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## Criminal Procedure: Confessions, Searches, and Seizures

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# CRIMINAL PROCEDURE: CONFESSIONS, SEARCHES, AND SEIZURES

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## I. INTRODUCTION

This Article summarizes and analyzes important cases decided by the United States Supreme Court and the Texas Court of Criminal Appeals from December 1, 2020 to November 30, 2021. The decisions are addressed by topic.

## II. *MIRANDA* & ARTICLE 38.22 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

### A. INTRODUCTION

#### 1. *Miranda*

In *Miranda v. Arizona*, the U.S. Supreme Court held that custodial interrogations are inherently coercive and that proper safeguards must be observed before a statement is considered voluntary under the Fifth Amendment Self-Incrimination Clause and therefore admissible.<sup>1</sup> The Supreme Court stated that people suspected or accused of crimes must be told before a custodial interrogation that they have the right to remain silent, that anything they say can and will be used against them, and that they have a right to an attorney even if they are indigent.<sup>2</sup> They must then waive those rights “voluntarily, knowingly, and intelligently” before giving a statement.<sup>3</sup> Deception is relevant to this inquiry if the deception “deprives a defendant of knowledge essential to their ability to understand the nature of their rights and the consequences of abandoning them.”<sup>4</sup> A defendant’s waiver of his rights protected by *Miranda* must be “a free and deliberate choice” “made with full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon it.”<sup>5</sup> It cannot be the product of intimidation, coercion, or deception.<sup>6</sup> Courts examine the “totality of the circumstances” to determine if a defendant’s waiver of their rights was effective.<sup>7</sup>

In *New York v. Quarles*, the U.S. Supreme Court recognized a “public

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2. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

3. *Id.* at 444.

4. *Id.*

5. *State v. Lujan*, 634 S.W.3d 862, 865 (Tex. Crim. App. 2021) (quoting *Moran v. Burbine*, 475 U.S. 412, 423–24 (1986)).

6. *Berghuis v. Thompkins*, 560 U.S. 370, 382–83 (2010) (quoting *Moran*, 475 U.S. at 421).

7. *Id.* at 382.

safety” exception to the *Miranda* requirement.<sup>8</sup> The Supreme Court believed that there are situations in which apprehension of a suspect requires law enforcement to take immediate action to protect the public and, in those cases, *Miranda* warnings are not necessary.<sup>9</sup> The Supreme Court stated:<sup>10</sup>

We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Based on that reasoning, the Supreme Court held that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need” for administration of the “prophylactic” *Miranda* warnings.<sup>11</sup>

## 2. Article 38.22

The Texas Legislature has codified *Miranda* in Article 38.22 of the Texas Code of Criminal Procedure.<sup>12</sup> Article 38.22 applies to written, oral, and sign language statements that are the product of custodial interrogation.<sup>13</sup> Article 38.22 requires not only that the suspect receive substantially the same warnings as described in *Miranda*, but also that the suspect must be warned that they “ha[ve] the right to terminate the interview at any time.”<sup>14</sup> It contains other procedural safeguards beyond *Miranda*. For example, an electronic recording must be made of the defendant’s oral or sign language statement before it is admissible.<sup>15</sup>

## 3. The Voluntariness of Statements Made Following an Illegal Arrest

While statements might be voluntary for Fifth Amendment Self-Incrimination purposes (e.g., someone was properly *Mirandized*), products of a prior illegal arrest are inadmissible as fruit of the poisonous tree under the Fourth Amendment suppression rule unless an exception applies. One exception, the attenuation-of-train doctrine, asks whether the statements are sufficiently attenuated from the illegal arrest.<sup>16</sup> The U.S. Supreme Court has identified four factors when considering whether there was sufficient attenuation: (1) *Miranda* warnings, (2) “the temporal

8. Moran, 475 U.S. at 421 (citing *Fare v. Michael C.*, 442 U.S. 707, 724–25 (1979)).

9. *New York v. Quarles*, 467 U.S. 649, 657 (1984).

10. *Id.* at 657–58.

11. *Id.*

12. *Id.* at 657.

13. TEX. CODE CRIM. PROC. ANN. art. 38.22., § 2(a)(1)–(4).

14. *Id.* §§ 2, 3(a).

15. *Id.* § 2(a)(1)–(5).

16. *Id.* § 3(a)(1).

proximity of the arrest” and the incriminating statements, (3) any “intervening circumstances,” and (4) the “purpose and flagrancy of the official misconduct.” The burden to prove attenuation is on the State.<sup>17</sup>

B. *WEXLER v. STATE*, 625 S.W.3D 162 (TEX. CRIM. APP. 2021)—  
WERE *MIRANDA* WARNINGS NECESSARY BECAUSE THE APPELLANT WAS  
IN CUSTODY OR WAS SHE ONLY TEMPORARILY DETAINED, OBTAINING  
THE NEED TO WARN HER?

In *Wexler*, the appellant was arrested for the possession of a controlled substance with the intent to distribute.<sup>18</sup> Police had been surveilling a house and arrested several people with methamphetamine leaving the house. Police obtained and executed a search warrant for the house.<sup>19</sup> When they entered, a detective told the appellant that he had a search warrant and asked where the drugs were.<sup>20</sup> The appellant told the detective that the drugs were “in her bedroom in a dresser drawer.”<sup>21</sup> Police recovered about twenty-five grams of methamphetamine, packaged marijuana, “drug paraphernalia, cash, and handgun magazines and ammunition.”<sup>22</sup>

At trial, the appellant argued that her statement was hearsay and that it was involuntary because she had not been *Mirandized*.<sup>23</sup> The State argued that the statement was admissible because she was not in custody at the time, and that it was a statement by a party opponent or one against interest.<sup>24</sup> The trial court overruled the appellant’s objections and admitted the statement.<sup>25</sup> The appellant was subsequently found guilty and sentenced to twenty-five years’ imprisonment.<sup>26</sup>

On appeal, the appellant argued that the trial court erred because she was in custody based on “(1) the large number of officers on the scene, (2) the presence of a [Harris County Sheriff’s Office High Risk Operations Unit] HROU armored vehicle, (3) the police had blocked the street prior to the search, (4) [the police] had potentially surrounded the house,” (5) the “police placed her in the backseat of a patrol car as well as [produced] a [narcotics detective’s] testimony [stating] that she was not free to leave,” and (6) “she was not told she was not under arrest.”<sup>27</sup> The Court of Appeals for the Fourteenth District of Texas at Houston disagreed and held that the appellant was not in custody when she made the

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17. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *accord* U.S. CONST. amends. IV, V.

18. *Id.*

19. *Wexler v. State*, 625 S.W.3d 162, 165 (Tex. Crim. App. 2021).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; *see* Tex R. Evid. 801(e)(1) (opposing party’s statement), 803(24) (statements against interest).

26. *Id.*

27. *Id.* at 166.

statement.<sup>28</sup> Relying on the testimony of the questioning officer, the court of appeals noted that the appellant was detained only for a short amount of time, that she was not informed that she was arrested or even a suspect, that she was not aware of how many officers were outside, and that she was not handcuffed or threatened with a weapon.<sup>29</sup> The court of appeals agreed no *Miranda* warnings were required because that the appellant was not in custody.<sup>30</sup> One justice dissented, stating that she would have held that a “reasonable person would [have believed] that [they] were under restraint to the degree associated with an arrest,”<sup>31</sup> thereby requiring *Miranda* warnings.<sup>32</sup> Furthermore, she pointed out that the appellant was forced to leave her home and face a well-organized and massive amount of law enforcement personnel.<sup>33</sup>

The appellant filed a petition for discretionary review, which the Texas Court of Criminal Appeals granted. The court noted that “whether a reasonable person in the suspect’s situation would have felt that there was a restraint on her freedom to a degree associated with arrest” depends on whether the record establishes the “circumstances manifested to and experienced by” the reasonable person.<sup>34</sup> Notably, the court favorably compared the facts of the appellant’s case to the traffic stop in *Berkemer v. McCarty*.<sup>35</sup> The court said that in *Berkemer*, the U.S. Supreme Court determined that a traffic stop, while curtailing the freedom of the driver, and a seizure for Fourth Amendment purposes, “does not constitute custody for *Miranda* purposes” “due to the nonthreatening, noncoercive [atmosphere] of the detention.”<sup>36</sup> Considering the public setting, the short duration of the traffic detention, and “the fact that *Berkemer* was not informed that the detention would not be temporary,” the Supreme Court concluded that this was not the “functional equivalent of an arrest.”<sup>37</sup> The court of criminal appeals, persuaded by *Berkemer*, held that the appellant, Wexler, was only temporarily detained because the detention “was in a public setting,” the appellant “was not told that her detention would not be temporary,” and “there was no evidence that she was aware of the overwhelming police presence.”<sup>38</sup>

Judge Walker dissented and agreed with the dissenting justice on the court of appeals that “a reasonable person . . . would not have felt free to leave” and that the appellant’s “freedom . . . was [so] significantly cur-

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28. *Wexler v. State*, 593 S.W.3d 772, 779 (Tex. App.—Houston [14th Dist.] 2019, pet. granted) (footnote omitted).

29. *Id.*

30. *Id.* at 779–80.

31. *Id.* at 780.

32. *Id.* at 783 (Hassan, J., dissenting) (quoting *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)).

33. *Id.* at 786.

34. *Id.* at 784.

35. *Wexler v. State*, 625 S.W.3d 162, 168 (Tex. Crim. App. 2021) (quoting *State v. Ortiz*, 382 S.W.3d 367, 373 (Tex. Crim. App. 2012)).

36. *See id.* at 169–70; *see also Berkemer v. McCarty*, 468 U.S. 420 (1984).

37. *Berkemer*, 468 U.S. at 436–40.

38. *Wexler*, 625 S.W.3d at 170 (citing *Berkemer*, 468 U.S. at 441–42).

tailed that she was in custody for *Miranda* purposes.<sup>39</sup> More specifically, Judge Walker relied on the fact that the appellant, while in a police car, was told that the police had a search warrant in addition to being asked, “[w]here are the drugs?”<sup>40</sup> Judge Newell dissented without opinion.

C. *PUGH V. STATE*, 624 S.W.3D 565 (TEX. CRIM. APP. 2021)—DOES THE FAILURE TO GIVE *MIRANDA* WARNINGS DURING AN EARLIER INTERVIEW BAR USE OF STATEMENTS MADE LATER IF THE APPELLANT WAS GIVEN *MIRANDA* WARNINGS BEFORE THE SECOND INTERVIEW?

Kedreen Marque Pugh, the appellant, was pulled over and arrested on a warrant while driving a car registered to his wife.<sup>41</sup> The appellant volunteered that he wanted to be “honest” and that he had “stuff” in his car while being taken to the police station.<sup>42</sup> In response to questioning about what was in the car, the appellant stated that he had drugs and a handgun.<sup>43</sup> Both a loaded gun and heroin were found in a bag on the front passenger floorboard.<sup>44</sup> The appellant was not *Mirandized* before or after his exchange with the officers in the car.<sup>45</sup> The appellant was charged with the possession of heroin with “intent to deliver in an amount greater than four grams but less than two hundred grams.”<sup>46</sup> At trial, the appellant moved to suppress his statement, but his motion was denied.<sup>47</sup> He was subsequently convicted.<sup>48</sup>

The Court of Appeals for the Fourth District of Texas at San Antonio concluded that the appellant’s statement was inadmissible because it was the product of a custodial interrogation.<sup>49</sup> The court of appeals found admission of the statement harmful because both officers testified that the statement led to the search of the car where they discovered the contraband, and the State repeatedly referenced the appellant’s statement regarding the heroin at trial.<sup>50</sup> On petition for discretionary review, the Texas Court of Criminal Appeals held that the court of appeals erred when it concluded that the heroin would not have been found without the appellant’s statement.<sup>51</sup> Although *Miranda* might have been a basis for excluding the appellant’s statement, the heroin was admissible because *Miranda* does not deal with physical evidence.<sup>52</sup> The court of criminal appeals also pointed out that the appellant’s volunteered statement con-

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39. *Id.*

40. *Id.* at 171 (Walker, J., dissenting).

41. *Id.* at 173.

42. Pugh v. State, 624 S.W.3d 565, 566 (Tex. Crim. App. 2021).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 567.

50. *Id.*

51. *Id.*

52. *Id.* at 568.



cerning honesty and that he had “stuff” in the car was admissible.<sup>53</sup> The court additionally found that the statement demonstrated that the appellant had knowledge of the drugs in the car and that there was other evidence showing that the appellant was a drug dealer who was using a gun to protect himself.<sup>54</sup> The court of criminal appeals reversed the judgment and remanded the case for the lower court to consider the remaining issues.

Judge Walker filed a concurring opinion in which Judge Newell joined. Judge Walker identified several theories the court of appeals could have relied on to affirm the trial court’s judgment.<sup>55</sup> He explained that the “police had probable cause to search the [car]” based on the appellant’s statements about drugs and a gun being in the car, that police could have searched the vehicle pursuant to the automobile exception to the Fourth Amendment, and that the independent source doctrine applied.<sup>56</sup>

D. *MARTINEZ V. STATE*, 620 S.W.3D 734 (TEX. CRIM. APP. 2021)—IS THE TAINT OF A PRIOR ILLEGAL ARREST DISSIPATED BY SUBSEQUENT *MIRANDA* WARNINGS?

Jesse Adrian Martinez, the appellant, was taken from his home late one night by police, without a warrant, to question him about the disappearance of one of his friends.<sup>57</sup> Police took the appellant to an interrogation room, where he sat for a few minutes until two detectives entered and read him his *Miranda* warnings.<sup>58</sup> The “[a]ppellant invoked his right to counsel, and the interview was terminated.”<sup>59</sup> The appellant was then told that he was “under arrest for murder,” and he was handcuffed to a bench in a holding cell.<sup>60</sup> Less than fifteen minutes later, the appellant “flagged down” one of the detectives and volunteered to make a statement.<sup>61</sup> The appellant was taken back to the interrogation room and was again read his *Miranda* warnings.<sup>62</sup> The appellant acknowledged his rights, then waived them and gave an hour-long statement.<sup>63</sup> In his statement, he said that he and some friends were doing cocaine with the victim and that they asked the victim to get more once they ran out.<sup>64</sup> While the victim was buying more cocaine, the appellant and his friends decided to rob him when he returned.<sup>65</sup> The appellant said that after the victim returned they all drove together to a church. Once they arrived, his two

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 570–71 (Walker, J., concurring).

57. *Id.* at 570–72.

58. *Martinez v. State*, 620 S.W.3d 734, 738–39 (Tex. Crim. App. 2021).

59. *Id.* at 739.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

friends and the victim exited the car and began speaking. The appellant said that, a short while later, he heard “a thud, got out of the car, and saw [the victim] on the ground, badly injured.”<sup>66</sup> According to the appellant, he got back into the car and heard his friends put the victim in the trunk.<sup>67</sup> They then drove to one of the appellant’s friend’s houses so the appellant could change his shirt and shoes before going home.<sup>68</sup> The appellant said that he believed his friends disposed of the victim’s body in the desert.<sup>69</sup>

The appellant subsequently filed a motion to suppress and argued that his confession was inadmissible because it was “the product of an illegal arrest” and therefore involuntary, despite that he had been *Mirandized* and waived his rights.<sup>70</sup> The trial court denied the motion based on the testimony of two detectives who stated that they “believed they had probable cause to arrest the appellant.”<sup>71</sup>

On appeal, the appellant argued that his confession was insufficiently attenuated from his illegal arrest to be voluntary.<sup>72</sup> The court of appeals explained that the appellant’s case laid at the intersection of the Fourth Amendment and the Fifth Amendment,<sup>73</sup> and it applied the factors adopted by the U.S. Supreme Court in *Brown v. Illinois*<sup>74</sup> to determine if the taint of an illegal arrest was attenuated: “(1) whether . . . *Miranda* warnings were given, (2) the temporal proximity of the arrest and the confession, (3) the presence of intervening circumstances, and (4) the flagrancy of the official misconduct.”<sup>75</sup> The Court of Appeals for the Eighth District of Texas at El Paso concluded that the *Brown* factors weighed in favor of finding that the appellant’s confession was “sufficiently attenuated” from his illegal arrest.<sup>76</sup> According to the court of appeals, the first, third, and fourth factors weighed in favor of finding attenuation.<sup>77</sup> The court of appeals explained that the police read the appellant his *Miranda* warnings, that the appellant reinitiated contact with police of his own free will, which was an intervening circumstance, and that there was no official misconduct.<sup>78</sup> The second factor weighed in favor of the appellant because of the relatively short amount time between his illegal arrest and his statement.<sup>79</sup>

On discretionary review, the Texas Court of Criminal Appeals determined that the court of appeals misapplied the third and fourth *Brown*

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 738, 739–740.

72. *Id.*

73. *Id.* at 740.

74. *Id.* at 741.

75. 422 U.S. 590, 603–04 (1975).

76. Martinez, 620 S.W.3d at 883–84 (citing *Brown*, 422 U.S. at 603–04).

77. *Id.* at 740.

78. *Id.*

79. *Id.*

factors,<sup>80</sup> and that it erroneously relied on the contents of the appellant's statement to support its determination that the police had probable cause to arrest him.<sup>81</sup> The court of criminal appeals explained that the appellant was illegally arrested when he was placed in a holding cell and handcuffed to a bench without probable cause.<sup>82</sup> The court of criminal appeals further explained that the "surrounding circumstances [suggested] that the official misconduct was flagrant, and it noted that "facts discovered after an arrest cannot be used in hindsight to supply probable cause."<sup>83</sup> The court further noted that, "even if there had been probable cause, the surrounding circumstances showed that the police misconduct was flagrantly abusive."<sup>84</sup> The court found that the police took the appellant from his home in the middle of the night "to cause fear, surprise, and confusion" to obtain a confession.<sup>85</sup> When properly weighed, the court of criminal appeals concluded that the taint of the appellant's illegal arrest had not been attenuated before he gave his confession, and it reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.<sup>86</sup> Judge Yeary concurred in the result, and Presiding Judge Keller dissented, both without opinion.

E. *STATE V. LUJAN*, 634 S.W.3D 862 (TEX. CRIM. APP. 2021)—HOW MANY TIMES MUST A DEFENDANT BE WARNED UNDER ARTICLE 38.22 WHEN THREE DIFFERENT STATEMENTS ARE GIVEN?

Erlinda Lujan, the appellee, was arrested by El Paso Police detectives as part of a murder investigation.<sup>87</sup> "The appellee gave three recorded statements while . . . in custody."<sup>88</sup> "The first and third recordings were made at the police station in an interrogation room equipped with recording equipment."<sup>89</sup> The second recording "was made on an iPad during and immediately after a car ride" in which detectives took the appellee to look for the victim's body.<sup>90</sup> Before the first interrogation, the appellee was admonished in the interview room about the intention of the interview, that she was being arrested, and that this was a formal interview.<sup>91</sup> The appellee was then read her *Miranda* warnings, which she waived.<sup>92</sup> In her statement, she recounted her role in the murder and told detectives that she could help them find the body.<sup>93</sup> Before exiting the interview room to go to the car, the detective stated, "when we come back, we can

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80. *Id.*

81. *Id.* at 743.

82. *Id.* at 744.

83. *Id.* at 743.

84. *Id.* (citing *Amores v. State*, 816 S.W.2d 407, 415 (Tex. Crim. App. 1991)(en banc)).

85. *Id.*

86. *Id.*

87. *Id.* at 744–45.

88. *State v. Lujan*, 634 S.W.3d 862, 864 (Tex. Crim. App. 2021).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 866.

93. *Id.*

continue, if you like, ok?”<sup>94</sup> Once in the car, detectives began secretly recording the appellee.<sup>95</sup> “No warnings were given.”<sup>96</sup> The appellee described her lifestyle of drugs, the death of the victim in question, and two additional kidnappings.<sup>97</sup>

At trial, the appellee filed a motion to suppress, citing *Miranda* and Article 38.22. The trial court admitted her first statement but suppressed her second and third.<sup>98</sup> The trial court concluded that the second statement was inadmissible because the appellee “was misled into believing that her in-car statement would not be used against her,” so her earlier waiver was not effective.<sup>99</sup>

The Court of Appeals for the Eighth District of Texas at El Paso agreed with the trial court that the second statement was inadmissible, but held that the appellee’s claim that her third statement should be suppressed did not comport with her claim on appeal that police engaged in a two-step interrogation—question first, warn later.<sup>100</sup>

On discretionary review, the Texas Court of Criminal Appeals affirmed the judgment of the court of appeals upholding the ruling of the trial court because the second statement was inadmissible.<sup>101</sup> The State argued that the court of appeals erred because the second interrogation was a continuation of the first under *Bible v. State*,<sup>102</sup> but the court of criminal appeals found that the continuation issue was irrelevant given the fact that the trial court found that the appellee was misled about the nature of her in-car statement.<sup>103</sup> The court of criminal appeals compared each of the three interviews to underscore the deceptive techniques used by the detectives.<sup>104</sup> For example, the detective’s statement to the appellee that he would return to the interview after the car ride demonstrated that the police believed that the in-car interview was not a real interview.<sup>105</sup> It also pointed out that the detectives “disguised the confessional aspect of the trip” as a trip to find the body, when they in fact had a deceitful goal instead.<sup>106</sup> The court held that the trial court did not abuse its discretion, and that the court of appeals’ judgment should be affirmed because the totality of the circumstances supported the trial court’s finding that the detectives led the appellee to believe that her statement in the car would not be used against her, rendering her earlier *Miranda* waiver ineffective.<sup>107</sup>

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 866–67.

98. *Id.* at 867.

99. *Id.*

100. *Id.* at 866.

101. *Id.* at 864.

102. *Id.* at 871.

103. 162 S.W.3d 234 (Tex. Crim. App. 2005).

104. *Lujan*, 634 S.W.3d at 870–71.

105. *Id.* at 867–68.

106. *Id.* at 869–70.

107. *Id.* at 870.

Judge Newell wrote a concurring opinion to express his concerns about the continuing viability of *Bible* because he believed that *Bible*'s underlying rationale is unclear and that the *Bible* test is difficult to apply under many fact patterns, like those in this case.<sup>108</sup> Judge Yeary concurred. He stated that, for *Miranda* purposes, he believed Article 38.22, Section 2(a) warnings be “given prior to the statement but during the recording,” thereby constituting a plain requirement that “a separate warning be given before each . . . recording that is made, even if it constitutes no more than a continuation of a previous statement” and “regardless of whether *Miranda* required separate warnings in this case.”<sup>109</sup> Presiding Judge Keller, joined by Judge McClure, dissented because they believed that the second interview was a continuation of the first under *Bible*.<sup>110</sup> Judge Slaughter dissented without opinion.

F. *MATA V. STATE*, 624 S.W.3D 824 (TEX. CRIM. APP. 2021)—DOES THE PUBLIC SAFETY EXCEPTION TO THE *MIRANDA* REQUIREMENT APPLY WHEN POLICE ARE TRYING TO LOCATE A KIDNAPPED CHILD?

Ricardo Mata, the appellee, called the mother of a fifteen-year-old girl who had been kidnapped and demanded \$300 for her release.<sup>111</sup> An investigator in the Major Crimes Unit of the Hidalgo Sheriff's Office went undercover as a friend of the mother to negotiate the ransom.<sup>112</sup> While the investigator spoke with the appellee, another officer “pinged” the appellee's cell phone and traced its location to a house.<sup>113</sup> Police later saw the appellee leave that house in a car.<sup>114</sup> They continued to ping the appellee's cell phone and realized that it matched the appellee's movements.<sup>115</sup> During the conversation with the undercover investigator, the appellee told the investigator that his phone battery was dying, at which point the investigator had an officer in a marked unit initiate a traffic stop.<sup>116</sup> When the investigators arrived, they accused the appellee of kidnapping and began interrogating him.<sup>117</sup> No *Miranda* warnings were given.<sup>118</sup> The appellee told an investigator that he would help locate the girl if they let him go.<sup>119</sup> One of the investigators told him that he was not free to leave, and the interrogation continued. Eventually, the “appellee revealed the child's location.”<sup>120</sup>

At trial, the appellee filed a motion to suppress.<sup>121</sup> He argued, among

108. *Id.* at 871, 867.

109. *Id.* at 873 (Newell, J., concurring).

110. *Id.* at 872 (Yeary, J., concurring).

111. *Id.* at 883 (Keller, P.J., dissenting).

112. *State v. Mata*, 624 S.W.3d 824, 826 (Tex. Crim. App. 2021).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

other things, that the roadside statements should be suppressed because no *Miranda* warnings were given.<sup>122</sup> The trial court agreed and suppressed the statements.<sup>123</sup> The State appealed and argued that the public safety exception to the *Miranda* requirement applied.<sup>124</sup> The Court of Appeals for the Thirteenth District of Texas at Corpus Christi–Edinburg disagreed.<sup>125</sup> It held that the public safety exception had only been used in situations involving guns, while this case involved a kidnapped child.<sup>126</sup> The State subsequently filed a petition for discretionary review.

In its petition, the State argued that the court of appeals erred, and the Texas Court of Criminal Appeals agreed that the public safety exception applied.<sup>127</sup> The court of criminal appeals explained that, although the exception had been applied only to guns, the rationale underlying the exception also applied to finding kidnapped children, specifically noting that:<sup>128</sup>

We see no further loss of clarity in recognizing that the “public safety” exception extends to attempts to find a kidnapped child. The *Quarles* case involved the location of a weapon, but its rationale was broader than that, and that rationale easily applies to a situation involving a kidnapped child.

Judge Walker, joined by Judge McClure, filed a concurring opinion to expound upon instances when the exception should apply.<sup>129</sup> He argued that its application “is not categorical and does not turn on whether there is a missing gun, whether there is a kidnapping, or whether public safety can be generally pointed to.”<sup>130</sup> Instead, the exception applies when the *Miranda* warnings themselves can cause more harm than good.<sup>131</sup> He further pointed out that if the appellee had been warned and decided to remain silent, the police might not have found the kidnapped girl.<sup>132</sup>

### III. SEARCH & SEIZURE

#### A. INTRODUCTION

##### 1. *Standing, Reasonable Expectation of Privacy, and Exigent Circumstances*

A person cannot challenge the propriety of a search or seizure under the Fourth Amendment, Article I, Section 9 of the Texas Constitution or Article 38.23 of the Texas Code of Criminal Procedure unless they have

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 827.

126. *Id.*

127. *Id.*

128. *Id.* at 826.

129. *Id.* at 828–29.

130. *Id.* at 829 (Walker, J., concurring).

131. *Id.*

132. *Id.*

standing.<sup>133</sup> To have standing under the Fourth Amendment, the person must have had a “reasonable personal expectation of privacy” that he claims was violated.<sup>134</sup> A defendant can show that they have a reasonable expectation of privacy by exhibiting an actual subjective expectation of privacy that society recognizes as objectively reasonable.<sup>135</sup>

## 2. *Franks v. Delaware*, 438 U.S. 154 (1978)

A search warrant must be supported by probable cause.<sup>136</sup> “Probable cause exists if there is a fair probability that evidence of a crime will be found at a specified location.”<sup>137</sup> The test is “whether a reasonable reading of the supporting affidavit provides a substantial basis for the magistrate’s conclusion that probable cause existed.”<sup>138</sup> A defendant who believes that a probable cause affidavit includes false statements might be entitled to a *Franks* hearing and subsequent suppression under the Fourth Amendment. In *Franks v. Delaware*,<sup>139</sup> the U.S. Supreme Court held that:<sup>140</sup>

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request.<sup>141</sup>

The Texas Court of Criminal Appeals has adopted a three-part test to determine if a defendant is entitled to a *Franks* hearing:<sup>142</sup>

(1) [The defendant must] [a]llege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false. Allegations of negligence or innocent mistakes are insufficient, and the allegations must be more than conclusory.

(2) [The defendant must] [a]ccompany these allegations with an offer of proof stating the supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished. If not, the absence of written support of the allegations must be satisfactorily explained.

133. *Id.* at 831–32.

134. *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004) (Fourth Amendment); *Richardson v. State*, 865 S.W.2d 944, 948–49 (Tex. Crim. App. 1993) (Article I, Section 9); *Fuller v. State*, 829 S.W.2d 191, 202 (Tex. Crim. App. 1992) (Article 38.23(a)).

135. *Handy v. State*, 189 S.W.3d 296, 299 (Tex. Crim. App. 2006).

136. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

137. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); TEX. CODE CRIM. PROC. ANN. art. 18.01(b).

138. *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983).

139. *Duarte*, 389 S.W.3d at 354.

140. 438 U.S. 154, 154 (1978).

141. *Id.* at 155–56.

142. *Id.*

(3) [The defendant must] [s]how that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant.

The defendant bears the burden of establishing, by a “preponderance of the evidence,” that a material misstatement was made intentionally or with reckless disregard for the truth.<sup>143</sup> A false statement is considered material if it “is necessary to a finding of probable cause.”<sup>144</sup>

### 3. Exclusionary Rules

Evidence obtained in violation of the Fourth Amendment or Article I, Section 9 of the Texas Constitution might be subject to suppression. Article 38.23 of the Texas Code of Criminal Procedure is modeled after the federal exclusionary rule, however it is broader in scope. Unlike the Fourth Amendment exclusionary rule, which applies only to government actors, Article 38.23(a) states that:

[n]o 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.<sup>145</sup>

Not only can a trial court suppress evidence pretrial, a defendant can also carry over the suppression issue to trial and request a jury instruction instructing the jury to determine if the evidence should be suppressed.<sup>146</sup> Article 38.23(a) further states that in cases “where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any evidence so obtained.”<sup>147</sup>

B. *TORRES V. MADRID*, 141 S. CT. 989 (2021)—DOES THE APPLICATION OF PHYSICAL FORCE BY LAW ENFORCEMENT TO ARREST A PERSON CONSTITUTE A FOURTH AMENDMENT SEIZURE EVEN IF THE PERSON DOES NOT SUBMIT AND IS NOT SUBDUED BY THE FORCE?

New Mexico State Police were executing an arrest warrant for a suspect at an apartment complex who was thought to be involved in drug trafficking, murder, other violent crimes, and white-collar crimes.<sup>148</sup> Torres, the petitioner, was standing with another person in the parking lot,<sup>149</sup> and two officers approached them.<sup>150</sup> The other person ran away, and the pe-

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143. *Id.* at 171.

144. Franks, 438 U.S. at 155–56.

145. *Id.* at 156.

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

147. *McPherson v. State*, 300 S.W. 936, 937 (Tex. Crim. App. 1927).

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

149. *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021).

150. *Id.*



petitioner got into the driver's seat of her nearby car.<sup>151</sup> An officer attempted to open her door to speak with the petitioner, but she drove away.<sup>152</sup> The officer and his partner shot into the petitioner's vehicle thirteen times, hitting her in the back twice and temporarily paralyzing her left arm.<sup>153</sup> The petitioner drove a short while down the road to another parking lot where she then stole an idling car and drove seventy-five miles to another town where she sought medical care.<sup>154</sup> She was arrested the next day.<sup>155</sup> The petitioner was charged with aggravated fleeing from law enforcement, assault on a police officer, and unlawful taking of a motor vehicle.<sup>156</sup>

The petitioner subsequently filed a federal civil rights lawsuit under Section 1983 of Title 42 of the United States Code. The petitioner claimed that the officers used excessive force when they shot her, asserting that such action was an unreasonable seizure under the Fourth Amendment.<sup>157</sup> On certiorari, the U.S. Supreme Court held that "the officers' shooting applied physical force to [the petitioner's] body and objectively manifested an intent to restrain her from driving away." Consequently, the Supreme Court concluded that the petitioner was seized the instant the bullets struck her.<sup>158</sup> The Supreme Court noted that, while firearms have existed for centuries, law enforcement did not begin carrying them until the end of the nineteenth century, and that it could find no common law case known to have reviewed the seizure of a person by firearm contemporaneous to the Framers' time.<sup>159</sup> However, the Supreme Court nonetheless concluded that the focus of the inquiry is on "the privacy and security of individuals, not the particular manner of 'arbitrary invasion[ ] by government officials.'" <sup>160</sup> noting that shooting a person is considered a seizure.<sup>161</sup> Importantly, the Supreme Court emphasized that not every physical contact by law enforcement is a seizure for Fourth Amendment purposes, rather the action must be paired with an objective intent to restrain.<sup>162</sup> The Supreme Court was also careful to state that this holding is narrow with respect to the type of apprehension, and that it was not addressing the use of "pepper spray, flash-bang grenades, lasers," or the like.<sup>163</sup>

Justice Gorsuch dissented, joined by Justices Thomas and Alito.<sup>164</sup> Jus-

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 998.

161. *Id.* (citing *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967)) (inner quotation omitted).

162. *Id.* at 999.

163. *Id.* at 998.

164. *Id.*

tice Gorsuch disagreed that merely touching a suspect could be a seizure because seizures generally required the “taking of possession of someone or something.”<sup>165</sup> Justice Gorsuch believed that the discussion of “mere touch” as a seizure in *Hodari* was only dicta and could not be considered under stare decisis.<sup>166</sup> Instead, he would have looked to the text of the Fourth Amendment rather than its history to find that a seizure means to take possession of something or someone.<sup>167</sup>

The Texas Court of Appeals for the Third District of Texas at Austin has relied on this case since it was decided. In *Haynes v. State*,<sup>168</sup> the court of appeals decided to apply this concept to an arrest where the suspect was tased by an officer.<sup>169</sup> The court observed that “the application of physical force to the body of a person with intent to restrain is an arrest” and stated that this applies even when the force is from a distance.<sup>170</sup>

C. *LANGE V. CALIFORNIA*, 141 S. Ct. 2011 (2021)—CAN POLICE ENTER A HOME WITHOUT A WARRANT IF THEY ARE PURSUING A PERSON WHO IS SUSPECTED OF COMMITTING A MISDEMEANOR THEN FLEES INTO THEIR HOME?

Arthur Lange, the petitioner, was playing loud music in his car, driving with the windows down, and honking his horn as he passed by a Sonoma patrol officer.<sup>171</sup> The officer began to follow the petitioner and eventually turned on his overhead lights to detain him, but the petitioner continued driving.<sup>172</sup> The petitioner reached his home, turned into his driveway, and pulled into the attached garage.<sup>173</sup> The officer followed the petitioner into the garage, questioned him, saw signs of intoxication, and asked him to perform field sobriety tests.<sup>174</sup> The petitioner did so and failed.<sup>175</sup> The officer arrested the petitioner for the misdemeanor offense of driving while intoxicated and for a noise infraction.<sup>176</sup> The petitioner’s blood alcohol concentration was more than three times the legal limit.<sup>177</sup>

The petitioner moved to suppress all evidence elicited after the officer’s entry into the garage, claiming that the officer violated the Fourth Amendment when he entered the garage without a warrant.<sup>178</sup> The State argued that probable cause was established when the petitioner contin-

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165. *Id.* at 1003 (Gorsuch, J., dissenting).

166. *Id.*

167. *Id.* at 1005.

168. *Id.* at 1005–08.

169. No. 03-19-00427-CR, 2021 WL 2604052, at \*1 (Tex. App.—Austin June 25, 2021, pet. ref’d) (mem. op.).

170. *Id.* at \*6.

171. *Id.* (citing *Torres*, 141 S. Ct. at 997, 1003).

172. *Lange v. California*, 141 S. Ct. 2011, 2016 (2021).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

ued to drive after the officer's lights signaled him to pull over and that a person fleeing after committing a misdemeanor always qualifies as an exigent circumstance.<sup>179</sup> The motion was denied, and the California Court of Appeals affirmed.<sup>180</sup> The appellate court adopted the State's suggested categorical rule that an "officer's 'hot pursuit' into the house to prevent the suspect from frustrating the arrest is always permissible under the exigent-circumstances exception to the warrant requirement."<sup>181</sup> The California Supreme Court denied review.<sup>182</sup>

The U.S. Supreme Court reviewed the decision to determine whether the bright-line rule adopted by the California Court of Appeals was appropriate.<sup>183</sup> The Supreme Court observed that it has identified several types of exigent circumstances over time,<sup>184</sup> and it said that it would look to its own precedents and common law practices "familiar to the Framers" to determine if a case-by-case analysis or a bright-line rule was appropriate.<sup>185</sup> The Supreme Court concluded that its precedent favored of using a case-by-case analysis because, under the totality of the circumstances, there will be varying levels of threat to society or law enforcement which might justify the action of law enforcement without seeking the necessary permissions.<sup>186</sup> It also explained that the common law does not support a categorical approach for misdemeanants like it does for felons in flight and that, when a misdemeanant flees without causing harm, a warrant must still be sought.<sup>187</sup> Additionally, the Supreme Court considered that, across the country, misdemeanors mean different things in different jurisdictions regardless of the resulting level of harm of the conduct,<sup>188</sup> and it observed that usually the exigency of the suspect fleeing into a home does not justify a warrantless entry into the home by law enforcement when a minor offense is involved.<sup>189</sup> The Supreme Court vacated the judgment and remanded the case for further proceedings.<sup>190</sup>

Justice Thomas concurred in part and concurred in the judgment. Justice Thomas believed that the majority "correctly rejected the argument that suspicion that a person committed [a crime always] justifies a warrantless entry into a home in hot pursuit of that person."<sup>191</sup> He wrote separately to point out that there are exceptions, both historical and categorical, to the rule the Supreme Court announced and that the federal exclusionary rule does not apply to evidence discovered in the course of

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179. *Id.*

180. *Id.*

181. *Id.* at 2017.

182. *Id.* at 2016.

183. *Id.* at 2017.

184. *Id.*

185. *Id.*

186. *Id.* at 2018.

187. *Id.* at 2021–22.

188. *Id.* at 2022.

189. *Id.* at 2020.

190. *Id.*

191. *Id.* at 2024–25.

pursuing a fleeing suspect.<sup>192</sup>

Justice Kavanaugh concurred and joined Part II of Justice Thomas's opinion. Justice Kavanaugh said that, while the Supreme Court framed its decision as a case-by-case analysis, the analysis still will almost always allow for the exigency in a misdemeanor context because exigencies are assessed by "risk of escape, destruction of evidence, or harm to others," which can still justify a warrantless entry.<sup>193</sup>

D. *CANIGLIA V. STROM*, 141 S. CT. 1596 (2021)—DO THE  
COMMUNITY CARETAKING DUTIES OF LAW ENFORCEMENT JUSTIFY  
WARRANTLESS SEARCHES AND SEIZURES?

Edward Caniglia, the petitioner, got into a fight with his wife, grabbed his handgun, and placed it on the dining room table, telling his wife to shoot him and "get it over with."<sup>194</sup> The wife instead chose to stay at a motel for the evening.<sup>195</sup> She called police the next morning to perform a welfare check on her husband when he did not answer the phone.<sup>196</sup> The police accompanied the wife to the home where the petitioner confirmed the night's account.<sup>197</sup> Police feared for the petitioner's safety, but allegedly promised they would not take his firearms when they called an ambulance to take him for a psychiatric exam.<sup>198</sup> However, police seized two handguns after the petitioner was taken away.<sup>199</sup> The petitioner sued the City of Cranston and the City of Cranston Police Department for violating his Fourth Amendment rights, but the district court granted summary judgment against the petitioner.<sup>200</sup>

On appeal, the U.S. Court of Appeals for the First Circuit affirmed on the grounds that police could enter the home under the "community caretaking" exception to the warrant requirement discussed in *Cady v. Dombrowski*.<sup>201</sup> The First Circuit reasoned that "police often have noncriminal reasons to interact with motorists on public highways" and that there is no logical reason why the exception would not also apply to homes.<sup>202</sup>

The U.S. Supreme Court granted certiorari.<sup>203</sup> It noted that, in *Cady*, police performed a warrantless search of a suspect's impounded vehicle, but that there is a "constitutional difference" between a home and a car.<sup>204</sup> The Supreme Court also contrasted the treatment of a vehicle

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192. *Id.* at 2025 (Thomas, J., concurring).

193. *Id.*

194. *Id.* at 2025 (Kavanaugh, J., concurring).

195. *Caniglia v. Strom*, 141 S. Ct. 1596, 1598 (2021).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1597; see *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

203. *Caniglia v. Strom*, 953 F.3d 112, 123–24 (1st Cir. 2020).

204. *Caniglia*, 141 S. Ct. at 1599.

under police control with the search of a car parked next to the owner's home<sup>205</sup> before concluding that the "community caretaking" doctrine should not be extended into the home because "what is reasonable for cars is different than what is reasonable for a home."<sup>206</sup> The Supreme Court vacated the judgment and remanded the matter for further deliberation.<sup>207</sup>

Chief Justice Roberts, joined by Justice Breyer, concurred. He wrote separately to explain that the role of a police officer has always been recognized as one of protecting the public from violence and that there is a need to assist people when they are hurt or are in imminent danger, and that this could require a warrantless entry into a home.<sup>208</sup>

Justice Alito concurred to observe that this set of facts had not been addressed before in the community-caretaking context where a short-term seizure was conducted for the purpose of ascertaining whether a person presented an imminent threat of suicide.<sup>209</sup> Justice Alito felt that this situation arises many times but the current precedents do not address the reasonableness of any possible Fourth Amendment violations.<sup>210</sup>

Justice Kavanaugh concurred to highlight the Chief Justice's point that the Supreme Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of assistance.<sup>211</sup>

E. *TILGHMAN v. STATE*, 624 S.W.3D 802 (TEX. CRIM. APP. 2021)—  
 DOES A PERSON STAYING IN A HOTEL ROOM HAVE A REASONABLE  
 EXPECTATION OF PRIVACY IN THE ROOM AFTER HOTEL MANAGEMENT  
 ALLOWED POLICE INTO THE ROOM WITHOUT NOTICE TO EVICT THE  
 OCCUPANT FOR SMOKING MARIJUANA AND NO EXIGENT  
 CIRCUMSTANCES EXISTED?

Michael Joseph Tilghman, the appellant, and two men were staying at a hotel in San Marcos. The hotel manager attempted to evict the group after he smelled marijuana coming from their room because hotel policy prohibited the use of illegal drugs on the premises.<sup>212</sup> The evening shift manager was informed of the situation and told to evict the occupants.<sup>213</sup> He also smelled the marijuana smoke emanating from the room and called police to help with the eviction.<sup>214</sup> An officer knocked on the room door and announced himself. No one answered, but the officer could hear whispering through the door.<sup>215</sup> The officer advised the manager that

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205. *Id.*

206. *Id.*

207. *Id.* at 1600.

208. *Id.*

209. *Id.* (Roberts, C.J., concurring).

210. *Id.* at 1601 (Alito, J., concurring).

211. *Id.*

212. *Id.* at 1602 (Kavanaugh, J., concurring).

213. *Tilghman v. State*, 624 S.W.3d 801, 803 (Tex. Crim. App. 2021).

214. *Id.*

215. *Id.*

they “did not have the right to enter the room, but [the manager] did.”<sup>216</sup> The manager unlocked the room, and the officer opened the door.<sup>217</sup> There were two men in the hallway of the room, and the officer heard sounds of a toilet flushing before a third man holding a razor popped his head out of the bathroom claiming he was shaving. The officer noticed, however, that the man had no water or shaving cream on his face.<sup>218</sup> Based on his training and experience, the officer believed that the occupants were trying to flush drugs down the toilet.<sup>219</sup> But, having no evidence, the officer notified the occupants that the hotel manager was evicting them and told them to collect their things and leave.<sup>220</sup> Four officers waited in different areas of the room while the men packed their belongings.<sup>221</sup> Those officers saw marijuana and methamphetamine in plain view.<sup>222</sup> The occupants were subsequently arrested.

The appellant filed a motion to suppress the evidence obtained by officers in the hotel room.<sup>223</sup> The trial court denied the motion and entered findings of fact and conclusions of law. On appeal, the appellant argued that the trial court abused its discretion in denying his motion to suppress.<sup>224</sup> The Court of Appeals for the Third District of Texas at Austin reasoned that the appellant maintained a reasonable expectation of privacy in the hotel room because there was no advanced notice of the eviction and no exigent circumstances existed to justify the warrantless entry in violation of the Fourth Amendment.<sup>225</sup> In its analysis, the court of appeals relied on several facts from the suppression hearing and focused on a lack of notice to the appellant and the other occupants.<sup>226</sup> The court of appeals relied on *Stoner v. California*, in which the U.S. Supreme Court held that a hotel guest has a reasonable expectation of privacy in their hotel room and that a hotel clerk may not consent to a search of the occupant’s room at the request of law enforcement.<sup>227</sup>

Justice Kelly argued in dissent that *Stoner* was inapplicable because police arrived to assist the hotel manager with an eviction, not to search the room as in *Stoner*.<sup>228</sup> This justice further observed that there is no law requiring a hotel guest be on notice of a hotel policy that might lead to an eviction,<sup>229</sup> and she found that, “because the hotel had the right to evict Appellant for using drugs on the premises in violation of hotel policy, it was lawful for hotel staff to call the police to effectuate the eviction, in-

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216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 803–04.

221. *Id.* at 804.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Tilghman v. State*, 576 S.W.3d 449, 454 (Tex. App.—Austin 2019, pet. granted).

226. *Id.* at 461–62, 463.

227. *Id.* at 461–62.

228. *Id.* at 459, 462 (citing *Stoner v. California*, 376 U.S. 483, 490 (1964)).

229. *Id.* at 469–70 (Kelly, J., dissenting).

cluding allowing police to enter Appellant's room."<sup>230</sup>

On petition for discretionary review, the State argued that "the Court of Appeals erred in holding that police could not lawfully enter a hotel room to help a hotel manager evict a guest engaging in criminal activity."<sup>231</sup> The Texas Court of Criminal Appeals largely agreed with the dissent from the court of appeals and reversed the judgment of the court of appeals. The court of criminal appeals reasoned that the "[a]ppellant's expectation of privacy in the hotel room was extinguished once the hotel staff took affirmative steps to evict him on suspicion that he was using illegal drugs in his room in violation of hotel policy."<sup>232</sup> This rendered the entry of the officers, with the assistance of the manager, lawful.<sup>233</sup> The court of criminal appeals favorably discussed a case with somewhat similar facts in which it was held that a motel guest who stays past the check-out occupancy period can be physically evicted with assistance from police officers at the request of motel staff.<sup>234</sup>

It also addressed the dissenting observation that there is no law in Texas governing hotel evictions. The majority of the court of criminal appeals concluded, after consulting extra-jurisdictional decisions, that "the lack of a Texas statute expressly authorizing eviction or a written rental agreement stating that violations of hotel policy will result in eviction . . . ," did not warrant a conclusion that the Fourth Amendment was violated.<sup>235</sup> The court of criminal appeals reasoned that a guest who engages in illegal behavior should reasonably know that such activity violates the hotel's policy and could result in eviction.<sup>236</sup> Based on the foregoing, the court held that the appellant no longer had an expectation of privacy by the time the police entered the room because control of the hotel room reverted to the hotel immediately upon the staff taking affirmative steps to evict the occupants.<sup>237</sup>

In a concurring opinion, Judge McClure agreed that the appellant had no reasonable expectation of privacy in the hotel room once he and the other occupants were evicted but expressed concerns about the lack of actual notice to the occupants, which could lead to unexpected results.<sup>238</sup> Judge McClure analogized the notice requirement to that in the criminal trespass statute<sup>239</sup> and said that a guest should have notice that his subjective expectation of privacy is vitiated by the eviction.<sup>240</sup> He believed that the court's holding could be used to circumvent the Fourth Amendment

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230. *Id.* at 471.

231. *Tilghman v. State*, 624 S.W.3d 801, 805 (Tex. Crim. App. 2021) (citing *Voelkel v. State*, 717 S.W.2d 314, 315 (Tex. Crim. App. 1986)).

232. *Id.* at 805.

233. *Id.* at 806.

234. *Id.*

235. *Id.* at 808 (citing *Voelkel*, 717 S.W.2d at 315–16).

236. *Id.* at 809–10.

237. *Id.* at 811.

238. *Id.* at 811–12.

239. *Id.* at 812 (McClure, J., concurring).

240. *Id.* at 813.

by hotel staff taking affirmative steps to evict an occupant without notice, allowing the police to immediately search any room on the property without concern of violating the Fourth Amendment.

F. *DIAZ V. STATE*, 632 S.W.3D 889 (TEX. CRIM. APP. 2021)—MUST UNTESTED STATEMENTS OF A CONFIDENTIAL INFORMANT BE EXCISED FROM A PROBABLE CAUSE AFFIDAVIT IN A *FRANKS* ANALYSIS WHEN THE INFORMANT WAS INTENTIONALLY MISIDENTIFIED AS AN ANONYMOUS SOURCE?

The Court of Appeals for the Fourteenth District of Texas at Houston’s decision in this case was discussed in last year’s article. Now, the Texas Court of Criminal Appeals has issued its opinion. Nelson Garcia Diaz, the appellant, and another broke into a Houston home where a police officer lived. Gunfire was exchanged, and the police officer was shot in the leg.<sup>241</sup> Fleeing the scene, the appellant and his partner dropped some of their own belongings—a pair of sunglasses worn by the appellant, the back cover of a cell phone, and a cell phone battery—which eventually led to their arrest.<sup>242</sup> After the burglary, the appellant’s partner spoke with an acquaintance who, unbeknownst to the partner, was a confidential informant for the DEA.<sup>243</sup> The partner told the CI that the appellant was “Jessie”<sup>244</sup> and, eventually, the appellant was fully identified.<sup>245</sup> Police arrested the appellant in Houston based on outstanding arrest warrants for armed robbery and kidnapping out of Georgia and performed a search incident to arrest.<sup>246</sup> Law enforcement found three cell phones on the appellant’s person<sup>247</sup> and sought a search warrant for the phones. In the probable cause affidavit, the investigator identified the source of the tip leading to the appellant’s apprehension as an anonymous tipster, not a criminal informant.<sup>248</sup> The appellant sought and obtained a *Franks* hearing.

On appeal, the appellant argued:

(1) the affidavit and warrant failed to establish that the specifically described property or items to be searched constituted evidence of the offense or evidence that appellant committed the offense; (2) the warrant impermissibly allowed a general search of the phones; and (3) the search warrant misrepresented the nature of the information leading the State to investigate the appellant, including that the investigator incorrectly characterized the DEA confidential informant as an “anonymous” source, which the trial court found was made attested to with reckless disregard for the truth.<sup>249</sup>

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241. *Id.* at 814.

242. *Diaz v. State*, 632 S.W.3d 889, 893 (Tex. Crim. App. 2021).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 891.

249. *Id.* at 889.



The court of appeals, however, found no *Franks* violation because the misstatement was not material: the crucial information was true and corroborated by the DEA agents.<sup>250</sup> Justice Spain dissented and argued that the majority did not address the distinction between the inherent reliability of citizen informants versus confidential informants who are not considered inherently reliable.<sup>251</sup> The justice took issue with the anonymous tip coming from a paid DEA informant and would have held that the misrepresentation in the affidavit was material, given the difference in presumptions applicable to different types of informants,<sup>252</sup> and that the remaining allegations in the affidavit did not amount to probable cause.<sup>253</sup>

On petition for discretionary review, the court of criminal appeals reviewed the *Franks* issue in three parts: (1) the mischaracterization of the DEA informant as an anonymous tipster, (2) the investigator's "implicit claim that he reached out to the DEA" instead of the reverse, and (3) the investigator's claim that "he asked the DEA to check the phone numbers" when the DEA did it on their own.<sup>254</sup> The court determined that the reliability of an informant depends on facts from which reasonable inferences can be drawn that they are credible or that their information is reliable regardless of whether the informant is anonymous or confidential.<sup>255</sup> The informant, for example, may provide the necessary probable cause if they have a proven track record or, as it is here, if the information is corroborated.<sup>256</sup> The credibility or reliability must fall "within the four corners of the affidavit."<sup>257</sup> Considering this rubric, the court compared the undisputed portions of the affidavit to the disputed portions.<sup>258</sup> The court determined that it was irrelevant that the officer said in the affidavit that the source of the information was an anonymous tipster because the credibility of criminal informants and anonymous tipsters are treated the same way and that the information was corroborated.<sup>259</sup> The court also determined that the party who initiated the trace to the appellant's phone (local police or the DEA) is immaterial because it is not necessary for the finding of probable cause.<sup>260</sup> The court of criminal appeals observed that, while the dissenting opinion from the court of appeals appropriately criticized the majority for crossing over the four corners of the affidavit, it overlooked the corroborating evidence within

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250. *Diaz v. State*, 604 S.W.3d 595, 600 (Tex. App.—Houston [14th Dist.] 2020, pet. granted).

251. *Id.* at 602.

252. *Id.* at 607 (Spain, J., dissenting) (citing *State v. Duarte*, 389 S.W.3d 349, 357 (Tex. Crim. App. 2012)).

253. *Id.* at 608.

254. *Id.*

255. *Diaz v. State*, 632 S.W.3d 889, 892 (Tex. Crim. App. 2021).

256. *Id.* at 894.

257. *Id.* at 893.

258. *Diaz*, 632 S.W.3d at 893; *see Franks v. Delaware*, 438 U.S. 154, 165 (1978); *see State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012).

259. *Diaz*, 632 S.W.3d 893–94.

260. *Id.* at 894–95; *see Duarte*, 389 S.W.3d at 357–58.

it.<sup>261</sup> The corroborating evidence within the affidavit stated that the appellant “could not be excluded as a source of DNA found on the sunglasses left at the scene by the shooter,” thereby supporting a finding of probable cause.<sup>262</sup> Finally, the court also determined that the appellant failed to meet his burden to prove false the implication that the investigator contacted the DEA on his own.<sup>263</sup> The judgment of the court of appeals was thus affirmed.<sup>264</sup>

G. *DAY v. STATE*, 614 S.W.3D 121 (TEX. CRIM. APP. 2021)—DO EXCLUSIONARY RULE PRINCIPLES APPLY TO THE OFFENSE OF EVADING ARREST OR DETENTION BECAUSE ONE ELEMENT UNDER THE STATUTE IS THAT THE ARREST OR DETENTION MUST BE “LAWFUL”?

In this case, a marshal was waiting in front of a residence to serve a traffic warrant on Danny Branton.<sup>265</sup> Six people arrived while the marshal was there.<sup>266</sup> One of those people was the appellant.<sup>267</sup> The uniformed marshal confronted the group and asked where the appellant was,<sup>268</sup> but no one responded. The marshal asked to see everyone’s identification, and two of the individuals left the scene before the marshal could stop them.<sup>269</sup> The marshal checked the identifications for the remaining four and for outstanding warrants.<sup>270</sup> The appellant, who stayed, told the marshal that he was not Danny Branton. However, the license check indicated that the appellant had an outstanding warrant out of Tarrant County.<sup>271</sup> The appellant realized that he was going to be arrested and started to walk to one of the vehicles under the guise of making a phone call.<sup>272</sup> Instead, the appellant attempted to flee to a vehicle as the marshal told him, “you can’t leave, you’re under arrest.” The appellant walked away, then began running.<sup>273</sup> He was arrested before he could get away.<sup>274</sup>

At trial, the appellant filed a motion to suppress all evidence obtained after the marshal found out that the appellant was not the person he was searching for.<sup>275</sup> The court denied the motion, finding that there were objective facts that showed the short detention was reasonable.<sup>276</sup> The appellant was told he could request an Article 38.23 jury instruction (the

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261. Diaz, 632 S.W.3d at 895; see Franks, 438 U.S. at 155–56.

262. Diaz, 632 S.W.3d at 895.

263. *Id.* at 896.

264. *Id.* at 895; see Franks, 438 U.S. at 171.

265. Diaz, 632 S.W.3d at 895.

266. Day v. State, 614 S.W.3d 121, 123 (Tex. Crim. App. 2020).

267. *Id.*

268. *Id.*

269. *Id.* at 124.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

Texas exclusionary rule instruction) if the issue was raised again.<sup>277</sup> At the close of evidence, the appellant re-urged his motion to suppress, which was again denied.<sup>278</sup> The appellant then moved for a directed verdict on the ground that the State failed to prove the appellant was fleeing a lawful detention or arrest.<sup>279</sup> The trial court denied the motion, stating that the jury should decide whether the State had proved the detention was legal.<sup>280</sup> The appellant requested a 38.23 jury instruction, which instructed the jury to disregard evidence obtained as a result of the warrant and the flight if they believed the detention was unlawful.<sup>281</sup> “The jury found the appellant guilty.”<sup>282</sup>

On appeal, the appellant argued that there was insufficient evidence to support his conviction and that his detention was unlawful even after the discovery of the Tarrant County warrant.<sup>283</sup> The Court of Appeals for the First District of Texas at Houston agreed. According to the court of appeals, the detention should have ended once the marshal realized that the appellant was not the person the marshal was searching for.<sup>284</sup> Despite their finding regarding the detention, the court of appeals concluded that “a pretrial motion to suppress is not a proper [procedural vehicle] to challenge the legality of an arrest in a prosecution for evading arrest because . . . ‘lawful detention’ . . . is an element of the offense.”<sup>285</sup>

The State Prosecuting Attorney (SPA) filed a petition for discretionary review, which was granted by the Texas Court of Criminal Appeals. The first and only issue the court addressed was the SPA’s ground for asking, “can the officer’s attempt to detain or arrest a suspect, which is otherwise lawful, be tainted by an earlier illegality and thereby negate evading’s lawful-arrest-or-detention element of evading, just as evidence is tainted under fruit-of-the-poisonous-tree?”<sup>286</sup> The court of criminal appeals found that the statutory language of the evading statute plainly requires proof that “an attempted arrest or detention is lawful at the time the person flees”<sup>287</sup> as an element of the offense and further noted that “the statute contains no exceptions or defenses based upon the officer’s conduct before or after a person flees the officer’s attempt to arrest or detain.” The court additionally recognized that the exclusionary rules serve a different purpose than the evading arrest statute—exclusionary rules are designed to deter future police misconduct while the penal statute is meant to punish someone who flees lawful police conduct—and that Arti-

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277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 124–25.

282. *Id.* at 125.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 125 (citing *York v. State*, 342 S.W.3d 528, 544 (Tex. Crim. App. 2011)); *Woods v. State*, 153 S.W.3d 413, 415 (Tex. Crim. App. 2005).

287. *Day*, 614 S.W.3d at 125.

cle 38.23 is invoked *after* a crime is committed.<sup>288</sup> Here, however, no evidence of the appellant's evasion existed before the challenged actions of the marshal.<sup>289</sup> The court further explained that its resolution was consistent with its decisions in *Woods v. State*<sup>290</sup> and *York v. State*.<sup>291</sup> According to the Texas Court of Criminal Appeals, the court in *Woods* held that a defendant cannot argue in an evading case that an initial illegal detention and subsequent arrest should be suppressed through a motion to suppress; instead, it must be challenged by asking for a directed verdict.<sup>292</sup> In *York*, the Texas Court of Criminal Appeals held that when the legality of an arrest or detention is an element of the offense, the issue should be litigated as part of the State's case at trial, not as a pretrial or trial suppression issue. The court went on to conclude that a rational jury could have reasonably inferred that the marshal was legally detaining the appellant on an existing warrant at the moment of flight,<sup>293</sup> and, as such, it reversed the judgment of the court of appeals and remanded the case to address the appellant's remaining points of error.<sup>294</sup>

H. *WHEELER v. STATE*, 616 S.W.3D 858 (TEX. CRIM. APP. 2021)—  
DOES THE GOOD FAITH EXCEPTION TO ARTICLE 38.23 APPLY WHEN A  
POLICE OFFICER SUBMITTED AN UNSWORN PROBABLE CAUSE  
AFFIDAVIT, THEN EXECUTED A SEARCH WARRANT.

A Pantego Police Officer arrested Chase Erick Wheeler, the appellant, for driving while intoxicated. The appellant declined to participate in standard field sobriety tests or to provide a breath or blood sample.<sup>295</sup> The officer sought a search warrant to take a blood sample, and he used template “forms for the probable cause affidavit, search warrant, return, and an order for assistance.”<sup>296</sup> The probable cause affidavit required an oath, but the officer signed the affidavit sans oath and left the signature line for the jurat blank.<sup>297</sup> The magistrate signed the warrant and the jurat without noticing the anomaly, and the officer then executed it.<sup>298</sup>

After being charged, the appellant filed a motion to suppress all blood evidence pursuant to Article I, Section 9 of the Texas Constitution and Article 18.01(b) of the Texas Code of Criminal Procedure.<sup>299</sup> The officer admitted at the hearing that he did not swear to an oath, but he stated

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288. *Id.* at 127.

289. *Id.* at 128–29 (citing *Martinez v. State*, 91 S.W.3d 331, 340 (Tex. Crim. App. 2002)).

290. *See id.* at 129; *see State v. Iduarte*, 268 S.W.3d 544, 551 (concluding that the exclusionary rule did not apply to the case because evidence of Iduarte pointing a gun at the officer was a subsequent independent criminal act of assault that was not casually connected to the officer's prior unlawful entry into Iduarte's apartment).

291. *Day*, 614 S.W.3d at 129 (citing 153 S.W.3d 413, 415 (Tex. Crim. App. 2005)).

292. *Id.* (citing *York v. State*, 342 S.W.3d 528, 544 (Tex. Crim. App. 2011)).

293. *Id.* (citing *Woods*, 153 S.W.3d at 414–15).

294. *Id.* at 130.

295. *Id.*

296. *Wheeler v. State*, 616 S.W.3d 858, 860 (Tex. Crim. App. 2021).

297. *Id.* at 861.

298. *Id.*

299. *Id.*

that he did not believe he was required to under his department's protocol.<sup>300</sup> The officer claimed he had never sworn an oath before and that, otherwise, the warrant had no noticeable defects.<sup>301</sup> The magistrate testified that she failed to realize the mistake and did not notice any defect in the affidavit.<sup>302</sup> The motion was denied, and the appellant pled guilty.

On appeal, the Court of Appeals for the Second District of Texas at Fort Worth held that the warrant was defective, and it concluded that the officer was objectively unreasonable in relying on a warrant he knew was based on an unsworn affidavit.<sup>303</sup> The court of appeals further found the error to be harmful.

The State filed a petition for discretionary review in the Texas Court of Criminal Appeals.<sup>304</sup> The court of criminal appeals stated that a sworn probable cause affidavit is needed for a search warrant to be valid:<sup>305</sup> "An oath is any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully."<sup>306</sup> The court observed that Texas law "has always required that the oath must be made 'before' or in the presence of another to convey the solemnity and critical nature of being truthful"<sup>307</sup> and that its decision in *McClintock v. State*<sup>308</sup> favored an interpretation of Article 38.23(b) that the "objectively reasonable officer" standard was intended to explain the statutory requirement of good faith.<sup>309</sup> Applying the statute's requirement, the court of criminal appeals concluded that it is irrelevant whether the officer subjectively acted in good faith because no objectively reasonable officer could have acted the same under this set of facts<sup>310</sup> The court of criminal appeals affirmed the judgment of the court of appeals.<sup>311</sup>

The dissent, joined by two other judges, concluded *McClintock* was distinguishable and argued that the majority reached the wrong result because the good faith exception should have applied.<sup>312</sup> According to the dissent, the officer acted in good faith because, believing that there was nothing deficient on the face of the warrant, the officer believed he was following his department protocol, and he did not intentionally mislead the magistrate.<sup>313</sup> The dissent further noted that no one ever accused the

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300. *Id.* (citing TEX. CONST. art. I, § 9; TEX. CODE CRIM. PROC. ANN. art. § 18.01(b)).

301. *Id.* at 861–62.

302. *Id.* at 862.

303. *Id.*

304. *Id.* (citing *Wheeler v. State*, 573 S.W.3d 437, 446 (Tex. App.—Fort Worth 2019, pet. granted)); see *McClintok v. State*, 541 S.W.3d 63, 72 (Tex. Crim. App. 2017) (stating no objectively reasonable officer could reasonably believe that a sworn affidavit is not required).

305. *Wheeler*, 616 S.W.3d at 863.

306. *Id.* at 864.

307. *Id.* (quoting *Vaughn v. State*, 177 S.W.2d 59, 60 (Tex. Crim. App. 1943)).

308. *Id.* (citing *Clay v. State*, 391 S.W.3d 94, 98–99 (Tex. Crim. App. 2013)).

309. 541 S.W.3d at 73.

310. *Wheeler*, 616 S.W.3d at 866.

311. *Id.* at 867.

312. *Id.*

313. *Id.* at 868 (Hervey, J., dissenting).

officer of intentionally misleading the magistrate, and that suppressing the evidence would not deter future police misconduct and would instead “penalize the police (and society) when the pertinent mistake was made by the magistrate in issuing the warrant.”<sup>314</sup>

I. *MARTIN v. STATE*, 620 S.W.3D 749 (TEX. CRIM. APP. 2021)—IS A POLICE OFFICER’S WARRANTLESS ENTRY INTO AN APARTMENT TO CONDUCT A SAFETY CHECK REQUESTED BY A FIREFIGHTER REASONABLE BECAUSE THE FIRE WAS AN EXIGENT CIRCUMSTANCE?

Firefighters responded to a fire at the appellant’s home and extinguished a small stovetop fire.<sup>315</sup> The electricity was turned off and the apartment was ventilated for safety.<sup>316</sup> One of the firefighters observed a torch, plastic baggies, and an unmarked pill vial in plain view, as well as multiple firearms, including a rifle hidden under some blankets.<sup>317</sup> Concerned about his safety and that of the other firefighters, he called police for assistance.<sup>318</sup> An officer arrived on the scene to assist without any knowledge of what was inside. He believed that he was dispatched to assist with a structure fire.<sup>319</sup> The battalion chief informed the officer of his safety concerns while outside the apartment and that he wanted him to perform a safety check.<sup>320</sup> Without the appellant’s consent, but believing that other firefighters were still securing the scene, the officer entered the apartment to conduct a protective sweep.<sup>321</sup> The officer saw the same items the firefighter initially saw in plain view, including a plastic baggie with a white, crystal-like substance, glass pipes, and water pipes with residue.<sup>322</sup> The appellant was arrested for possession of drug paraphernalia.<sup>323</sup> Upon execution of a search warrant later that night by a narcotics officer, methamphetamine that had not been in plain view was found, and the appellant was charged for possession of methamphetamine.<sup>324</sup>

The appellant filed a motion to suppress.<sup>325</sup> He argued that the officers had no lawful basis for entering his apartment, so what they saw, even if in plain view, could not supply probable cause for the search warrant, and further argued there were no exigent circumstances for the entry because the fire was already doused.<sup>326</sup> The State argued that because the firefighters were lawfully present in the apartment due to the exigency of the fire, they were permitted to seize anything within plain view and that

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314. *Id.* at 868–69.

315. *Id.* at 869.

316. *Martin v. State*, 620 S.W.3d 749, 754 (Tex. Crim. App. 2021).

317. *Id.*

318. *Id.*

319. *Id.* at 755.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 756.

325. *Id.* (See TEX. HEALTH & SAFETY CODE ANN. § 481.115(c)).

326. *Id.*

the police should be able to “step into the shoes” of the firefighters for the same purpose.<sup>327</sup> The trial court denied the motion and made fact findings that there were exigent circumstances after finding the testimony of both the officer and the firefighter credible.<sup>328</sup>

On appeal, the Court of Appeals for the Second District of Texas at Fort Worth held that if firefighters discover evidence of criminal activity in the course of a lawful entry during exigent circumstances, they may seize evidence in plain view.<sup>329</sup> The court of appeals extended that reasoning to the police officer because the exigency continued “for a reasonable time to allow firefighters to complete their duties, and it was within this window that [the officer] conducted his investigation.”<sup>330</sup> The court of appeals further concluded that the officer could step into the firefighters’ shoes and that his entry was lawful.<sup>331</sup>

On petition for discretionary review, the Texas Court of Criminal Appeals agreed with the conclusion of the intermediate court but used different reasoning.<sup>332</sup> The court of criminal appeals decided against the application of a broad rule that an officer may always “step into the shoes” of a firefighter during the course of an exigency to observe and seize contraband that is in plain view.<sup>333</sup> Instead, the court addressed the facts of the case and whether the exigency of the fire justified the officer’s warrantless entry when he arrived at the request of the firefighter.<sup>334</sup> The court of criminal appeals found *Michigan v. Tyler*<sup>335</sup> persuasive. In that case, the U.S. Supreme Court held that a search warrant is not needed when a fire or police official enters a structure during or in the immediate aftermath of a fire to conduct legitimate duties connected to the original exigency of the fire.<sup>336</sup>

The appellant also challenged whether the affidavit prepared by the narcotics officer was supported by probable cause however the court instead found that it was based on the observations of the first police officer and the fireman that contacted him.<sup>337</sup> The court of criminal appeals excised all challenged portions of the affidavit prepared by the narcotics investigator and determined that the remaining facts, standing on their own, still established probable cause that drugs would have been found in the appellant’s apartment.<sup>338</sup> The judgment of the court of appeals was affirmed.<sup>339</sup>

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327. *Id.*

328. *Id.* at 756–57.

329. *Id.* at 757.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 758.

334. *Id.*

335. *Id.* at 761.

336. 436 U.S. 499, 509 (1978).

337. *Id.*

338. Martin, 620 S.W.3d at 762–63.

339. *Id.* at 765–66.