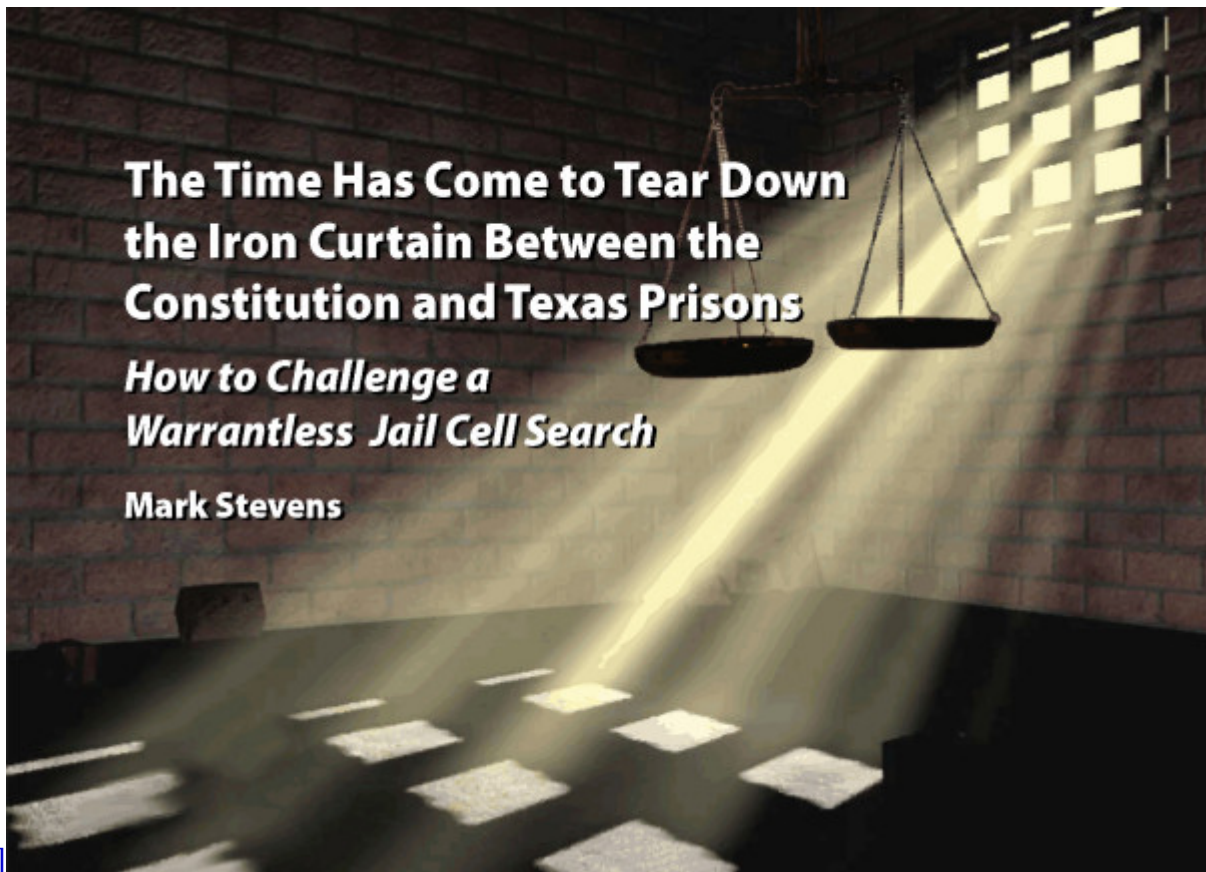
The Time Has Come to Tear Down the Iron Curtain Between the Constitution and Texas Prisons

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How to Challenge a Warrantless Jail Cell Search

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Let's say a prosecutor has a hunch your client might have something in his cell that could be used against him in his upcoming trial. Maybe a weapon, or drugs, or perhaps a journal in which he has written something that might incriminate him, or at least make him look bad. She could try to get this the old-fashioned way?by presenting an affidavit sufficient to convince a neutral and detached magistrate there is probable cause that evidence of a crime will be found in the cell to be searched. Or, if she favored expediency over the constitution, she might just ask someone at the jail to toss the cell, seize everything in it,

and immediately deliver the goods to her so she could see if her hunch was right.

Not surprisingly, some prosecutors handling serious felony cases favor the less formal approach to evidence-gathering, and routinely issue broadly written directives to jail personnel that read like this:

In preparation for an upcoming trial, I request that you conduct a cell search of inmate Joe Smith's cell/housing area and seize and provide the following: original, non-privileged correspondence, to include any/all writings, notes, correspondence (inmate and outside mail), drawings, poetry, and any contraband found during the search.

Is that legal? If your presumptively innocent client had the wherewithal to post bond, there is no way a Texas prosecutor could order his *home* searched without a warrant on the mere suspicion that she might find something to help her prepare for trial.¹ Prosecutors, though, point out that jails are unlike homes, and that warrants and probable cause are unnecessary when dealing with prisoners because they have no Fourth Amendment rights whatsoever. There are a number of cases from a variety of jurisdictions, including Texas, that support this position.

It turns out that there is also a line of cases holding that prisoners—at least those who have not yet been convicted—do retain some Fourth Amendment rights.² Although these rights are substantially less than those enjoyed by persons in the free world, they do prevent prosecutors from ordering warrantless cell searches, the sole purpose of which is to gather evidence to prosecute the person whose cell was searched. This article discusses that line of cases and offers suggestions you can start with if the state uses a directive-like approach to obtain evidence against one of your clients.

A. ?There is no iron curtain drawn between the constitution and the prisons of this country?

In *State v. Granville*, the Texas Court of Criminal Appeals held that the warrantless search of a pretrial detainee's cellular telephone was unconstitutional. The court disagreed for several reasons with the state's argument that the defendant had *no* legitimate privacy interest at all in the phone's contents, just because he was in jail.

For one thing, the ?assumption that prisoners or pretrial detainees are without any Fourth Amendment rights is not supported by the Supreme Court.³ *Granville* cited *Wolff v. McDonnell*, where the high court held that though his ?rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.⁴

Additionally, *Granville* distinguished earlier cases that had permitted warrantless searches of a prisoner's clothing, finding obvious differences between clothing and cell phone content, which can contain ?highly personal emails, texts, photographs, videos, or access to a wide variety of other data about the individual citizen, his friends, and family.⁵ Concluding that ?a cell phone is not like a pair of pants or a shoe,? the court found that the warrantless search of Granville's cell phone violated the Fourth Amendment.⁶

The ?central concern underlying the Fourth Amendment? has remained the same throughout the centuries; it is ?the concern about giving police officers *unbridled discretion to rummage at will among a person's private effects.*?⁷

But the ?unbridled discretion to rummage at will among a person's private effects? is exactly what the prosecution has when it directs the jail to search a cell without warrant. With neither probable cause nor warrant, with absolutely no institutional concern for the safety of the jail, its employees, or other inmates, but solely for the purpose of preparing for its upcoming trial, the prosecutors send deputies to take every non-privileged paper from the living quarters of indigent, presumptively innocent, citizens and often walk away

with hundreds of pages of writings, drawings, photographs, and other materials every bit as personal and private as what can be found on a cell phone. Although there are certainly cases to the contrary, a compelling argument can and should be made—starting with *Granville*—that the Constitution does not give prosecutors as much discretion as they think they have to rummage at will through a prisoner’s private effects.

B. What does the Supreme Court say?

There are two cases from the Supreme Court that some believe are in conflict. Others say they are factually distinguishable and can be harmonized in a way that both permits the safe and efficient operation of penal institutions and grants reasonable protections to those incarcerated in those institutions.

1. *Bell v. Wolfish* balances the institutional interests against those of the prisoner

Bell v. Wolfish was decided five years after *Wolff v. McDonnell*, one of the cases cited in *Granville*, and *Bell* contains the same lofty assurance found in both *Wolff* and *Granville*—that there is no “iron curtain” between prisons and the constitution.⁸ One of the questions in *Bell* was whether subjecting pretrial detainees to warrantless body-cavity searches without probable cause violates the Fourth Amendment. Answering this required the Court to balance institutional security dangers against the privacy rights of the detainees. Jail “is a unique place fraught with serious security dangers,” the Court recognized.⁹ “Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates,” the Court concluded that the searches there did not violate the constitution.¹⁰

2. *Hudson v. Palmer* holds that convicted prisoners have no Fourth Amendment rights

Although the pretrial detainees did not prevail in *Bell*, the Court made it clear that they retained limited Fourth Amendment rights, as long as these rights do not conflict with the over-riding duties of prison officials to maintain security. Later, in *Hudson v. Palmer*, the Court expressly declined to conduct any sort of balancing test. The *Hudson* Court concluded that a warrantless “shakedown” in a penitentiary that uncovered contraband was not unconstitutional because “the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”¹¹ The persons searched in *Hudson* were prisoners who had been convicted, and not the presumptively innocent pretrial detainees in *Bell*. In a different case, though—*Block v. Rutherford*, decided the same day as *Hudson*—the Court rejected a similar claim from pretrial detainees that was based on Due Process.¹²

C. Does *Hudson* conflict with *Bell*, *Wolff*, and *Granville*?

1. *Broadnax v. State*, an unpublished opinion from the court of criminal appeals, reads *Hudson* categorically

Some courts have interpreted *Hudson* as holding that no incarcerated person—neither presumptively innocent pretrial detainee nor convicted prisoner—has any Fourth Amendment rights *whatsoever*. An unpublished case from the Texas Court of Criminal Appeals in 2011, *Broadnax v. State*,¹³ seems to agree. Relying on *Hudson* and *Soria v. State*,¹⁴ the Court concluded that “a shakedown search of a pretrial detainee’s cell does not violate the Fourth Amendment or due process.”¹⁵

2. The cases can be harmonized

In *United States v. Cohen*, the Second Circuit acknowledged *Hudson*, but distinguished it factually. There, unlike in *Hudson*, prosecutors, not jail administrators, instituted the search. The prosecutors in *Cohen* were seeking evidence to use in a criminal prosecution; the search was not “even colorably motivated by institutional security concerns.” And the appellant in *Cohen* was a presumptively innocent, pretrial detainee, living in jail because he was unable to make bond. The Second Circuit reversed the conviction and did it in a

way that resolved the apparent conflict between *Hudson*, on the one hand, and *Bell* and the earlier cases, on the other. "The door on prisoner's rights against unreasonable searches has not been slammed shut and locked." *Hudson*, the court held, had not contemplated "a cell search intended solely to bolster the prosecution's case against a pretrial detainee awaiting his day in court." No prison official had instituted the search, and it was clear to the court that no "institutional need" was served by the search in that case. The prisoner retained an expectation of privacy that was sufficient to challenge the investigatory search undertaken there.¹⁶

Because his effects were searched at the instigation of non-prison officials for non-institutional security related reasons, the validity of the search may be challenged. An individual's mere presence in a prison cell does not totally strip away every garment cloaking his Fourth Amendment rights, even though the covering that remains is but a small remnant.¹⁷

D. *Granville*, *Cohen*, *Bell*, and other cases establish that directive searches are unconstitutional

In addition to the Second Circuit, where *Cohen* was decided, courts from Florida, Georgia, New Jersey, and Nebraska agree that warrantless searches ordered by prosecutors to collect evidence against pretrial detainees are not categorically immune from Fourth Amendment protection.¹⁸

Judge Cochran, who wrote for the court in *Granville*, mentioned *Cohen* in a footnote as supporting the proposition that "jail detainees enjoy a diminished expectation of privacy, not that a detainee has absolutely no reasonable expectation of privacy."¹⁹ Furthermore, it is clear that Judge Cochran knew about *Hudson* "she also mentioned it in a footnote."²⁰ Yet writing for the court, she did not adopt *Hudson*'s absolutist position. Instead, she cited both *Bell* and *Wolff*, and then performed a balancing test very similar to the one applied in those cases, and in *Cohen*, and its progeny.

One unpublished civil case from the San Antonio Court of Appeals, *Lutz v. Collins*, is also instructive. There the court recognized *Cohen*, but found two significant distinguishing facts. First, Lutz, unlike the appellant in *Cohen*, was not a pretrial detainee. Second, unlike in *Cohen*, the search of Lutz's cell was in relation to an entirely different crime.²¹

Although there are certainly cases to the contrary, in and out of Texas, a fair reading of *Granville*, *Bell*, and *Cohen* supports the conclusion that the warrantless search and seizure of a pretrial detainee's cell, instigated by prosecutors for the sole purpose of gathering incriminating evidence, violates the Fourth and Fourteenth Amendments of the United States Constitution.

E. Making your case

Despite those cases that take the categorical approach that pretrial detainees have no Fourth Amendment rights at all, the contrary argument is compelling. Lawyers who fail to timely and specifically object to evidence obtained from warrantless cell searches disserve their clients and risk being found ineffective and sued for malpractice. It's easy to avoid those pitfalls, though.

If you timely and properly object at and before trial, the state should properly bear the burden of proving the legality of a warrantless cell search. An effective objection will require some up-front work from you.

1. Try to prevent the problem from happening before it happens

Caution all incarcerated clients at your first meeting that at best, their expectations of privacy in jail are much different than in the free world. In addition to the standard warnings not to talk or write about their cases to other prisoners, or to friends and family during visitation, on the telephone, or in letters, tell your clients that their cells may be searched at any time, and that the writings they have made or collected can be

seized, read by prosecutors, and used in evidence in court.

San Antonio lawyer John Economidy²¹ legendary for his meticulous pretrial preparation²² suggests that we go to the jail six weeks before trial and have the defendant give you his files.

Another excellent San Antonio lawyer²³ Joel Perez²⁴ is even more proactive. Knowing that San Antonio prosecutors routinely order cell tosses in high-profile cases, Joel has filed pretrial motions requesting that *before they occur*, the trial court ^{preclude any searches by any law enforcement agency that would be conducted at the direction of the District Attorneys Office.} Alternatively, the motion requests that if a search is conducted, nothing taken be examined, reviewed, or made known to the prosecutor's office ^{prior to the Court conducting an in camera review of the said fruits of the search for a determination whether same violated the Texas Constitution and U.S. Constitution.}

2. Find out if anything was seized

As trial approaches, ask your client if his cell was tossed by jail officials, and if so, was he given a property receipt for the items seized. Regardless of what he tells you, make a specific, written demand for copies of anything the prosecutors, police, or jail authorities have seized from your client's cell, with or without a warrant. Demand copies of all documents purportedly authorizing that search and seizure, including warrants, affidavits, directives, and all other communications, written or oral.

3. Move to suppress the evidence

Move to suppress everything that was seized, as well as anything that might have been derived indirectly from anything seized. Although it is theoretically possible to preserve error by only objecting to evidence when it comes in at trial, it almost always makes sense to also file a written, pretrial motion to suppress, and to request and get a pretrial hearing. Cite the Fourth and Fourteenth Amendments to the United States Constitution, Article I, §9 of the Texas Constitution, articles 18.02(10) and 38.23(a) of the Texas Code of Criminal Procedure, as well as the leading cases, including *Granville* and *Cohen*.

Be as specific as you can about the facts surrounding the search and seizure, when it occurred, and what was seized. If you have obtained the directive, attach it as an exhibit to your motion to suppress. Subpoena all persons involved, including the prosecutor who issued the directive and the jail officials who searched the cell. Tangible evidence, like writings by and to the defendant are ideal, but also complain if you believe the state has used something found in the cell to obtain other evidence, such as identities of witnesses it would not otherwise have had.²³

4. Don't let your prosecutor rely on generalities

This article assumes that your client's cell was searched without either particularized suspicion or a search warrant. If the prosecutor went to the trouble of getting a warrant then you will have to challenge it and the affidavit in the traditional ways such challenges are made. Good luck with that.

Absent a warrant, the prosecutor's most likely defense against suppression will be that the event was a ^{toss} and not a search at all, but just an administrative action designed to insure institutional security.²⁴ The most obvious weakness in this argument is that institutional security should rarely be a concern of the prosecutor, and that any such claim should be backed up by evidence comparable to probable cause that there is something in the cell that raises a legitimate security issue.

Don't let your prosecutors vaguely pontificate about jailhouse danger, and your client's history of violence, and the safety of witnesses. They should have to be specific about how the search in question was necessary to meet some identifiable and specific security concern in the case, such as a threat to the safety of the jail, or another prisoner, or a witness, or to some other specific person. In most cases, it should be pretty easy to

show that the search was in fact a search for evidence and not security related at all. Of course, any sort of security claim is obviously pretextual and easily defeated where the prosecutor issues a blanket directive like the example given earlier in this article.

And even if the prosecutor comes up with a plausible threat to security seeming to require the cell search, this would not justify a warrantless search, absent exigent circumstances making getting a warrant unworkable. If the security interest can be credibly established, it should generally not be a problem to get a judge to quickly sign a warrant based on probable cause, especially in this post-*McNeely* age, when magistrates are seemingly everywhere, all the time.²⁵

5. Follow through

Expect that your adversary will cite the usual suspects in response to your motion to suppress: *Hudson*, *Soria*, and *Broadnax*. Don't let this discourage you. These are either poorly reasoned cases or they are factually distinguishable (or both), and they were decided before *Granville*. And don't be discouraged if the trial court overrules your motion. You usually only see cell-toss evidence in bigger, high-profile cases, and judges are always more reluctant to suppress evidence in such cases. If you have properly objected in the trial court, and if your client is convicted, you are ready to take this to the court of appeals and, if necessary, to the court of criminal appeals and the United States Supreme Court. Although none of those courts are likely to be friendly to criminal defendants, especially in something like a capital murder case, logic is on your side. It is time for a good lawyer to make good law and take this outrageously unconstitutional tool out of the hands of over-zealous prosecutors.

Notes

1. The Fourth Amendment generally mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." A "man's house is his castle." *Payton v. New York*, 445 U.S. 573, 596 (1980). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). Texas goes even further than the federal constitution, requiring that search warrants for mere evidence be issued only by certain judges, and preventing altogether warrants for "personal writings by an accused." Tex. Code Crim. Proc. Ann. art. 18.02(10).
2. This issue arose in a case of mine, and while I had a general idea that a prosecutor ought not be able to get away with this, my general idea was going nowhere until Valerie Cortinas Fisher, then a student-lawyer with the criminal defense clinic at St. Mary's University School of Law, analogized our cell search with the cell phone search in *State v. Granville*, and then found the seminal case of *United States v. Cohen*. Both these cases are discussed throughout this paper and form the backbone of this argument.
3. *State v. Granville*, 423 S.W. 3d 399, 414 (Tex. Crim. App. 2014).
4. 418 U.S. 539, 555-556 (1974); *Granville v. State*, 423 S.W. 3d at 414.
5. *State v. Granville*, 423 S.W. 3d at 415.
6. *Id.* at 417.
7. *Id.* at 405 (emphasis supplied), quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009).
8. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).
9. *Id.* at 559.

10. *Id.* at 560.

11. 468 U.S. 517, 526 (1984).

12. *Id.* at 591(“We reaffirm that “proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees?”), quoting *Bell v. Wolfish*, 441 U.S. 520, 557 n. 38 (1979).

13. 2011 WL 6225399 (Tex. Crim. App. 2011)(not designated for publication).

14. *Soria v. State*, 933 S.W. 2d 46 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1253 (1997).

15. *Broadnax v. State*, at *10; see, e.g., *People v. Phillips*, 555 N.W.2d 742, 743 (Mi. 1996)(Hudson’s rationale “applies equally to pretrial detainees and inmates confined in jails?”); *State v. Martin*, 367 S.E.2d 618, 621 (N.C. 1988)(“same considerations . . . apply to pretrial detainees who are confined in jails?”).

16. 796 F.2d 20, 23?24 (2d Cir.1986), *cert. denied*, 479 U.S. 854 (1986).

17. *Id.*

18. See *Rogers v. State*, 783 So. 2d 980, 991?92 (Fla. 2001); *State v. Henderson*, 517 S.E.2d 61, 63?66 (Ga. 1999), *cert. denied*, 528 U.S. 1083 (2000); *State v. Jackson*, 729 A.2d 55, 56 (N.J. Ch. Div. 1999); *McCoy v. State*, 639 So. 2d 163, 166?67 (Fla. Dist. Ct. App. 1994); *State v. Neely*, 462 N.W.2d 105, 112 (Neb. 1990).

19. *State v. Granville*, 423 S.W. 3d at 414; see also *Riley v. California*, 134 S. Ct. 2473, 2488 (2014)(not every search is valid just because the person is in custody).

20. *State v. Granville*, 423 S.W. 3d. at 414 n.56.

21. 2009 WL 330958, at *4 (Tex. App.?San Antonio, 2009, pet. denied)(not designated for publication); see also *Willis v. Artuz*, 301 F.3d 65, 68 (2d Cir. 2002)(denying 1983 relief where the plaintiff was a convicted prisoner, not a pretrial detainee, like Cohen).

22. In the last 20 years, Joel Perez and his frequent trial partner, Raymond Fuchs, have tried a number of challenging capital cases, and they have yet to have a client sentenced to death.

23. Tex. Code Crim. Proc. art. 38.23(a)(permitting suppression of “evidence obtained . . . 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. . . .?”); see generally *Wong Sun v. California*, 371 U.S. 471 (1963)(regarding the seizure of evidence gained during an illegal arrest that led to discovery of other evidence).

24. See *Soria v. State*, 933 S.W. 2d 46 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1253 (1997). Although few facts are provided in *Soria*, the court ultimately determined it was “not unreasonable for jail officials to conclude that the drawing at issue disserved *legitimate institutional interests*.” *Id.* 60.

25. *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013)(the natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases).

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