A
Peace Officer's Guide to Texas Law

2023 Edition

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PREFACE

This 2023 Peace Officer Guide is a continuation of a semi-annual series published by the Texas Police Association for many years as a service to its members. The Guide is a compendium of reports from the Legal Digests of the Texas Police Association from September 2021, to August 2023. The editor has attempted to select those court decisions which are of significance to the working law enforcement officer and, within those selections, has attempted to identify and present the information pertinent to the daily work of police officers in Texas. This Guide is dedicated to the men and women of Texas law enforcement and especially to those officers wounded or killed in the line of duty and to their families. The Legislative portion of the Guide is merely a start to identifying the many, many provisions of the recent Texas Legislature actions related to law enforcement. The reader is directed to the TCOLE update class pertaining to that legislative session.

Joe C. Tooley

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1. BRADY CASE -- Conviction dismissed for Brady violation.

Applicant was convicted of unlawful possession of a firearm by a felon and sentenced to three years' imprisonment. He did not appeal his conviction. Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court.

Applicant contends, among other things, that his plea was involuntarybecause it was induced by material misrepresentations by law enforcement officers in their probable cause affidavit and incident reports that the search and subsequent discovery of the firearm in Applicant's hotel room were done legally. Based on the record, the trial court has determined that Applicant's plea was involuntary.

Relief is granted. Brady v. United States, 397 U.S. 742 (1970). The judgment in cause number F-20-60819-V in the 292nd District Court of Dallas County is set aside, and Applicant is remanded to the custody of the Sheriff of Dallas County to answer the charges as set out in the indictment. The trial court shall issue any necessary bench warrant within ten days from the date of this Court's mandate.

Dissent by J. Yeary: Today the Court concludes that Applicant's guilty plea was entered involuntarily, and it grants him a new trial. I disagree with that disposition and think that we should remand the cause for additional fact development relating to Applicant's claim that his guilty-plea counsel rendered ineffective assistance in counseling him to accept the plea though a basis existed to suppress crucial state's evidence in the case. But because I would not grant Applicant a new trial at this point, without a complete record on Applicant's ineffective assistance of counsel claim, I respectfully dissent.

Called to a motel at which gunshots had been reported in a hallway, police officers found shell casings in front of Applicant's motel room door and knocked. Applicant opened the door, but he immediately closed it again. Officers heard what sounded like a "handgun chambering a round" inside and began to issue verbal commands through the door. When Applicant again opened the door, the police immediately rushed in and subdued him. Conducting a protective sweep, the officers found a gun holster, but no gun. Applicant eventually told them the gun was under the mattress. He was arrested and pled guilty within a few weeks, in a plea bargain in which he obtained a three-year penitentiary sentence on a charge of possession of a firearm by a felon, enhanced to a second-degree felony. As part of the guilty plea, the State agreed to drop a misdemeanor charge against him for firing the gun off in the hallway. In addition, his court-

appointed trial attorney hoped to persuade federal prosecutors not to seek federal gun-possession charges since he would already be serving state penitentiary time. Not long after Applicant's guilty plea, the State revealed to the defense for the first time that police body cam recordings existed which showed facts about which Applicant's counsel had been unaware when advising Applicant whether to accept the State's plea offer. The body cam recordings revealed that, after Applicant was subdued and handcuffed, he at first refused to reveal the whereabouts of the gun. Officers then took him out into the hallway, and the door to the motel room closed and automatically locked, so that officers could not gain readmission. While out in the hallway, Applicant finally told police that the gun was under the mattress. They obtained a room key from the motel clerk and re-entered the room to retrieve the gun—without first obtaining a search warrant. Habeas counsel was appointed, and Applicant now makes three claims in his Article 11.07 post-conviction application for writ of habeas corpus.

He claims that the State's failure to disclose the body cam video prior to his guilty plea violated Brady v. Maryland, 373 U.S. 83 (1963). Relatedly, he claims that the deprivation of this information prior to his guilty plea rendered the plea involuntary. And finally, he claims that, in any event, his trial counsel performed in an unconstitutionally ineffective manner when he recommended that Applicant accept the State's plea bargain before he had adequately investigated the facts of the case.

The Conviction Integrity Unit of the Dallas County District Attorney's Office has conceded that Applicant is entitled to relief on his first two claims, while withholding judgment with respect to his claim of ineffective assistance of counsel. The convicting court has, accordingly, entered recommended findings of fact and conclusions of law in which it urges this Court to grant relief on Applicant's Brady claim and his claim that his plea was involuntary. The convicting court has made no recommendation, however, regarding Applicant's ineffective assistance claim. Today, the Court grants relief exclusively on Applicant's claim that his plea was rendered involuntary by the State's tardy disclosure of the body cam video. Because I believe that granting relief on that basis is inappropriate, I respectfully dissent. I will discuss Applicant's first two claims together, and then separately address his ineffective assistance of counsel claim.

This Court has yet to definitively say, in a published opinion, whether or not Brady applies to a guilty-plea scenario. But even if we had, Brady would not apply to render Applicant's guilty plea involuntary based on a missed opportunity to exclude inculpatory evidence via a motion to suppress on Fourth Amendment grounds. The State has not withheld exculpatory evidence; there is no suggestion that Applicant did not actually commit the offense to which he pled guilty. I therefore dissent to granting relief, particularly in an abbreviated per curiam opinion, on the basis of Applicant's claim that his plea was rendered involuntary.

The United States Supreme Court has made it clear that not every failure on the State's part to impart relevant information to an accused ahead of a guilty plea proceeding will render his choice to accept a guilty plea involuntary for due process purposes. In United States v. Ruiz, 536 U.S.

622 (2002), it held that the failure to disclose evidence that would have served to impeach a state's witness, had the case gone to trial, did not render the guilty plea so uninformed as to affect the voluntariness of the plea. "To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with is accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." Among the examples the Supreme Court gave of circumstances about which a defendant who pleads guilty need not be aware is that the admissibility of his out-of-court confession could have been challenged in court.

Here, while Applicant may have been unaware of the existence of the body cam video when he entered his guilty plea, he was present when the police officers re-entered his motel room without a warrant, and so he was aware of the circumstance that might have rendered admission of the gun at a subsequent trial challengeable. That Applicant's lawyer may not have discovered enough about the case to recognize the Fourth Amendment significance of that circumstance before advising him to plead guilty seems to me to be a matter of the potential ineffectiveness of his counsel, not the voluntariness of his plea. To me, this case sounds an awful lot like Richardson.

What is more, Ruiz also held that due process does not even require the Government to disclose evidence of which it is aware at the time of a guilty plea that would establish that the accused may have an affirmative defense to prosecution or that a witness may be impeached. That being so, it is hard to imagine how an accused's ignorance of a potential Fourth Amendment basis to challenge the admissibility of evidence in court could prove fatal to the voluntariness of his guilty plea. The Court does not explain why it should in its per curiam opinion today.

Rather than to grant Applicant relief on his claim that his guilty plea was involuntary, I would remand the cause for further fact development of his ineffective assistance of guilty-plea counsel, and for recommended findings of fact and conclusions of law with respect to that issue from the convicting court. I respectfully dissent.

***Ex Parte Yearling*, No. WR-93,662-01, Ct. Crim App. May 25, 2022.**

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2. SEARCH & SEIZURE

Cell phone search w/o warrant, good faith exception to exclusionary rule. **Border Exception.**

Alfredo Aguilar, Jr. attempted to cross into the United States from Mexico with two female associates both of whom carried large cans filled with methamphetamine. After detaining Aguilar, United States Customs and Border Protection (CBP) agents forensically searched his cell phone without a warrant. Soon after, Aguilar was charged with multiple counts of narcotics conspiracy, possession, and importation. The district court denied Aguilar's motion to suppress the evidence found during the forensic search of his cell phone, and following a stipulated bench trial, found Aguilar guilty on all counts in the indictment. Aguilar appeals only the denial of the motion to suppress. Because the CBP agents acted in good faith when searching Aguilar's phone, we affirm.

The Gateway to the Americas International Bridge connects Nuevo Laredo, Mexico with Laredo, Texas. Because the bridge is a port of entry to the United States, any person crossing the bridge from Mexico to the United States must pass CBP primary inspection and, if the reviewing CBP officer thinks necessary, secondary inspection.

At 11:00 p.m. on May 15, 2018, Aguilar, accompanied by Cristin Cano and Cristal Hernandez, attempted to enter the United States on foot by crossing the Gateway to the Americas International Bridge. Cano was carrying two plastic-wrapped one-gallon cans that were labeled as containing hominy beans. Hernandez carried similar cans that were labeled as containing jalapeños. CBP Officer Saucedo was the primary inspection agent who interviewed Cano and Hernandez. Saucedo was suspicious of the heft and sound of the cans, so he referred the women to the secondary inspection area. The secondary inspection agent, CBP Officer Trevino, first interviewed Cano alone and then Hernandez and Cano together. Trevino was suspicious about the cans' contents because most cans of jalapeños contain vinegar, but when he shook these cans, it sounded like there was no liquid inside the cans. Trevino's suspicion was further heightened because the women said that the cans contained ingredients for the Mexican soup menudo when he had never known anyone to include jalapeños in menudo. Trevino thus decided to have a K9 unit inspect the cans. Meanwhile, Aguilar was being screened by CBP Officer Serna at the primary inspection point. When Serna ran Aguilar's Texas driver's license through a customary database search, he received an alert that Aguilar previously had been arrested for smuggling two undocumented aliens into the United States. Serna then asked Aguilar if he was traveling with anyone else, and Aguilar indicated that he was traveling with the two women who had been inspected by Saucedo. Serna then sent Aguilar to the secondary inspection area. During the secondary inspection, Aguilar told CBP agents that he and the two women had gone to Mexico to buy ingredients for menudo and that he had been the one to pay for the groceries.

When the K9 unit arrived, there was a K9 alert on the cans carried by Cano and Hernandez. And an x-ray of the cans revealed anomalies. Following the x-ray, the CBP contacted Homeland Security Investigations Special Agent Salinas to continue the investigation. When Salinas arrived,

he interviewed Cano and Hernandez, but Aguilar declined to provide a statement. The next afternoon, Salinas took custody of Aguilar's phone. Nine days later, another agent forensically examined the phone's SIM card without a warrant. The forensic data search of Aguilar's cell phone showed that he had recently placed six outgoing calls to phone numbers in Mexico.

Eventually, the law enforcement investigation revealed that the cans carried by Cano and Hernandez contained 10.7 kilograms of methamphetamine. Because of his connection to Cano and Hernandez, Aguilar was charged with conspiring to import more than 50 grams of methamphetamine into the United States and with importing more than 50 grams of methamphetamine in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1)(H), 963. He also was charged with conspiring to possess more than 50 grams of methamphetamine with the intent to distribute and with possessing more than 50 grams of methamphetamine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846. Following his indictment, Aguilar moved to suppress the evidence obtained from the forensic examination of his cell phone. The district court held an evidentiary hearing and denied Aguilar's motion, reasoning "that the agents acted reasonably . . . pursuant to a good-faith belief that they could search [the] phone and its contents." Soon thereafter, Aguilar agreed to a stipulated bench trial, and the district court found Aguilar guilty on all counts. Notably, none of the evidence recovered from the forensic search of Aguilar's phone was included in the facts stipulated to at the bench trial. Aguilar appeals the denial of the motion to suppress.

Having determined that the district court's denial of Aguilar's motion to suppress is properly before us, we turn to the merits of the motion to suppress ruling. "When reviewing a denial of a motion to suppress evidence, we review factual findings for clear error and the ultimate constitutionality of law enforcement action *de novo*." Because the government prevailed below, we view the evidence in the light most favorable to it.

Aguilar argues that the Supreme Court's decision in *Riley v. California*, 573 U.S. 373, 393–97 (2014), which recognized a heightened privacy interest in smart phones, bars warrantless forensic searches of cell phones at the border. The district court did not reach this issue, but instead, held that regardless of whether there was a Fourth Amendment violation, the evidence obtained from Aguilar's cellphone should not be suppressed because the agents who conducted the forensic search acted in good faith.

Starting with the basics, the Fourth Amendment prohibits unreasonable searches and seizures. *See* U.S. Const. amend. IV. When government officials conduct a search in violation of the Fourth Amendment, prosecutors are barred from introducing evidence obtained in the unlawful search at trial. *See United States v. Ganzer*. But, as the district court noted, there is the good faith exception to the exclusionary rule. Under this exception, "evidence is not to be suppressed . . . where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." This exception thus applies when government officials "acted reasonably in light of the law existing at the time of the search." Accordingly, to determine whether the district court properly applied the good faith exception to deny Aguilar's motion to suppress, we ask: **What was the law at the time of the search, and secondly,**

was CBP's forensic search of Aguilar's cell phone objectively reasonable in the light of the then-existing law?

(*emphasis by ed. This is the question on the good faith exception.*)

[***The Border Exception***:] Although the Fourth Amendment applies at the border, its protections are severely diminished. At the border, "[t]he government's interest is at its 'zenith' because of its need to prevent the entry of contraband . . . and an individual's privacy expectations are lessened by the tradition of inspection procedures at the border." Accordingly, the border-search exception allows officers to conduct "routine inspections and searches of individuals or conveyances seeking to cross [United States] borders" without any particularized suspicion of wrongdoing. Individualized suspicion may, however, be required if a border search is "highly intrusive" or impinges on "dignity and privacy interests."

Neither this court nor the Supreme Court has announced whether forensic digital border searches require individualized suspicion. But, at the time of the search of Aguilar's phone, the Ninth Circuit, the Fourth Circuit, and a Maryland district court had concluded that forensic digital border searches require reasonable suspicion. It appears to us, however, that no court had required a warrant to conduct a forensic search of a cellphone at the border.

Given the state of the law at the time Aguilar's phone was forensically searched, we conclude that the border agents had a good faith, reasonable belief that they could search Aguilar's phone without obtaining a warrant. At the time of the search, CBP knew Aguilar had attempted to cross the border with Cano and Hernandez who were carrying four cans that physical inspection and x-rays revealed to be suspicious. Further, a K-9 unit had alerted the agents to the presence of narcotics in the cans, and Aguilar had implicated himself as the purchaser of the cans' contents. Thus, there was clearly "a particularized and objective basis for suspecting [Aguilar] of criminal activity," which is all that is required to establish reasonable suspicion, the highest level of suspicion that had been required at the border at the time of the search. And, although *Riley* made clear that individuals have a heightened privacy interest in smart phones, this court has held post-*Riley* that border agents acted reasonably when they "continue[d] to rely on the robust body of pre-*Riley* caselaw that allowed warrantless border searches of computers and cell phones." We therefore agree with the district court that the good faith exception to the exclusionary rule applies to the forensic search of Aguilar's phone, and we affirm the district court's denial of Aguilar's motion to suppress.

To sum up: the only issue presented in this appeal is whether the district court erred in denying Aguilar's motion to suppress the information obtained from the forensic border search of his cell phone. And because the good faith exception to the exclusionary rule applies to the forensic search of Aguilar's phone, the district court did not err in denying Aguilar's motion to suppress. Accordingly, the judgment of the district court is, in all respects, AFFIRMED.
U.S. v. Aguilar, Jr., No. 19-40554, 5th Cir., Sept. 02, 2020.

SEARCH & SEIZURE – REASONABLE SUSPICION

Otha Ray Flowers, convicted of a federal gun violation, appeals the denial of his motion to suppress evidence as a violation of his Fourth Amendment rights. The questions on appeal are whether Flowers and Jeremy Mayo were "seized" when five or six patrol cars parked behind and around Mayo's Cadillac with their patrol lights flashing, and if they were seized, whether Officer Stanton had reasonable suspicion to conduct a "Terry stop." Under the circumstances of this case and viewing the facts in the light most favorable to the Government, assuming arguendo that these individuals were seized, there was reasonable suspicion to do so. We AFFIRM.

On Saturday, February 18, 2017, around 8:30 p.m., Officer Eric Stanton of the Jackson Police Department was patrolling an area of Jackson, Mississippi. Officer Stanton was a member of the Direct Action Response Team (DART), a proactive unit tasked to "look[] for suspicious behavior, suspicious activities, traffic stops, [and] things of that nature . . . ." On that night, Officer Stanton's supervisor had directed the DART to an area of Jackson, around Capitol Street and Road of Remembrance, where "recent violent crime and burglaries" had occurred.

As Officer Stanton was turning from Capitol Street onto Road of Remembrance, he saw a silver Cadillac parked in the south end of a small parking lot connected to an open convenience store. It was dark outside, but Officer Stanton observed that the vehicle was occupied by two men, one in the driver's seat and one in the passenger's seat. Officer Stanton observed the vehicle "for approximately 10 to 15 seconds" and noticed the occupants "didn't appear to be exiting the vehicle, [and] didn't appear to be patronizing the establishment." Therefore, he decided to conduct what he characterized as a "field interview."

Officer Stanton testified that at this point, he and five to six other officers, all in separate patrol cars, converged upon the silver vehicle with their blue lights activated. The parking lot in front of the store was narrow, with very little space or room to maneuver. Officer Stanton later acknowledged that it would have been impossible for the silver vehicle to leave the parking lot because of the way the officers parked their cars around it.

Officer Stanton got out of his patrol car and approached the silver vehicle, as did other officers. He testified that the men in the vehicle were still free to leave at this point in the encounter, but he did not communicate that to them. Flowers, sitting in the driver's seat, did not attempt to flee. As Officer Stanton approached, Flowers lowered the driver's side window. With the window down, Officer Stanton reported smelling "what appeared to be the strong odor of marijuana coming from the vehicle." Officer Stanton asked Flowers for identification and Flowers provided his Mississippi driver's license. According to Officer Stanton, the passenger in the vehicle— Jeremy Mayo—then threw an object into his mouth. In response, Officer Stanton ordered both men to exit the Cadillac. When Flowers stepped out of the vehicle, Officer Stanton saw in plain view a silver, .32-caliber revolver on the driver's seat where Flowers had been sitting. A criminal history check revealed that Flowers had an outstanding arrest warrant, and Officer Stanton placed him under arrest. During a search incident to his arrest, Flowers stated that he had marijuana on him, and Officer Stanton recovered a small, clear plastic bag of marijuana from his front left pocket. Officer Stanton identified this marijuana as the source of the odor he smelled upon approaching Flowers's driver-side window.

Flowers was charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before trial, Flowers moved to suppress evidence of the gun on the basis that the encounter with Flowers was a seizure that violated the Fourth Amendment. The district court explained orally on the record his reasons for rejecting the motion. The district court determined that there was "no evidence" that the "investigatory aspect of the initial approach of the officers ever evolved into a seizure." Flowers proceeded to trial, and a jury convicted him.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Evidence seized in violation of the amendment may be excluded from introduction at trial. A temporary, warrantless detention of an individual constitutes a seizure for Fourth Amendment purposes and may only be undertaken if the law enforcement officer has reasonable suspicion to believe that a crime has occurred or is in the offing. Importantly, however, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen…." …we construe the evidence presented at the suppression hearing "in the light most favorable to the prevailing party"—here, the Government. Because a seizure under the Fourth Amendment must be "justified at its inception," our first task is ordinarily to determine when the seizure occurred. Flowers contends that he was seized at the outset of the police encounter, when the patrol cars surrounded the vehicle in which he was sitting. The government contends that the police encounter with Flowers was consensual, and a seizure did not occur until after Officer Stanton smelled marijuana from Flowers's open window, giving rise to probable cause for arrest.

A seizure occurs when, under the totality of the circumstances, a law enforcement officer, by means of physical force or show of authority, terminates or restrains a person's freedom of movement. The test that applies in the absence of an unambiguous intent to restrain or upon a suspect's passive acquiescence is whether "in view of all of the circumstances…, a reasonable person would have believed that he was not free to leave." And the Court added to this test that when a person "'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."

The parties debate the existence of a "seizure" under the circumstances present here, and there appears to be no Fifth Circuit case where a law enforcement seizure occurred by the mere surrounding presence of police cars and Officer Stanton's non-threatening approach to Mayo's auto. We need not resolve that debate and will assume arguendo that the police cars' surrounding of the Cadillac, under the totality of circumstances, "seized" Flowers and Mayo. The district court principally viewed this incident as analogous to a stop-and-frisk situation, for which the court found reasonable suspicion under *Terry*. This conclusion, based on credibility determinations to which we are bound to defer, was sufficient to vindicate the officers' actions.

The following facts are determinative. The police were patrolling on Capitol and Remembrance, the exact streets where this arrest occurred, because of the prevalence of "violent crime and burglaries." The Supreme Court has noted, "the fact that [a] stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." In addition, Officer Stanton was no novice. He possessed an undergraduate degree in justice administration and a masters

degree in criminology and had ten years of law enforcement experience. In determining reasonable suspicion, courts must consider the facts in light of the officer's experience.

The officer saw a car parked in the convenience store lot as far as possible from the storefront, facing its brick wall rather than the glass door, so its occupants could not easily be viewed from within the store. Two males were in the car, and Officer Stanton observed that neither of them stepped out of the Cadillac heading toward the store for 10–15 seconds. The district court found the officer's testimony credible. Every case that turns on reasonable suspicion is intensely fact specific. The reasonable, articulable facts taken in context here supported an investigation at least to the point of the officer's dispelling the ambiguity in the situation.

In 1992, this court decided en banc that a police officer did *not* violate the Fourth Amendment when he "reached out and touched the pants pocket" of an individual who, appearing to be intoxicated, was standing in the road, at night, in a high crime area. As happened here, the individual was later convicted of illegally possessing a gun discovered during the frisk. We reiterated *en banc* the reasonableness of an officer's conduct during a stop and-frisk two years later in *United States v. Michelletti,* (officer lightly frisked pants pocket in which a man held his right hand while barging out of the back door of a bar at closing time, holding an open beer in his left hand, as he approached a group of police and individuals they were about to question). *Michelletti* noted that in the seminal *Terry* case, when detained by the police, the suspects had actually turned and began walking away from the store they had possibly been casing for later burglary. Moreover, in support of its conclusion, the Supreme Court relied heavily on the police officer's seasoned judgment of what the occasion demanded. Here, of course, we are not confronted with the additional physical invasion of a frisk, only the officer's attempt to question Flowers and Mayo, which was cut short by the marijuana odor wafting from their car. Time has not overborne these considered holdings in our circuit.

Ignoring these authorities, Flowers and the dissent cite other cases. The case most heavily relied upon by Flowers is *United States v. Hill*, but that case is distinguishable. First, the court held that there was no seizure until the officer took the suspect out of his car and told him to turn around and place hands on his car. The officer's merely approaching the car and insisting that the suspect talk to him did not trigger a seizure. Second, *Hill* has nothing to say about the circumstances preceding the officer's commands, other than that the elevated incidence of crime considered there spanned an entire county, not a single neighborhood as in this case. Third, apart from concern about crime in the county, the only facts supporting the seizure in *Hill* were that the man and woman were sitting in a car and the woman hastily exited when they noticed the police. Fourth, the car was parked in plain view in an apartment complex, a location where one would expect multiple cars to be parked, not in a suspicious spot as the only car in a convenience store lot.

Nor is our holding contrary to *United States v. Beck*, on which the dissent relies. In that case, the court held there was no reasonable suspicion for an afternoon seizure of two individuals seen parked in a car, where no crimes had been committed recently in the vicinity, and there was no reason to suspect the vehicle's occupants were engaging in improper conduct. In *Flowers,* however, the stop occurred at night in a neighborhood so unsavory it had a special task force assigned to patrol actively, and the defendants were parked suspiciously close to a convenience

store in a manner that suggested to the seasoned officer that its occupants might be casing the store or preparing to prey on patrons.

United States v. McKinney is also not helpful to the dissent. In that case, there was no suppression hearing in the district court, and this court's review was therefore de novo. Further, the defendant McKinney had entered a conditional guilty plea, and when this court found the facts insufficient to sustain reasonable suspicion as a matter of law, we remanded for a hearing and potentially a trial. Although *McKinney* is somewhat similar, its procedural posture prevents using that case as precedent here.

In any event, *McKinney* correctly observed that the reasonable suspicion analysis "depends on the combination of facts," [B]ut the combination of facts in *Flowers* is different. In *McKinney,* the court described the crime in the area as several recent drive-by shootings, which is serious to be sure, but does not present the same pervasive and continuous criminal pattern described in the case before us. It also appears that the officers in *McKinney* voiced a questionable and overbroad approach to policing that did not suffice to articulate a reasonable basis for suspicion. In this case, in a notoriously crime-ridden neighborhood, at night, two men were seen to be dawdling in a Cadillac parked out of view from inside the convenience store but also stationed where they could watch its entrance. Convenience stores are a type of establishment known to be frequent targets for theft, robbery, and burglary. Taken together, these facts present a similarly suspicious scenario to that which alerted the officer in *Terry*, and it captured the attention of the officer here. Finally, the non-threatening nature of Officer Stanton's approach to the car's occupants is supported here by the lack of hostility on the part of Flowers and Mayo, and indeed a reaction that indicated Flowers was attempting to cooperate with the "field interview."

It bears repeating that apart from the presence of a number of police cars, the tenor of Officer Stanton's encounter with Flowers was entirely benign until Stanton smelled marijuana. He conducted no physical frisk of Flowers's person but simply approached the Cadillac to ask some questions.

If this course of conduct is constitutionally impermissible, then it is difficult to see how any active policing can take place in communities endangered and impoverished by high crime rates.4 Officers in such areas may well require safety in numbers, while the law-abiding citizens desperately need protection that will be denied if law enforcement officials believe that incriminating evidence will be suppressed or they will be sued for alleged violations of rights. *Terry* prescribes a careful balance that protects individual rights, but not at the expense of reasonable law enforcement activity and officer safety. More recently commenting on these types of cases, the Supreme Court noted in *Illinois v. Wardlow*, "[e]ven in *Terry,* the conduct justifying the stop was ambiguous and susceptible of an innocent explanation." The Court rejected the proposition that because the suspect's flight from officers might have been innocent and "not necessarily indicative of ongoing criminal activity," the detention was constitutionally unreasonable. The Court reaffirmed that "officers c[an] detain individuals to resolve the ambiguity" in their conduct. Indeed, the Court emphasized that, in allowing such detentions, the Fourth Amendment "accepts the risk that officers may stop innocent people."

In the case before us, there is no indication that the officers were either abusive or threatening. Once Flowers opened his window, Officer Stanton smelled a distinct odor of marijuana, and immediately afterward he saw Mayo apparently attempting to swallow something that could be evidence. At that point, it is undisputed that he had probable cause to seize Flowers by asking him to step out of the car, leading to the immediate discovery of his pistol.
* * *
Based on the foregoing discussion, we AFFIRM the conviction.

***U.S. v. Flowers*, No. 20-60056, 5th Circuit, July 30th, 2021.**

SEARCH & SEIZURE Probable cause/Reasonable suspicion.

"This is where it gets good, man." This was Chimene Hamilton Onyeri's response to questions regarding charges pending against him for violent crimes. For Onyeri, criminal activity coalesced into daily life. Rather than obtain gainful employment to support himself, he engaged in a pattern of criminal conduct. And this pattern ultimately caught up to him when he attempted to assassinate a Texas state judge.

Onyeri appeals one count of his conviction for this pattern, namely his conviction for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). Substantively, he alleges three issues on appeal. For the reasons set forth below, we affirm the judgment of the district court on all issues. Onyeri's criminal activities involved a multitude of misdeeds that spanned almost half a decade. Pertinent to this appeal is his criminal misconduct from late 2011 to 2015, the years during which Onyeri gathered and led his associates to engage in racketeering activity, which he cavalierly nicknamed the "Chimene, Incorporation." Because of the nature of Onyeri's challenges on appeal, a summary of some of the evidence adduced at his trial aids our discussion. Onyeri recruited his friend Bernard Akwar to assist him in stealing credit card numbers through the use of a skimmer. As they perfected their craft, Onyeri also brought Henry Yehe into the enterprise, and Yehe would steal gift cards from the various stores they visited. Next, the conspirators would emboss the stolen credit card numbers onto the stolen gift cards and then encode the gift cards with the same credit card information. They converted these gift cards into cash by using them to purchase electronics and then selling the electronics for cash, or by using them to buy legitimate gift cards. Onyeri also engaged a bank employee to open a bank account for them using stolen identities. The conspirators placed some of their proceeds into that account.

Emboldened by their successes, Onyeri and Akwar also stole identities—"[n]ames, socials, and dates of birth"—to fabricate tax returns. They connected with Sherica Price, who would file the fraudulent returns for them. And, in the course of this scheme, they sought the assistance of several mailmen, bribing them into intercepting tax-refund checks on their behalves.

During the same period, Onyeri expanded this enterprise to include debit card fraud as well. He and Akwar researched "bezels," devices that would capture a debit card's information while it was used at an ATM, and they had one made to further their scheme. They also engaged Rasul Scott

and Marcellus Burgin to assist them. The combination of these activities proved lucrative for Onyeri and his associates, resulting in ATM withdrawals of $20,000 and $40,000 at a time. But Onyeri's and Akwar's luck was not limitless: they were arrested and charged in Texas state court for some of this fraudulent misconduct in 2012. When they were apprehended, Onyeri was out on bond for other charges, including violent crimes. And, prior to facing those charges, Onyeri had been incarcerated for three years. As a result, Onyeri was not released on bond again and remained in custody for one year—but he attempted to continue to lead his criminal enterprise, even from prison.

It was at this point that the Honorable Julie H. Kocurek, a Texas state judge for the 390th District Court in Austin, was assigned to Onyeri's case. Little did Onyeri know, this was the beginning of the end for him. Onyeri ultimately pled guilty to the charges stemming from his and Akwar's 2012 arrest, and Judge Kocurek placed him on a three-year deferred adjudication probation, under which—"[p]rovided [he] obey[ed his] condition of probation and . . . successfully complete[d] probation"—he would not face conviction for these charges.

Only two and a half years later, however, the government filed a motion to proceed with an adjudication of guilt, following allegations that Onyeri had engaged in the fraudulent use of debit cards in Calcasieu Parish, Louisiana. Judge Kocurek later testified at Onyeri's trial that she insisted the District Attorney's Office move quickly with Onyeri's case and reset the case for hearing on November 8, 2015. She further testified that she suggested Onyeri may face six to seven years in prison.

Onyeri acted quickly after this, fearing that he was going to be sent to prison. On November 6, 2015, two days before the scheduled hearing, Onyeri struck. Before Judge Kocurek and her family returned home that Friday night, he placed a trash bag in front of her driveway to create a diversion. When the vehicle stopped outside the house's gate so that Judge Kocurek's son could move the bag, Onyeri made his move, shooting Judge Kocurek through the passenger side window of her car. Although he seriously injured Judge Kocurek, he "missed," and she survived.

Despite his failed attempt to assassinate the Judge, Onyeri bragged about his role in her shooting. This led the authorities to suspect he was responsible, as an informant relayed this information. A computerized check also revealed a pending warrant for Onyeri's arrest. At this point, the officers tried a Houston address where they believed Onyeri may be located. Finding it to be a "bad address," they turned next to Onyeri's father's house.

An interview at his father's house alerted the authorities that Onyeri was likely travelling in a silver Dodge Charger with black rims, and shortly thereafter, a task force member identified the vehicle in the neighborhood, headed toward Onyeri's father's house. Officer Derek Uresti testified at trial that the officers followed the vehicle through the neighborhood, ultimately initiating a traffic stop when the Charger made an errant right-hand turn. The officers apprehended Onyeri when they called the passengers out of the vehicle. Among other evidence, they recovered a "smashed" Samsung Galaxy cell phone from the rear floorboard of the vehicle.

Not long thereafter, Onyeri was charged in a seventeen-count indictment for RICO violations, including one count for conspiracy to commit RICO violations. The racketeering acts charged

were: (1) mail fraud, (2) bribery of a public official, (3) wire fraud, (4) identity theft, (5) access device fraud, (6) conspiracy to commit money laundering, (7) money laundering, and (8) attempted murder. After a jury trial lasting twenty days, the jury found Onyeri guilty on all counts. Onyeri timely appealed.

On appeal, Onyeri argues that the district court erred by admitting evidence obtained from the traffic stop because it was not supported by probable cause or reasonable suspicion. He further contends that there was not sufficient evidence to support his RICO conspiracy conviction and that the district court erred by denying his motion for a judgment of acquittal. We first address Onyeri's challenge to the district court's conclusion that the officers had probable cause to make the initial traffic stop and the resulting denial of Onyeri's motion to suppress the information obtained from his Samsung Galaxy. He contends that Officer Uresti's testimony regarding the traffic stop was not credible. Analyzing the stop in its entirety, we conclude the district court was correct. "[W]e may consider all of the evidence presented at trial, not just that presented before the ruling on the suppression motion, in the light most favorable to the prevailing party, which in this case is the Government."

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Probable cause is a "practical, nontechnical conception." It is a "fluid concept" guided by a totality of the circumstances analysis. We have said that "the constitutionality of [an] officer's stop of [a] vehicle must stand or fall based on whether [the defendant] violated Texas law[.]" That is, the "legal justification for the traffic stop must be 'objectively grounded.'"

Officer Uresti testified at trial that he observed the vehicle that Onyeri was riding in commit a minor traffic violation, making a wide right-hand turn into an adjacent lane. He explained how a proper right-hand turn should be made, according to the Texas Transportation Code: "when making a right turn, the operator shall approach and complete the turn closest to the . . . right-hand curb or the edge of the roadway." In this case, Officer Uresti testified, the number two lane was the proper lane for completing a right turn; "[t]he inside lane closest to the median is the number one lane, and the outside lane is the number two lane." But, he told the district court, he saw the vehicle make an improper turn "into the number one lane" in violation of Texas Transportation Code § 545.101. Officer Uresti's observation of this traffic violation therefore gave him an objectively grounded legal justification—and sufficient probable cause—to initiate the stop.

Onyeri disputes the district court's finding that Officer Uresti's testimony was credible. The crux of his argument centers on Officer Uresti's responses that he didn't remember certain details of the traffic stop. Onyeri argues that Officer Uresti's failure to recall aspects of the stop undermines the district court's credibility finding, and therefore, any probable cause.

Onyeri's contentions are misleading. Officer Uresti also answered, with certainty, many other questions about the traffic stop. For example, hetestified that traffic was permitted to flow during the traffic stop and that the road was not obstructed. He also stated that his line of sight to the silver Charger was not obstructed in any way and that he had no doubt that he saw the Charger turn into the number one lane. These details are crucial to the determination of whether to stop the Charger,

and whether the officers had probable cause. In contrast, many of the aspects of the stop that Officer Uresti could not remember were unimportant to the propriety of initiating the traffic stop. It is eminently plausible that the traffic stop occurred just as Officer Uresti explained; nothing in the record suggests otherwise. And the district court twice stated for our review that it found Officer Uresti credible.

Furthermore, "the clearly erroneous standard is particularly strong because the judge had the opportunity to observe the demeanor of the witnesses" at the suppression hearing and at trial. We cannot identify any clear errors in the district court's factual findings. Accordingly, we conclude that the district court correctly denied Onyeri's motion to suppress.

Onyeri preserved his challenge to the sufficiency of the evidence by moving for a judgment of acquittal at the close of the Government's case. We review these claims *de novo*, according "substantial deference to the jury verdict." We "must affirm a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Onyeri's challenge is specific to one offense of conviction: conspiring to violate the RICO statute. The elements of a RICO conspiracy are: (1) an agreement between two or more people to commit a substantive RICO offense; and (2) knowledge of and agreement to the overall objective of the RICO offense. These elements may be established by circumstantial evidence.

First, there is sufficient evidence to find that two or more people agreed to violate § 1962(c), which criminalizes racketeering activity. Evidence presented at trial showed that Onyeri engaged associates to assist him in carrying out his many fraudulent schemes. They met to discuss the organization and plan activities in furtherance of the enterprise, including mail fraud, wire fraud, and murder, as prohibited by RICO. This evidence supports the jury's determination that two or more people agreed to violate § 1926(c).

Second, there is sufficient evidence that Onyeri agreed to the overall objectives of the conspiracy; indeed, he orchestrated it. At trial, Akwar told the jury that he and Onyeri agreed that Akwar "would come with [Onyeri] to make money," which meant "going to various stores, and purchasing iPads with gift cards with stolen credit card information on it." Akwar further testified that he and Onyeri agreed to perpetrate the tax fraud together as well. The jury also heard another of Onyeri's associates, Scott, testify that he "was thinking [he was] about to get rich" once he agreed to help Onyeri with debit card and credit card skimming. Finally, the evidence at trial showed that Onyeri himself traveled to Judge Kocurek's home to kill her and that *he* carried out this attempt, another one of the overall objectives of the conspiracy. The jury heard evidence of this not only from Burgin, and Scott, but the jury also heard Onyeri's own testimony that he was in Judge Kocurek's neighborhood that night, placed the trash bag in front of her gate, waited for the Judge and her family to return home, and was standing by her vehicle when the gun that *he was holding* "burst out." What's more, the jury heard evidence that Onyeri bragged about it. In sum, there is more than sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Onyeri agreed with several of his associates to further the overall objectives of the RICO conspiracy.

Therefore, upon review of the record, we conclude that the district court did not err in denying Onyeri's motion for a judgment of acquittal as the jury heard sufficient evidence to find Onyeri guilty of the RICO conspiracy count.

The judgment of the district court is therefore AFFIRMED.

***U.S. v. Onyeri*, 5th Cir., No. 18-50869, April 28th, 2021.**

SEARCH AND SEIZURE, Firearm in the home. Caretaker function.

Decades ago, this Court held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this conclusion, the Court observed that police officers who patrol the "public highways" are often called to discharge noncriminal community caretaking functions," such as responding to disabled vehicles or investigating accidents. The question today is whether *Cady*'s acknowledgment of these "caretaking" duties creates a standalone doctrine that justifies warrantless searches and seizures in the home. It does not.

During an argument with his wife at their Rhode Island home, Edward Caniglia (petitioner) retrieved a handgun from the bedroom, put it on the dining room table, and asked his wife to "shoot [him] now and get it over with." She declined, and instead left to spend the night at a hotel. The next morning, when petitioner's wife discovered that she could not reach him by telephone, she called the police (respondents) to request a welfare check.

Respondents accompanied petitioner's wife to the home, where they encountered petitioner on the porch. Petitioner spoke with respondents and confirmed his wife's account of the argument, but denied that he was suicidal. Respondents, however, thought that petitioner posed a risk to himself or others. They called an ambulance, and petitioner agreed to go to the hospital for a psychiatric evaluation— but only after respondents allegedly promised not to confiscate his firearms. Once the ambulance had taken petitioner away, however, respondents seized the weapons. Guided by petitioner's wife—whom they allegedly misinformed about his wishes—respondents entered the home and took two handguns. Petitioner sued, claiming that respondents violated the Fourth Amendment when they entered his home and seized him and his firearms without a warrant. The District Court granted summary judgment to respondents, and the First Circuit affirmed solely on the ground that the decision to remove petitioner and his firearms from the premises fell within a "community caretaking exception" to the warrant requirement. Citing this Court's statement in *Cady* that police officers often have noncriminal reasons to interact with motorists on "public highways," 413 U. S., at 441, the First Circuit extrapolated a freestanding community-caretaking exception that applies to both cars and homes. Accordingly, the First Circuit saw no need to consider whether anyone had consented to respondents' actions; whether these actions were justified by "exigent circumstances"; or whether any state law permitted this kind of mental-health

intervention. All that mattered was that respondents' efforts to protect petitioner and those around him were "distinct from 'the normal work of criminal investigation,'" fell "within the realm of reason," and generally tracked what the court viewed to be "sound police procedure."

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "'very core'" of this guarantee is "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"

To be sure, the Fourth Amendment does not prohibit all unwelcome intrusions "on private property," *ibid.*—only "unreasonable" ones. We have thus recognized a few permissible invasions of the home and its curtilage. Perhaps most familiar, for example, are searches and seizures pursuant to a valid warrant. We have also held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to "'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" And, of course, officers may generally take actions that "'any private citizen might do'" without fear of liability.

The First Circuit's "community caretaking" rule, however, goes beyond anything this Court has recognized. The decision below assumed that respondents lacked a warrant or consent, and it expressly disclaimed the possibility that they were reacting to a crime. The court also declined to consider whether any recognized exigent circumstances were present because respondents had forfeited the point. Nor did it find that respondents' actions were akin to what a private citizen might have had authority to do if petitioner's wife had approached a neighbor for assistance instead of the police.

Neither the holding nor logic of *Cady* justified that approach. True, *Cady* also involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home—"'a constitutional difference'" that the opinion repeatedly stressed. In fact, *Cady* expressly contrasted its treatment of a vehicle already under police control with a search of a car "parked adjacent to the dwelling place of the owner." *Cady*'s unmistakable distinction between vehicles and homes also places into proper context its reference to "community caretaking." This quote comes from a portion of the opinion explaining that the "frequency with which . . . vehicle[s] can become disabled or involved in . . . accident[s] on public highways" often requires police to perform noncriminal "community caretaking functions," such as providing aid to motorists. But, this recognition that police officers perform many civic tasks in modern society was just that—a recognition that these tasks exist, and not an open-ended license to perform them anywhere.

What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly "declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home." We thus vacate the judgment below and remand for further proceedings consistent with this opinion. *It is so ordered.*

Caniglia v. Strom, U.S. Supreme Court, No. 20-157, May 17th, 2021.
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Border search

Following a bench trial, appellant Julio Cesar Tenorio was convicted of smuggling bulk cash in violation of 31 U.S.C. § 5332. Tenorio appeals his conviction and sentence, arguing that the district court erred in denying his motion to suppress evidence obtained from a stop and search at the border as he was leaving the United States and attempting to enter Mexico. We AFFIRM.

On June 13, 2019, Tenorio drove a Chevrolet Tahoe to the port of entry in Del Rio, Texas, on the U.S.-Mexico border. Customs and Border Protection ("CBP") officers stopped Tenorio's vehicle in the outbound lane, and Tenorio told the officers that he was leaving the country and traveling to Mexico. Tenorio declared that he did not have any weapons or ammunition and that he had $3,200 in U.S. currency. CBP officer Eric Medina testified that Tenorio "appeared nervous" during the encounter and "began to have a facial twitch" "as soon as [they] started talking about the currency." He further testified that when another officer began a spot check of the vehicle with a canine, Tenorio "kept looking back towards the canine to see what the canine was doing." According to Medina, because of Tenorio's nervous demeanor, his indication that he was traveling from the United States to Mexico, and the fact that the canine "showed some interest" in the vehicle, officers asked him to pull his vehicle over. Tenorio pulled over to a spot approximately 20 to 25 yards from where the initial stop occurred. Medina testified that this initial encounter lasted less than five minutes. Once pulled over for the secondary search, Tenorio was given an opportunity to amend his declaration. He again declared no weapons, no ammunition, and $3,200 in cash. The officers then asked Tenorio to step out of his vehicle. In the meantime, a canine alerted to the back of Tenorio's vehicle. After sniffing the vehicle, the canine came over to Tenorio and alerted to his boot. Also during the secondary inspection, an officer discovered a GPS tracker beneath the steering wheel of Tenorio's vehicle. Medina testified that during this period, Tenorio "avoid[ed] all eye contact" and that his hands were "visibly trembling." Medina frisked Tenorio for weapons, during which officers noticed that Tenorio kept staring down at his boots. An officer asked Tenorio to lift his leg and looked down to see black trash bags inside his boots. Inside the bags was U.S. currency totaling $18,900, which, combined with an additional $3,404 cash in Tenorio's wallet, amounted to $22,304. Officers called Homeland Security Investigations ("HSI") Agent Allen Conner to the port of entry, where Conner met with Tenorio and read him his Miranda rights. Tenorio waived those rights and told Conner that the cash was from alien-smuggling activities. After his interview with Tenorio, Conner searched two cell phones that Tenorio had on him but found nothing of interest. Conner never questioned Tenorio about the contents of the phones and later turned the phones over to Tenorio's mother. On July 10, 2019, Tenorio was charged in a one-count indictment with bulk cash smuggling in violation of 31 U.S.C. § 5332. Tenorio moved to suppress evidence obtained from the searches at the border and the search of his cell phones, as well as his post-arrest statements to Agent Conner. The district court held an evidentiary hearing and denied the motion. Tenorio was convicted following a bench trial and now appeals, arguing that the court erred in denying his suppression motion. On appeal, Tenorio contends that (1) the dog sniff of his person was unlawful because the officers lacked reasonable

suspicion, (2) his detention and referral to a secondary inspection constituted a nonroutine border search, which required reasonable suspicion, and (3) the search of his cell phones at the border was unlawful because the officers lacked a search warrant and, in the alternative, lacked reasonable suspicion to conduct the search. On appeal from a district court's ruling on a motion to suppress, we review factual findings for clear error and legal conclusions de novo, viewing the evidence in the light most favorable to the prevailing party.

Tenorio's first two arguments are resolved under the border-search exception to the Fourth Amendment warrant requirement. Although the Fourth Amendment's prohibition on unreasonable searches applies at the international border, its protections there are "severely diminished." Because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," searches made at the border "are reasonable simply by virtue of the fact that they occur at the border." United States v. Flores-Montano, 541 U.S. 149, 152–53 (2004). Accordingly, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." This court has held that the border-search exception applies not only to entrants into the country but also to those departing.

The border-search exception allows "routine" searches and seizures without individualized suspicion or probable cause. Montoya de Hernandez, 473 U.S. at 538. This court explained the meaning of "routine" in United States v. Kelly, writing that

> [a] "routine" search is one that does not seriously invade a traveler's privacy. In evaluating whether a search is routine, the key variable is the invasion of the privacy and dignity of the individual. We have previously determined that ordinary pat downs or frisks, removal of outer garments or shoes, and emptying of pockets, wallets, or purses are all routine searches, and require no justification other than the person's decision to cross our national boundary.
>
> "Non-routine" border searches, on the other hand, are more intrusive and require a particularized reasonable suspicion before a search can be conducted. Non-routine searches include body cavity searches, strip searches, and x-rays. These types of objectively intrusive searches would likely cause any person significant embarrassment, and invade the privacy and dignity of the individual.

Here, Tenorio first argues that the canine sniff of his person required reasonable suspicion. It did not. The record indicates that the dog sniffed around Tenorio's vehicle and person and gave a positive alert to Tenorio's boot. As the court in Kelly explained, "a canine sniff, even one involving

some bodily contact, is no more intrusive than a frisk or a pat-down, both of which clearly qualify as routine border searches." The canine sniff here was a routine border search and therefore did not require individualized suspicion.

Tenorio's second argument fails for similar reasons. He contends that his detention was unconstitutionally prolonged and amounted to a non-routine border search, requiring reasonable suspicion. But the length and circumstances of Tenorio's detention were consistent with a routine border search. The secondary search lasted approximately ten minutes and consisted of questioning by CBP agents, a search of Tenorio's vehicle, a canine sniff of his vehicle and person, a weapons frisk, and an eventual request that Tenorio lift his leg. These ordinary investigative measures are, individually and collectively, a far cry from "cavity searches, strip searches, . . . x-rays" and other "objectively intrusive searches" that "invade the 'privacy and dignity of the individual.'" Tenorio's detention did not exceed the bounds of routine border searches and therefore did not require reasonable suspicion.

Finally, we do not address the constitutionality of the search of Tenorio's cell phones. The district court made a finding, which Tenorio does not dispute on appeal, that Agent Conner did not use any information from the phone search before or during his interview with Tenorio. And the parties' stipulation of facts for Tenorio's trial includes no evidence from the cell-phone search. Accordingly, there is no evidence to be suppressed.
The district court did not err in denying Tenorio's suppression motion. Tenorio's conviction and sentence are AFFIRMED.

U.S. V. Tenorio, **No, 5th Cir., 21-50989, Dec. 09, 2022.**

SEARCH & SEIZURE

consent

Paul Malagerio was seized by federal agents under an administrative warrant. A search of his trailer revealed several firearms that Malagerio, an illegal alien, could not lawfully possess. He moved to suppress evidence of the weapons, maintaining that the arrest and search violated the Fourth Amendment. The district court denied Malagerio's motion, and he appeals. Malagerio says that the agents exceeded the scope of their administrative warrant by arresting him not in a public place but in his doorway. We conclude that the district court did not err in finding that Malagerio was not arrested in his home or its curtilage. As for the search of the trailer, the record confirms the district court's finding that Malagerio consented. Because there was no error in the denial of the motion to suppress, we affirm the conviction.

Malagerio is a Canadian citizen. He last entered the United States in 2013 without a visa, meaning that he could not legally remain for more than six months. In 2020, the Department of Homeland Security received a tip that Malagerio was in the country illegally. After further investigation, the senior detention deportation officer in charge of the case found probable cause that Malagerio was present unlawfully and issued an administrative warrant for his arrest. A team of at least six agents was dispatched to arrest Malagerio around 7:00 am. The agents were concerned that Malagerio, who works in the exotic animals industry, might have access to firearms or dangerous animals. Malagerio was living in a trailer park; the owner of the trailer park allowed the agents to enter the property to talk to Malagerio. One of the officers had his bodycam turned on at this point and for about three minutes thereafter, though there is no audio until about halfway through that period. An agent, having already unholstered his gun, then knocked on Malagerio's door and told him to come out with his hands up. Malagerio responded that he would be out shortly and came to the door about sixty to ninety seconds later. In the meantime, the agent on point had knocked repeatedly and "ordered" Malagerio to come out. By the time Malagerio came to the door, most or all of the agents had trained their guns on him, including one shotgun. The agents instructed Malagerio several times to keep his hands up and exit the trailer. Malagerio complied and was promptly handcuffed. The video ends around that point. According to the agents, Malagerio verbally consented to the search of his trailer. Malagerio also signed a written consent, though it is not clear when he did so. For his part, Malagerio remembers telling the agents they would need to get a search warrant. Either way, the search transpired, and the officers discovered three firearms. As an illegal alien, Malagerio could not lawfully possess the firearms. The government therefore indicted him for violating 18 U.S.C. § 922(g)(5) and § 924(a)(2). Malagerio moved to suppress all the evidence resulting from the encounter. As relevant on appeal, Malagerio maintained that his arrest and the search of his trailer violated the Fourth Amendment. The district court held a lengthy suppression hearing in which Malagerio and three officers gave their versions of the events. The district court denied Malagerio's motion and made oral and written factfindings. After reviewing the testimony and video, the court deemed the officers credible and Malagerio not credible. It also determined that Malagerio had not been arrested in his home because knocking on his door and instructing him to exit did not constitute a seizure. Even if his Fourth Amendment rights were violated, the court reasoned that the good-faith exception would mean that exclusion of evidence was not necessary. In reaching those conclusions, the court relied on Abel v. United States, 362 U.S. 217 (1960), in which the Court had affirmed the admissibility of evidence gathered per a home arrest without a judicial warrant. The court also found that Malagerio gave effective consent to the search of his trailer. Malagerio stood trial, maintaining that, while he had been present in the United States illegally and had possessed firearms, he had not known he was present illegally. That defense proved unavailing, and the jury found Malagerio guilty. On appeal, Malagerio challenges the denial of his motion to suppress, but he does not otherwise object to his trial or sentence.

Malagerio's primary theory on appeal is that he was arrested unlawfully, meaning that any evidence gathered from the subsequent search must be suppressed. His position depends on several premises. To prevail, his arrest must have been illegal, that illegality must be of the type that triggers the exclusionary rule, and the arrest must have poisoned the search. Instead of working through each of those premises, we focus on the district court's factual findings, which are not clearly erroneous and, instead, are supported by the record. Specifically, the district court found that Malagerio was not arrested in his home or its curtilage, so there was no Fourth Amendment violation.

Malagerio was arrested under an administrative warrant based on the suspicion that he was unlawfully present in the United States. Administrative warrants do not comply with the requirements that the Fourth Amendment places on judicial warrants. In the immigration context, administrative warrants can be issued without probable cause that a crime has been committed1 and without the involvement of "a neutral and detached magistrate." To arrest someone without a judicial warrant and with no suspicion that a crime has been committed would ordinarily be unconstitutional. But deportation is not a criminal punishment. Thus, "immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability."
Malagerio waives any contrary position and maintains, instead, that, although the agents might have been legally entitled to arrest him in a public place, they were not permitted to seize him within his home. The district court found that Malagerio was not seized until after he had exited his home (the trailer) and that he was not located on any curtilage of that home. Those findings are not clearly erroneous. It follows that we need not decide whether an administrative warrant may be used to arrest an alien in his home. We leave that important question for another day. Malagerio says that he was "seized in [his] doorway." Oral Argument at 4:06–08. But "a person standing in the doorway of a house is 'in a "public" place,' and hence subject to arrest without a warrant permitting entry of the home." As for Malagerio's notion that he was arrested in the curtilage, the district court found to the contrary. Malagerio was spread on the hood of his truck that was parked in an open driveway between his trailer and a neighbor's. Such an open driveway is not curtilage, and at the very least, the district court's finding of no curtilage is protected as plausible in light of the record as a whole.
Malagerio presents an alternative theory: Even if his arrest did not trigger the exclusionary rule, the warrantless search that turned up the guns would still be unconstitutional. The district court concluded that the search had been permissible because Malagerio consented to it. Malagerio primarily contests whether his consent was voluntary. But he also advocates factual conclusions that, if correct, would mean he never gave effective consent. The district court considered and rejected his notion of effective consent. As for voluntariness, Malagerio never presented that contention in the district court. Malagerio thus faces daunting standards of review, and the evidence he points to is not close to sufficient. We reject his alternative theory.
In his motion to suppress, Malagerio objected that the agents "searched his home without a warrant or effective consent." Specifically, he alleged that "[a]t all relevant times, Malagerio refused

consent and requested agents obtain a warrant." He maintained that position in his reply motion, stating that "he did not consent at the time of the search . . . and . . . he requested agents obtain a search warrant."

At no point did Malgerio articulate the theory that he now advances on appeal—that is, that he "was not in a position to give voluntary consent." The district court accordingly characterized his position as "not contest[ing] the voluntariness of his consent . . . ; instead, he alleges that the did not give consent in any way." Thus, Malagerio did not advance any theory on voluntariness that was "specific enough to bring the alleged error to the district court's attention."

Malagerio's approach is thus subject to plain error review. Reversal would be appropriate only if, as the initial requirements, there is error and that error "is clear or obvious."

On the other hand, Malagerio did press his effective consent theory in the district court, meaning that he is spared from plain error review on that score. But whether a defendant gave effective consent is a question of fact.

Factual findings are reviewed for clear error, meaning that we may overturn them only if we are left with "a definite and firm conviction that a mistake has been made." Findings regarding the credibility of competing witnesses are especially difficult to overturn.

For consent to excuse a warrantless search, "the government must demonstrate that there was (1) effective consent, (2) given voluntarily, (3) by a party with actual or apparent authority." (emphasis by ed.) Malagerio has never disputed that he had authority to consent to the search of his trailer, so only the first and second prongs are at issue.

The existence of effective consent, like its scope, is determined with reference to "objective reasonableness." "Recitation of magic words is unnecessary; the key inquiry focuses on what the typical reasonable person would have understood by the exchange between the officer and the suspect."

Three officers testified that Malagerio consented verbally, and he signed a consent form. In calls from jail, he also mentioned that he had been cooperative. That evidence indicates that Malagerio gave effective consent. Malagerio counters that the officers' testimony was internally inconsistent. For instance, one agent remembers initially asking for consent "to enter his trailer to get his Canadian passport and his identification documents," while another says that the initial consent also covered the firearms. But those discrepancies are minor, and the district court, viewing the testimony as a whole, deemed the officers consistent and credible. As for the written consent, Malagerio's objection is stronger— because he was in handcuffs, he could not have signed it before the search, and "an earlier illegal search" cannot be justified"based upon a later consent to an

additional search." But the written consent is irrelevant if, as the officers testified and as Malagerio implied in his jail calls, he consented verbally before the search. We thus reject Malagerio's theory that he did not effectively consent to the search.

Turning to voluntariness, we apply a six-factor test: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. All six factors are relevant, but no single one is dispositive or controlling.

Malagerio's custodial status was not voluntary, but most or all of the remaining factors tilt in favor of the search's being voluntary. The officers described Malagerio as "very cooperative," and "cordial." Malagerio described his own demeanor similarly. That testimony suggests he was not coerced. There is no indication that he is uneducated or unintelligent. And he claims that he feared no discovery of incriminating evidence because "[i]t's just guns in Texas."

It is less clear whether Malagerio knew he had the right to refuse. He says that he knew he had that right and exercised it, but the district court deemed him incredible. Even assuming Malagerio did not understand his right to refuse consent, that still leaves four factors in favor of voluntariness. We perceive no error in the denial of the motion to suppress on this ground, much less the kind of obvious error that would be necessary to prevail on plain error review. Malagerio has not made the requisite showing that his consent to the search was either ineffective or involuntary. His challenge to the lawfulness of the search thus fails. Having rejected the challenges to the arrest and the search, we AFFIRM the conviction.

***U.S. V Malagerio*, No. 21-10729, 5th Cir., Sept. 23,2022.**

SEARCH & SEIZURE – Pursuit, warrantless entry into home, hot pursuit, exigent circumstance.

JUSTICE KAGAN delivered the opinion of the Court.

The Fourth Amendment ordinarily requires that police officers get a warrant before entering a home without permission. But an officer may make a warrantless entry when "the exigencies of the situation" create a compelling law enforcement need. *Kentucky* v. *King*, 563 U. S. 452, 460 (2011). The question presented here is whether the pursuit of a fleeing misdemeanor suspect always—or more legally put, categorically—qualifies as an exigent circumstance. We hold it does not. A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case.

This case began when petitioner Arthur Lange drove past a California highway patrol officer in Sonoma. Lange, it is fair to say, was asking for attention: He was listening to loud music with his windows down and repeatedly honking his horn. The officer began to tail Lange, and soon afterward turned on his overhead lights to signal that Lange should pull over. By that time, though, Lange was only about a hundred feet (some four-seconds drive) from his home. Rather than stopping, Lange continued to his driveway and entered his attached garage. The officer followed Lange in and began questioning him. Observing signs of intoxication, the officer put Lange through field sobriety tests. Lange did not do well, and a later blood test showed that his blood-alcohol content was more than three times the legal limit.

The State charged Lange with the misdemeanor of driving under the influence of alcohol, plus a (lower-level) noise infraction. Lange moved to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry had violated the Fourth Amendment. The State contested the motion. It contended that the officer had probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal.
And it argued that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied Lange's motion, and its appellate division affirmed.

The California Court of Appeal also affirmed). In the court's view, Lange's "fail[ure] to immediately pull over" when the officer flashed his lights created probable cause to arrest him for a misdemeanor. And a misdemeanor suspect, the court stated, could "not defeat an arrest which has been set in motion in a public place" by "retreat[ing] into" a house or other "private place." Rather, 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." That flat rule resolved the matter: "Because the officer was in hot pursuit" of a misdemeanor suspect, "the officer's warrantless entry into [the suspect's] driveway and garage [was] lawful." The California Supreme Court denied review.

Courts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect. Some courts have adopted such a categorical rule, while others have required a case-specific showing of exigency. We granted certiorari Because California abandoned its defense of the categorical rule applied below in its response to Lange's petition, we appointed Amanda Rice as *amicus curiae* to defend the Court of Appeal's judgment.
The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As that text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' "
That standard "generally requires the obtaining of a judicial warrant" before a law enforcement officer can enter a home without permission. But not always: The "warrant requirement is subject to certain exceptions."
One important exception is for exigent circumstances. It applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable."). The exception enables law enforcement officers to handle "emergenc[ies]"—situations presenting a "compelling need for official action and no time to secure a warrant." Over the years, this Court has identified several such exigencies. An officer, for example, may "enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury," or to ensure his own safety. So too,

the police may make a warrantless entry to "prevent the imminent destruction of evidence" or to "prevent a suspect's escape." In those circumstances, the delay required to obtain a warrant would bring about "some real immediate and serious consequences"—and so the absence of a warrant is excused.

Our cases have generally applied the exigent-circumstances exception on a "case-by-case basis." The exception "requires a court to examine whether an emergency justified a warrantless search in each particular case." Or put more curtly, the exception is "case-specific." That approach reflects the nature of emergencies. Whether a "now or never situation" actually exists—whether an officer has "no time to secure a warrant"—depends upon facts on the ground. So the issue, we have thought, is most naturally considered by "look[ing] to the totality of circumstances" confronting the officer as he decides to make a warrantless entry.

The question here is whether to use that approach, or instead apply a categorical warrant exception, when a suspected misdemeanant flees from police into his home. Under the usual case-specific view, an officer can follow the misdemeanant when, but only when, an exigency—for example, the need to prevent destruction of evidence—allows insufficient time to get a warrant. The appointed *amicus* asks us to replace that case-by-case assessment with a flat (and sweeping) rule finding exigency in every case of misdemeanor pursuit. In her view, those "entries are categorically reasonable, regardless of whether" any risk of harm (like, again, destruction of evidence) "materializes in a particular case." The fact of flight from the officer, she says, is itself enough to justify a warrantless entry. (The principal concurrence agrees.) To assess that position, we look (as we often do in Fourth Amendment cases) both to this Court's precedents and to the common-law practices familiar to the Framers.

The place to start is with our often-stated view of the constitutional interest at stake: the sanctity of a person's living space. "[W]hen it comes to the Fourth Amendment, the home is first among equals." At the Amendment's "very core," we have said, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." Or again: "Freedom" in one's own "dwelling is the archetype of the privacy protection secured by the Fourth Amendment"; conversely, "physical entry of the home is the chief evil against which [it] is directed." The Amendment thus "draw[s] a firm line at the entrance to the house." What lies behind that line is of course not inviolable. An officer may always enter a home with a proper warrant. And as just described, exigent circumstances allow even warrantless intrusions. But the contours of that or any other warrant exception permitting home entry are "jealously and carefully drawn," in keeping with the "centuries-old principle" that the "home is entitled to special protection." So we are not eager—more the reverse—to print a new permission slip for entering the home without a warrant.

Key to resolving that issue are two facts about misdemeanors: They vary widely, but they may be (in a word) "minor." … So "a 'felon' is" not always "more dangerous than a misdemeanant." But calling an offense a misdemeanor usually limits prison time to one year. States thus tend to apply that label to less violent and less dangerous crimes. Most States count as misdemeanors such offenses as traffic violations, public intoxication, and disorderly conduct. So the *amicus*'s (and concurrence's) rule would cover lawbreakers of every type, including quite a few hard to think alarming.

This Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. Add a suspect's flight and the calculus changes—but not enough to justify the *amicus*'s categorical rule. We have no doubt that in a great many cases flight creates a need for police to act swiftly. A suspect may flee, for example, because he is intent on discarding evidence. Or his flight may show a willingness to flee yet again, while the police await a warrant. But no evidence suggests that every case of misdemeanor flight poses such dangers. Recall that misdemeanors can target minor, non-violent conduct.

"). Those non-emergency situations may be atypical. But they reveal the overbreadth—fatal in this context—of the *amicus*'s (and concurrence's) rule, which would treat a dangerous offender and the scared teenager the same. In misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry.

Our Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not most, cases allow a warrantless home entry. ***When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting.*** And those circumstances, as described just above, include the flight itself. ***But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.***

(emphasis by ed.)

The common law in place at the Constitution's founding leads to the same conclusion. That law, we have many times said, may be "instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."

(extensive legal discussion of this point omitted by ed.)

The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.

Because the California Court of Appeal applied the categorical rule we reject today, we vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

***Lange v. California*, No. 20-18, U.S. Supreme Court, June 23, 2021.**
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SEARCH & SEIZURE – Detention or arrest?

EXCESSIVE FORCE ELEMENTS

QUALIFIED IMUNITY ELEMENTS

The police shot and killed John Lincoln as he stood beside then eighteen-year-old daughter Erin. She here alleges that after she collapsed and cried out, Officer Patrick Turner picked her up, threw her over his shoulder, and carried her to a police car, where she sat handcuffed against her will. Erin brought suit under 42 U.S.C. § 1983 against Turner, alleging unreasonable seizure and excessive force. The district court sustained Turner's defense of immunity and granted his motion to dismiss. We AFFIRM.

As this case comes to us from a Rule 12(b)(6) motion to dismiss, we accept Erin's well-pleaded facts as true. Erin alleges that on the night of December 26, 2013, her father, John Lincoln—diagnosed with bipolar disorder and out of his medication—took a gun from his father's house and went to his mother Kathleen's home. When John arrived, Kathleen was not home, but Erin was. John's father believed that John was a threat to Kathleen and called John's sister Kelly, an Arlington Police Department officer. Kelly then called the Colleyville Police Department and told them that John might pose a threat to Kathleen. A large SWAT team arrived, including officers from multiple police departments. A police dispatcher contacted Erin, who explained that her father would not hurt her. As the stand-off continued, Erin attempted to calm her father. At one point the phone rang, and Erin, knowing it was the police, urged her father not to answer it "because it would upset him." John answered the phone and became upset.

At some point, John began opening the front door and shouting at the police while holding his father's gun. Every time John opened the door, Erin was standing next to him. The final time John opened the door, the police shot and killed him.

When Erin fell to the ground beside John and cried out, Turner handcuffed her and threw her over his shoulder. Erin alleges that "Turner carried her into the backyard, hung her roughly over the back gate and then threw her onto her feet. Erin was then put [] in the back of a police car in handcuffs;" she "did not fight, struggle, or resist;" and she was eventually taken to the police station by another officer, where she was interrogated for five hours.

Erin sued several police officers, including Turner. She filed her original complaint in October 2015 and she amended several months later. The district court granted Turner's motion to dismiss. It found that Erin insufficiently pled her claim as required by Rule 8(a)(2), and alternatively that Erin did not overcome qualified immunity.

Erin appeals.

Federal Rule of Civil Procedure 8(a)(2) states: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]" "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the

'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Turner moved under Rule 12(b)(6) for failure to state a claim. [T]he district court concluded that "plaintiffs have alleged little more than bare legal conclusions" and that "[t]he facts pleaded do no more than permit the court to infer the possibility of misconduct and that is not enough to allow plaintiffs to go forward with their claims." Erin argues that she sufficiently alleged claims for unconstitutional

seizure and excessive force. She contends that the district court erred when it stated there was no allegation of Erin having contact with Turner, since she "allege[d] that Turner cuffed her, physically threw her over his shoulder, threw her over a fence and then physically placed her, against her will and still handcuffed, into the back of a patrol car." Erin also maintains that she sufficiently alleged the elements of an excessive force claim; specifically, she maintains that she alleged (1) "a severe emotional injury," (2) "which resulted from a use of force that was clearly excessive," and (3) "[that] excessiveness . . . was clearly unreasonable."

Turner counters that "Erin has not pleaded sufficient facts to show that [he] unreasonably seized her as a material witness and suspect after John was shot," and that with respect to excessive force, Erin pled "only de minimis injuries consistent with a constitutional handcuffing" and did not show that Turner directly caused the injuries or "plead facts sufficient to show that the force used was excessive in light of the hostage/criminal situation."

We hold that Erin sufficiently pled unconstitutional seizure and excessive force, and address each in turn.

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" The extent of this constitutional protection varies with the type of seizure at issue. "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." "This court has recognized that there are different 'tiers of citizen-police contact for purposes of [F]ourth [A]mendment analysis.'" That is:

> The first tier involves no coercion or detention and does not implicate the fourth amendment. The second tier, an investigatory stop, is a brief seizure that must be supported by reasonable suspicion . . . Finally, the third tier is a full scale arrest [which] must be supported by probable cause.

Brown v. Texas articulated a test that has been used to analyze detentions not easily categorized as investigatory stops or arrests, such as "stop and identify" detentions, check-point stops, and some witness detentions. Detentions that begin as one type can transform into another.

As we will explain, the claimed detention here could be classified as a *de facto* arrest requiring probable cause, an investigatory stop that must be supported by reasonable suspicion, or a witness detention subject to the *Brown* balancing test. Rather than press these categories, whose boundaries are blurred, we treat each type of detention in turn, and conclude that Erin has sufficiently stated a claim under all three standards.

Based on the allegations in her amended complaint, Erin's detention may rise to the level of a *de facto* arrest that must be supported by probable cause. "An arrest occurs when, 'in view of the all the circumstances surrounding the incident, a reasonable person would have believed that he was

not free to leave.'" This is a fact-specific inquiry. Here, Erin alleges that Turner handcuffed her and placed her in the back of a police car against her will for approximately two hours. Taking these facts as true, a reasonable person could "believe that her freedom was restrained to a degree typically associated with arrest." Such a detention must be supported by probable cause. "Probable cause exists 'when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.'" Importantly, "[t]he facts must be known to the officer at the time of the arrest; post-hoc justifications based on facts later learned cannot support an earlier arrest."

Turner argues that "[s]everal crimes and potential crimes had taken place, and police were about to investigate." Yet Turner only connects Erin to one potential crime: interfering with police officer's attempts to communicate with John before the shooting. To support this claim, Turner points to Erin's admission in the amended complaint that she urged her father not to answer the phone when the police called. However, while Erin included this information in the amended complaint, there is no indication that the police knew about this at the time Turner seized Erin. Nothing else in Erin's amended complaint could lead to the conclusion that Erin had committed or was going to commit an offense. In short, "the facts as alleged in the amended complaint do not permit a conclusion that [Turner] had probable cause to arrest [Erin] [for interference] at the time of the arrest[]." Said differently, the "factual content" pled "allows the court to draw the reasonable inference that the defendant is liable for" an unconstitutional arrest.
Even if Erin's seizure were treated as a less intrusive investigatory detention, she states a plausible claim. "[U]nder the 'very narrow exception' announced in *Terry v. Ohio*, police officers may briefly detain a person for investigative purposes if they can point to 'specific and articulable facts' that give rise to reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime."

Turner argues that he had reasonable suspicion to detain Erin, emphasizing that legal conduct can support reasonable suspicion; that "there is no rigid time limit on the duration of an investigatory detention"; and that, based on the events leading up to the police shooting and that an investigation was about to commence, "officers could have reasonably suspected that Erin may have been involved in criminal activity." Turner specifically argues that reasonable suspicion existed that Erin was "part of a larger criminal enterprise" including interference with police officers. We disagree.
Turner does not clarify what "larger criminal enterprise" he repeatedly refers to. In any event, suspicion of unidentified criminal activity is not the kind of "particularized and objective basis for suspecting legal wrongdoing" that is necessary to support detention. Nor does the case law support a finding of reasonable suspicion on these allegations. The cases that Turner relies on treat detentions based on specific, articulable clues that a particular type of crime might be afoot.
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Accepting Erin's allegations as true, Turner lacked the "minimal level of objective justification" to detain her. In short, Erin pled a plausible claim, even if her seizure is seen to be an investigatory detention.

Finally, Erin has sufficiently pled unreasonable seizure even if we assume that she was detained as a witness. The Fourth Amendment arrives "whenever a police officer accosts an individual and

restrains his freedom to walk away." In recent years, the Court has held that the Fourth Amendment's reasonableness requirement constrains detention of potential witnesses to a crime—even when the intrusion goes no further than a brief checkpoint stop. In these suspicionless stops, courts often apply *Brown v. Texas*, requiring weighing (1) "the gravity of the public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty."

Erin argues that her detention was not a permissible witness detention, distinguishing the situation at hand from the type of brief investigatory checkpoint stop authorized by the Supreme Court in *Illinois v. Lidster*. Turner counters that Erin has not sufficiently pled facts "to show that [he] unreasonably seized her as a material witness," though elsewhere he distinguishes Erin from a mere "member of the public" and suggests that she was "potentially a suspect in a larger criminal enterprise."

The allegations make out a sufficient claim for an unreasonable detention even she was detained as a witness. The Supreme Court's application of *Brown* in *Lidster* is instructive, finding it reasonable to briefly detain drivers at a roadside checkpoint to question motorists about a hit-and-run in the area. The Court found that the public concern was grave, since the police were investigating a "specific and known crime" that had "resulted in a human death"; that it was tailored to obtain information from drivers who might have seen the accident; and that "[m]ost importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect." In weighing this final factor, the Court noted that the stops required only "a very few minutes" in line and "only a few seconds" of police contact, and that they "provided little reason for anxiety and alarm." As in *Lidster*, this case brings to us a matter of significant public concern.

And the second factor may weigh even more in favor of the police here—Erin was present at the crime scene, and in fact was the only person inside the house with her father. Through the eyes of a reasonable police officer, she was likely to possess helpful information, and it was reasonable to seek it, at least to confirm her identity and contact information. Accepting this, the facts alleged here went beyond the bounds of a reasonable detention. This was not the type of "minimally intrusive" stop authorized by *Lidster*. Instead, a distressed young woman was handcuffed and left in the back of a police car for almost two hours. The stop provoked significant "anxiety and alarm," and lasted much longer than necessary to obtain information.

Confronting a similar question, two circuits agree that detaining police cannot detain a person for a significant period of time solely because she witnessed a police shooting. In *Walker*, the Tenth Circuit concluded that "a ninety-minute detention for this purpose [of obtaining names, addresses, and voluntary statements from witnesses] was unreasonable." In *Maxwell*, the Ninth Circuit similarly found that law enforcement officers could not "detain, separate, and interrogate the [witnesses] for hours" solely as witnesses. In so holding, both courts noted that "[e]ven in the *Terry* stop context—which involves a suspicion of criminal activity that is absent here—the Supreme Court has never endorsed a detention longer than 90 minutes."

As our sister circuits noted, "[w]hat little authority exists on [the] question [of witness detention], suggests that police have less authority to detain those who have witnessed a crime for investigatory purposes than to detain criminal suspects." We agree, and find that Erin has sufficiently pled an unreasonable seizure even under the *Brown v. Texas* balancing test. Erin has alleged a detention that would have been unreasonable if she were a suspect.

We turn to whether Erin sufficiently pled excessive force. The district court thought that "[t]here [was] no allegation that Erin or her family had any contact with movants, physical or verbal." This was mistaken. Erin alleged the following physical contact between herself and Turner:

> Erin was handcuffed and thrown over the shoulder of Defendant Patrick Turner. Erin, terrified, did not fight, struggle or resist. Turner carried her into the backyard, hung her roughly over the back gate and then threw her onto her feet. Erin was then put her in the back of a police car in handcuffs.

Given these factual allegations, we cannot agree with the district court that Erin "alleged little more than bare legal conclusions."

"To succeed on an excessive force claim, a plaintiff bears the burden of showing (1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." At this pleading stage, Erin has pled facts that would "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
We have stated that "[a]lthough a showing of 'significant injury' is no longer required in the context of an excessive force claim, '[this Court] require[s] a plaintiff asserting an excessive force claim to have suffered at least some form of injury.' The injury must be more than a de minimis injury and must be evaluated in the context in which the force was deployed." Although Erin alleges receiving bruises and scratches, she points to her psychological injuries, like sleeplessness, anxiety, and depression, as the sufficient injuries to support her excessive force claim. Erin is correct that psychological injuries can satisfy the injury requirement. This Court has explained:

While certain injuries are so slight that they will never satisfy the injury element, *see, e.g.*, *Glenn*, 242 F.3d at 314 (holding that "handcuffing too tightly, without more, does not amount to excessive force"), psychological injuries may sustain a Fourth Amendment claim. *See Dunn v. Denk*, 79 F.3d 401, 402 (5th Cir. 1996) (en banc). The plaintiff's physical injuries in *Dunn* were only bruises, but she suffered substantial psychological injuries. We held that she alleged an injury sufficient to demonstrate the violation of a clearly established constitutional right.

Turner does not fully engage Erin's assertion that her psychological injuries are sufficient here. Rather, he argues that handcuffing injuries are often insufficient and that "Erin did not allege these injuries 'resulted directly and only' from Officer Turner's actions, but that she was injured by 'the force used on her' and '*further* traumatized' by Officer Turner's actions." The argument that Erin failed to sufficiently connect her injuries to Turner's actions is not without any footing, as Turner was not the only officer involved. But Erin's amended complaint alleges that "[w]hen Defendant Turner handcuffed [Erin] and threw her over his shoulder, she was shocked and terrified. She sustained bruises and scratches from the force used on her and was further traumatized by the actions of the officer." At the pleading stage, these factual allegations are sufficient to connect Erin's alleged injuries to Turner's use of force—and therefore to sufficiently plead causation. To conclude otherwise would mean that when a plaintiff suffers injuries at the hands of multiple officers for multiple reasons, she will be precluded from stating an excessive force claim against any single officer for failure to allege that her injuries "resulted directly and only from" that particular officer's excessive use of force.

Finally, Erin has sufficiently pled that the force used by Turner was objectively unreasonable. "To 'gaug[e] the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force.' This balancing test 'requires careful attention to the facts and circumstances of each particular case.'" Given Erin's allegations that she did not "fight, struggle or resist in any way" and "questioned why she was being taken into custody," Turner's alleged force was excessive.

Turner argues that Erin's own descriptions of herself after the shooting "justif[ied] Officer Turner's actions to secure Erin—a 'severely traumatized, non-compliant, unidentified, victim/suspect[.]" Although Erin alleged that she was grief-stricken, she also alleged—contrary to Turner's characterization—that she was compliant. Erin further alleged that Turner never asked her to stand up, move away from her father, or follow him to a different location. The factual allegations show that Turner's use of force was excessive to the need and thus unreasonable. As a result, Erin has sufficiently pled a claim of excessive force.

Although we hold that Erin has adequately pled her claims to survive a Rule 12(b)(6) challenge, her claims may still be barred on the basis of qualified immunity. "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" "When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense." "The basic steps of our qualified-immunity inquiry are well-known: a plaintiff seeking to defeat qualified immunity must show: '(1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'"

As we have already concluded that Erin sufficiently alleged violations of her right to be free from unreasonable seizure and excessive force, the remaining question for qualified immunity purposes is whether those rights were clearly established.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" "This inquiry 'does not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'" "The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." "The central concept [of the test] is that of fair warning: The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."
The district court found that Erin did not overcome Turner's qualified immunity defense, reasoning:

> Plaintiffs have not cited any authority to establish that every reasonable officer would have known that he could not detain a witness for a period of approximately two hours while an investigation was underway . . . Nor have they shown that

> Turner's actions in removing Erin from the area where medical personnel were treating her injured father was clearly unreasonable and that every officer would have known so.

Erin avers that "[n]o reasonable officer could have believed that there was probable cause to detain, handcuff, or arrest Erin Lincoln." Erin's argument is twofold: first, that Turner had no probable cause to arrest her under Texas Penal Code § 38.15 for "interference with public duties" because her conduct fell within a clearly established "speech only" exception, and second, that it is clearly established that "a person cannot be taken into custody for [approximately two hours] simply for being a witness to an event, particularly where the individual was taken into custody forcefully . . . without ever being questioned."

Turner responds first by arguing that Erin has waived any argument that the "speech only" exception applies here. Then he attempts to distinguish two cases that the plaintiff relied on, noting that neither case "involves a witness to a police shooting in which she was the only person with the suspect before the shooting, interfered with police attempts to communicate with the suspect, and was standing next to the suspect when he threatened police and was shot." Finally, Turner points to *Walker*, where the Tenth Circuit found that there was no clearly established law prohibiting a ninety-minute detention of two witnesses to a police shooting, and asserts that we should reach the same conclusion here.

The district court held that plaintiffs did not cite clearly established law establishing that an officer cannot "detain a witness for a period of approximately two hours while an investigation was underway," although the parties have also consistently addressed Erin's detention as a potential suspect. The reality may be somewhere in between. Turner seized Erin in the aftermath of a police shooting resulting from a SWAT team deployment. Even on Erin's account, the scene was tense, and the officers were acting with incomplete information. In these circumstances, Turner may have been entitled to detain Erin for some amount of time to determine her role in the situation. As we explained, Turner exceeded this authority when he handcuffed Erin and detained her in the back of a police car for two hours. In doing so, Turner violated Erin's constitutional rights.
Yet we are not persuaded that "*every* reasonable official would have understood that what he is doing violates that right." At this stage, Erin has the burden to demonstrate that the law was clearly established in this area on the date of the incident.
…..
Qualified immunity does not operate at a high level of generality.
Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity ". . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."
…..
However, none of those cases clearly established that a law enforcement officer could not detain a witness to a police shooting for these two hours while a SWAT team sorted out the scene, at the least when the witness was standing beside a person when the police shot him. Thus, we find that Erin has not shown that the contours of the right were so clearly established that "a reasonable official would understand that what he is doing violates that right."

Finally, we note that there may well be an emerging trend toward holding it unreasonable to detain a police shooting witness for an extended period of time, absent either reasonable suspicion or

probable cause to believe that a crime has been committed. While we may look to other circuits to find clearly established law, we must consider "the overall weight" of such authority. A "trend" alone is just that. As of December 2013, only two circuits had weighed in on the "contours of the right." These cases alone do not provide sufficient authority to find that the law was clearly established. This conclusion is bolstered by the fact that the Tenth Circuit itself found no "clearly established weight of authority from other courts," and the Ninth Circuit relied on intra-circuit precedent to find clearly established law.

Turning to Erin's excessive force claim, Turner argues that "Erin cites no case law to show that no reasonable officer would have thought the means by which Officer Turner seized her was constitutional." Although Erin identifies the second step in the qualified immunity analysis, it is not clear that her contention was that the right to be free from excessive force was clearly established in this case. Instead, she suggests that her allegations lead to the conclusion that physically removing Erin in the manner that Turner did was unreasonable, and that her injuries sustain her claim. However, these are arguments that feed into the first step of the qualified immunity analysis— whether there was a constitutional violation. Accordingly, Erin waived argument as to the clearly established law prong and thus cannot overcome qualified immunity. Regardless, we cannot on this record conclude that Erin could overcome qualified immunity on her excessive force claim given the lack of guiding precedent that shows the force used in this particular situation was "clearly unreasonable."

In sum, although Erin stated a plausible claim for relief on both claims, we AFFIRM the district court's grant of qualified immunity to Turner and its dismissal of the claims.

***Lincoln v. Turner*, No. 16-10856, 5th Cir. Oct. 31, 2017.**

SEARCH & SEIZURE – protective sweep and standing.

Before the court is Erik Rodriguez's motion to suppress a revolver found in the pocket of a jacket he left in a friend's car. That motion presents not only novel and difficult questions of Fourth Amendment standing but also far more prosaic questions of Fourth Amendment substance. The questions in the latter category suffice to resolve the case, so that is where we turn. Whether a defendant in Rodriguez's position had Fourth Amendment standing to challenge the search in question will wait for another day. Instead, we affirm on the ground that the search was a legal protective sweep.

Rodriguez was a passenger in a car driven by his friend. Police noticed the car straddling two lanes of traffic, so they began to follow it. They observed that there were two men in the car and that both were wearing hooded jackets. The passengers appeared intently interested in the police car and were shifting in their seats. The officers found that activity suspicious. Having already observed a traffic violation, they decided to execute a stop. The police activated their lights, but at first the vehicle did not pull over. Instead, it passed two driveways before pulling into a third—an apartment complex with a reputation for gang activity. Once in the complex, the vehicle continued to roll forward before stopping after a blip from the officers' siren. As the officers exited their

cruiser and approached the vehicle, the driver initially opened his door, then remained in the car and rolled down his windows, as instructed. The officers noticed an infant in the back seat. The officers removed both Rodriguez and the driver. The driver was still wearing his jacket, but Rodriguez was no longer wearing his—even though the temperature was in the forties. Neither man had a driver's license, and the driver admitted that one of his IDs was fake. The officers thus detained both men and placed them, in handcuffs, in the back of their patrol car, even though Rodriguez was not suspected of any crime. As one officer ran the driver's IDs, the other searched the vehicle's passenger compartment. He discovered a jacket on the backseat floorboard— its color matched Rodriguez's pants, but the officer testified that he did not immediately "put two and two together" and consider that the jacket belonged to Rodriguez. The officer found a revolver in the jacket's pocket. Rodriguez and the driver gave the officers permission to use their phones to call family members to pick up the car and baby. But in addition to making the calls, an officer also, without permission, went through the phones. As he did, he observed "MS-13 material" that appeared to implicate Rodriguez. Both Rodriguez and the driver were arrested for state crimes—the driver for tampering with a government document and Rodriguez for unlawfully carrying a weapon in connection with gang activity. Rodriguez turned out to be an illegal alien, meaning that, regardless of any connection to MS-13 or other gangs, his possession of the revolver was a federal crime. He was thus charged with violating 18 U.S.C. § 922(g)(5)(A). Rodriguez filed a motion to suppress, maintaining that the search of the vehicle violated his Fourth Amendment rights and that his questioning during the stop violated his Fifth and Sixth Amendment rights. After an evidentiary hearing, the district court ordered the suppression of statements made by Rodriguez, reasoning that they were taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966). It also suppressed evidence gained from the search of Rodriguez's phone, which the court concluded violated Riley v. California, 573 U.S. 373 (2014). But it did not suppress the gun—the court ruled that the stop of the vehicle and detention of the passengers had been reasonable, and Rodriguez "neither had nor claimed any ownership or possessory interest or reasonable expectation of privacy in the" vehicle because he had been merely a passenger. Rodriguez thus had no standing to challenge the search. With the gun admitted, Rodriguez pleaded guilty and was sentenced to time served plus three years' supervised release. Rodriguez appeals the conviction, maintaining that the district court erred by denying his motion to suppress. II. "When reviewing the denial of a motion to suppress evidence, this court reviews the district court's factual findings for clear error and the district court's conclusions. . . de novo." Rodriguez does not challenge any of the district court's fact findings. Thus, as the government concedes, the only questions before us are legal ones that we review de novo.

A Fourth Amendment inquiry typically proceeds in two parts: A court first asks whether the defendant had standing to challenge the search and then, if the answer is yes, asks whether the search was reasonable. In other contexts, that order would be not just typical but mandatory. Standing is a matter of jurisdiction, and courts must assess their jurisdiction before turning to the merits.

But Fourth Amendment standing is a different matter. "The concept of standing in Fourth Amendment cases can be a useful shorthand . . . but it should not be confused with Article III standing . . . ." To the contrary, Fourth Amendment standing "is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim." Thus, we are not bound to decide whether Rodriguez had standing to challenge the search

of his jacket. Instead, the usual rule applies, and we may affirm the judgment for any reason supported by the record. Thus, we may affirm if we conclude, as we do, that that search was lawful.

That course is particularly appropriate here in light of the novelty of the Fourth Amendment standing questions. Rodriguez presents two theories in support of Fourth Amendment standing, and precedent does not definitively answer either. First, Rodriguez maintains that he had a reasonable expectation of privacy in the jacket. "Typically," a passenger in a car, as distinct from the driver, "lacks standing to complain of its search." But this circuit has recognized an exception for a passenger's personal luggage. "The owner of a suitcase located in another's car may have a legitimate expectation of privacy with respect to the contents of his suitcase." Rodriguez maintains that the same logic extends to the pockets of the jacket he had removed and left in the vehicle. But jackets are not exactly like suitcases, and neither party, nor this court, has located any precedent squarely addressing Rodriguez's theory.

Second, Rodriguez maintains that he has standing to challenge the search because it qualifies as a trespass. Because he did not advance that theory before the district court, it is subject to the demanding standard of plain-error review.

Rodriguez relies primarily on *United States v. Richmond*, which itself interprets *United States v. Jones*,. Those cases hold that, in addition to the more familiar reasonable expectation-of-privacy test described above, a defendant can show Fourth Amendment standing if the government has committed a common-law trespass as part of an investigation. But the recent vintage of those cases leaves us with few authorities interpreting them, and we do not have the benefit of the district court's assessment.

All of that is to say that the question of Rodriguez's standing is difficult. Admittedly, "judges may not invoke judicial modesty to avoid difficult questions." But neither is it "the role of the federal courts to answer legal questions unless specific cases need answers." In keeping with that principle, we reserve for another day the theories of Fourth Amendment standing presented by Rodriguez; we turn instead to a question to which our precedents provide a more certain answer.

Turning to the merits of the search of Rodriguez's jacket, we conclude that the search was reasonable. Specifically, it was justified by the protective sweep exception to the Fourth Amendment's warrant requirement. The protective-sweep exception was first articulated in the vehicular context in *Michigan v. Long*. The Court allowed police "to conduct an area search of the passenger compartment [of a vehicle] to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." Such searches are permissible even if a suspect has been removed from the vehicle—as long as he "is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside." That logic controls even if the suspect has been handcuffed.

While *Gant* searches and *Long* searches are both justified by the interest in officer safety, they are nonetheless distinct. Long searches are premised on the possibility that a suspect might return to a vehicle, but Gant searches occur when a suspect is being placed under arrest and is therefore unlikely to return to the vehicle. Long's roots lie not in the search-incident-to-arrest exception

but, instead, in the framework established by *Terry v. Ohio*. Thus, post-*Gant* decisions of this court have continued to apply *Long*, including to situations in which a suspect is handcuffed at the time of the search.

The officers did not arrest Rodriguez until they had discovered the gun. To be lawful, a search of his property would thus have to have been a Long search rather than a *Gant* search. For a *Long* search to be valid, an officer must have "a reasonable suspicion that the person poses a danger and may gain immediate control of weapons." That suspicion must be based on "specific and articulable facts."

Our precedents have identified several circumstances that can help clear that bar. Most relevant here, "[t]hat a person is stooping down and moving from side to side in the front seat of an automobile may form the basis of [a] reasonable belief" that he is armed and dangerous.

The officers observed both Rodriguez and the driver moving within their seats apparently in response to the presence of police. Rodriguez was shifting "[a]s if [he was] removing a jacket." That observation alone was in the direction of creating a reasonable suspicion that Rodriguez was concealing a weapon, thereby justifying a Long search before Rodriguez was released. And there are more facts pointing in the same direction. The vehicle passed other driveways and stopped in an apartment complex associated with gang activity. Once within that complex, it continued to roll forward rather than stop immediately. The driver initially opened his door as the officers approached. All of those factors could have contributed to a reasonable belief on the part of the officers that they were in danger and could take steps to protect themselves. Rodriguez counters that there are insufficient factual findings to assess the validity of a protective sweep, and so remand is appropriate. We disagree. In the absence of formal fact findings justifying the denial of a motion to suppress, remand may be appropriate where the record provides a basis to doubt the district court's decision, such as a mistaken legal assumption or express refusal to resolve certain facts. But "ordinarily," we affirm if the evidence in the record allows us to do so, as it does here. Though the district court did not specifically identify the above points as factual findings, Rodriguez has not expressly disputed any of them. The fact findings the district court did make do not suggest that it doubted the officers' credibility or that it was deliberately avoiding the question of danger. We thus adopt the ordinary course and look to evidence outside the formal fact findings to affirm the judgment. Rather than challenge facts indicating the situation's dangerousness, Rodriguez seeks to rebut the protective-sweep theory by questioning whether he could have taken control of the weapon in the car. He states that when the sweep occurred, "there was no realistic possibility that either [Rodriguez or the driver] . . . would have been permitted to reenter the [vehicle] at any point during the encounter." To be sure, the driver was already known to have been driving without a license and to have a fake ID, so even if he had not been formally arrested when the search occurred, the police could have expected that he soon would be. But Rodriguez could easily have returned to the car. As the district court found, he had only been detained, not arrested. Though police were later forced to impound the vehicle, at the time of the search they still hoped to release it to the driver's wife. Until the gun was found, there was no reason to doubt that Rodriguez (though he did not have a driver's license) would soon be allowed to return to the car as a passenger and drive away. Rodriguez responds that by that point, the "encounter" between him and law enforcement would be over, obviating any concern for officer safety. But an encounter between civilians and law enforcement begins before, and thus can continue after, a suspect has

been subjected to a search or seizure. Long and its progeny are premised on the understanding that a police officer may still be in danger after a suspect is released and allowed to return to his car. Rodriguez points to no authority questioning that understanding.
The officers had a reasonable basis to believe that Rodriguez might return to the vehicle and access a weapon. Under Long, they were thus authorized to conduct a protective sweep of the passenger compartment. Because the search was legal, the question of Rodriguez's standing to challenge it is immaterial. Rodriguez's conviction and the denial of his motion to suppress are AFFIRMED.

***U.S. v. Rodriguez*, 5th Cir., No. 21-20150, May 13, 2022.**

SEARCH & SEIZURE – cell phone search – good faith rule -- warrants.

State troopers arrested Brian Morton after finding drugs in his car during a traffic stop. Morton also had three cellphones in the car. A state judge later signed warrants authorizing searches of the phones for evidence of drug crime. The warrants allowed law enforcement to look at photos on the phones. When doing so, troopers discovered photos that appeared to be child pornography. This discovery led to a second set of search warrants. The ensuing forensic examination of the phones revealed almost 20,000 images of child pornography. This federal prosecution for receipt of child pornography followed. Even though search warrants authorized everything law enforcement did when searching the cell phones, Morton argues the evidence discovered during those searches should be suppressed. We disagree because law enforcement is usually entitled to rely on warrants, and none of the exceptions that undermine good-faith reliance on a judge's authorization applies.

Shortly after midnight, state trooper Burt Blue pulled over Morton's van on Interstate 20 about fifty miles west of Fort Worth. After approaching the driver's side door, Blue smelled marijuana. Morton eventually admitted he had marijuana in the van. Blue then searched Morton and found an Advil bottle in his right pocket. The bottle contained several different colored pills that Morton admitted were ecstasy. Morton was arrested. Blue and another trooper searched the van. Inside a plastic container wrapped in tape they discovered two plastic bags, one of which contained a small amount of marijuana. They also found a glass pipe with marijuana. In addition to the drug evidence, the troopers discovered approximately 100 pairs of women's underwear, a number of sex toys, and lubricant. A backpack with children's school supplies was also inside the van. A lollipop was inside a cupholder. Based on what they found in the van, the troopers were concerned Morton was a sexual predator.

The troopers also seized three cellphones during the search of the van. A few days after Morton's arrest, Blue applied for search warrants for the three phones. The search warrants sought evidence of drug possession and dealing. In the affidavits he submitted in support of the warrants, Blue recounted the traffic stop and the drug evidence discovered in the van and on Morton. He also

explained why, based on his experience, he believed it likely that the cellphones contained evidence of illegal drug activity. People often communicate via cellphone to arrange drug transactions. And "criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs." A state district judge concluded that probable cause existed for the searches and signed the three warrants. Each warrant allowed troopers to search for various items on the phones including "photographs, digital images, or multimedia files in furtherance of narcotics trafficking or possession." While searching the phones, Blue and a Department of Public Safety agent saw images they believed were child pornography. They stopped searching and sought new warrants seeking evidence of child pornography. The same state district judge issued the new warrants. The forensic search of the phones that followed located 19,270 images of child pornography on the three phones. A federal grand jury charged Morton with receipt of child pornography. Morton moved to suppress the pornographic images found on the phones. He argued that probable cause did not support the initial warrants allowing the phone searches. The good-faith doctrine did not apply, he continued, because the affidavits were too "general in nature" to tie the phones to drug activity. He also briefly contended that the search of the phone for drug evidence was pretextual because the troopers were really concerned that Morton might have committed sex crimes. The district court refused to suppress the evidence. It concluded that the good-faith exception to the suppression rule applied. After losing his suppression motion, Morton entered a conditional guilty plea that allowed him to challenge the searches on appeal. Morton's appeal initially succeeded. A panel of our court concluded that, although the "affidavits successfully establish probable cause to search Morton's contacts, call logs, and text messages for evidence of drug possession,"

…

Riley v. California, one of the recent Supreme Court cases applying the Fourth Amendment to modern technology, held that the search of a cellphone incident to arrest requires a warrant.

Morton and supporting amici view this case as a follow-on that allows us to flesh out when probable cause exists to believe that certain applications on a cellphone contain incriminating evidence. They argue that Riley's warrant requirement will be a mere formality if officers can search an entire phone based on nothing more than the fact that criminals sometimes use phones to conduct their illicit activity. Despite the invitation to treat this as another difficult case addressing how "the degree of privacy secured to citizens by the Fourth Amendment" is affected "by the advance of modern technology," a longstanding rule resolves the case: Evidence should not be suppressed when law enforcement obtained it in good-faith reliance on a warrant.

The good-faith rule flows from two central features of modern Fourth Amendment jurisprudence: the warrant requirement and the suppression remedy. The Supreme Court has held that a warrant is generally required for certain searches, most notably searches of the home and most recently searches of cellphones incident to arrest. Behind the warrant requirement is the idea that the "inferences which reasonable men draw from evidence" to decide if probable cause exists should "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in

the often competitive enterprise of ferreting out crime." Although obtaining a warrant from that neutral judge may burden law enforcement before it conducts the search, the police obtain a benefit after the search. When a court reviews an after-the-fact challenge to the search, "the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants."

To this unwillingness to second guess the magistrate who authorized the warrant, the exclusionary rule adds another component. As a judicially created remedy rather than a constitutional requirement, the exclusionary rule is justified by the deterrent effect of suppressing evidence when it was obtained unlawfully. A key consideration in deciding when suppression will deter is whether "law enforcement officers have acted in objective good faith." The need to punish police conduct and thus deter future violations via suppression "assumes that the police have engaged in willful, or at the very least negligent, conduct." The exclusionary rule is not aimed at "punish[ing] the errors of judges and magistrates" who issue warrants.
Deference to the judge issuing the warrant and the exclusionary rule's focus on deterring police misconduct results in the good-faith exception to the suppression remedy: A "'warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting a search.'"

Normally, but not always. The Supreme Court identified four situations when "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Reliance on a warrant is unreasonable when: 1) the magistrate issued it based on information the affiant knew was false or should have known was false but for reckless disregard of the truth; 2) the magistrate wholly abandoned the judicial role; 3) the warrant is based on an affidavit so lacking in probable cause as to render belief in its existence unreasonable; and 4) the warrant is facially deficient in particularizing the place to be searched or things to be seized.

Morton principally tries to defeat good faith by invoking the third exception, which involves what are commonly known as "bare bones" affidavits. "'Bare bones' affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." A look at some bare-bones affidavits from Supreme Court cases shows just how bare they are. One affidavit, from the Prohibition Era, said nothing more than that the agent "has cause to suspect and does believe that certain merchandise . . . has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within" the defendant's home. Another affidavit, this one supporting an arrest warrant, said only that, on a certain day, the defendant "did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation" and that the affiant "believes" certain people "are material witnesses in relation to this charge." Similarly, the allegations supporting an arrest warrant were bare bones when the only information was that "defendants did then and there unlawfully break and enter a locked and sealed building." Lastly,

Houston police officers obtained a search warrant based only on their statement that they "received reliable information from a credible person and do believe that [drugs] are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." These affidavits do not detail any facts, they allege only conclusions.
Also consider affidavits we have found to be bare-boned. In what we described as a "textbook example of a facially invalid, 'barebones' affidavit," the officer listed just the defendant's "biographical and contact information" and then stated "nothing more than the charged offense, accompanied by a conclusory statement" that the defendant committed that crime. In another case, an officer obtained a warrant to search a motel room based on an affidavit stating nothing more than that the officer "received information from a confidential informant" who was known to him and who had "provided information in the past that ha[d] led to arrest and convictions." As these cases illustrate, bare-bones affidavits contain "wholly conclusory" statements such as "the affiant 'has cause to suspect and does believe' or '[has] received reliable information from a credible person and [does] believe.'"

The affidavits used to search Morton's phones are not of this genre; they have some meat on the bones. Each is over three pages and fully details the facts surrounding Morton's arrest and the discovery of drugs and his phones. They explain where the marijuana and glass pipe were discovered, the number (16) and location of the ecstasy pills, and the affiant's knowledge that cellphones are used for receipt and delivery of illegal narcotics. In support of the request to search for photos on the phones, the affiant explains he "knows through training and experience that criminals often take photographs of co-conspirators as well as illicit drugs and currency derived the sale of illicit drugs." Whatever one might conclude in hindsight about the strength of the evidence it recounts, the affidavit is not "wholly conclusory."

The affidavits, then, put all the relevant "facts and circumstances" before the state judge, allowing him to "independently determine" if the notoriously fuzzy probable-cause standard had been met. In other words, the judge made a judgment call. Judgment calls in close cases are precisely when the good-faith rule prevents suppression based on after-the-fact reassessment of a probable-cause determination.

Although he invokes the bare-bones exception, Morton does not confront the caselaw showing it applies to affidavits that are wholly conclusory. He instead mostly challenges the probable-cause determination assessment itself, contending that the facts "merely establish[ed] probable cause for a user-quantity drug possession arrest and not probable cause to search the entire communication and photographic contents of [his] phones." Drug possessors, he points out, are less likely to use phones for drug activity than are dealers. He contends it would gut Riley if the linking of criminal activity to cellphones can be based on nothing more than an officer's experience that certain offenders often use cellphones in connection with their crimes. But this is not such a case. Morton

had multiple phones in his car along with the drugs, which our court and others have recognized can indicate that the phones are being used for criminal activity.

It is a close call whether the evidence recounted in the affidavits established probable cause for drug trafficking as opposed to drug possession. And if the evidence indicated only possession, then it is another close call whether there was probable cause to believe that evidence of drug possession would be found on the phones. But as we have emphasized, on close calls second guessing the issuing judge is not a basis for excluding evidence. Viewed in their entirety, the affidavits supporting the warrants are far from bare bones. It thus was reasonable to rely on the warrants and search the phones. For most of this case, Morton's argument was the one we have just addressed: that searching any part of his phones was unjustified because the affidavits establish probable cause only for drug possession and not the trafficking that is more logically tied to phones. But even the panel originally hearing this appeal did not accept that argument despite holding that the photos should have been suppressed. The panel recognized probable cause existed to "search Morton's contacts, call logs, and text messages" on his phone, just not the photos. Morton now runs with this theory that good-faith should be "analyzed separately" for each area to be searched. Because he did not make this claim in the district court or in his original appellate brief, it is forfeited, and we are not deciding it. Even if we could consider Morton's new argument advocating a piecemeal analysis, it would not change our holding that the good-faith rule applies. At least one other court has taken the approach of the original panel in this case and analyzed whether an affidavit is bare bones for particular items to be searched. Our precedent takes a different approach. When a defendant moved to suppress evidence obtained under a warrant that authorized the seizure of "twenty-six categories of evidence, primarily written and electronic documents," our good-faith inquiry did not parse probable cause for each category. We instead focused on whether the affidavit as a whole was bare bones, while "keep[ing] in mind that it is more difficult to demonstrate probable cause for an 'all records' search of a residence than for other searches." That is, the scope of a warrant may influence whether it is bare bones. An affidavit that is not bare bones for a limited search could be bare when supporting a broader search. Keeping the focus on the entirety of the affidavit s is the traditional bare-bones inquiry and consistent with the ultimate question whether an officer would know the affidavit is "so lacking in probable cause as to render belief in its existence unreasonable" despite a judge's finding that probable cause existed…
Viewing the entire affidavit against the broad phone search it authorized, it is borderline rather than bare bones. And even if our caselaw allowed a photographs-only inquiry and Morton preserved that argument, we would still not characterize the evidence supporting that request as "wholly conclusory."

The officers relied in good faith on the warrants the state judge issued. On finding images that appeared to be child pornography, they went back to the judge for additional warrants (Morton does not challenge how the searches were conducted). We see no unreasonable law enforcement conduct that warrants suppression of the evidence the searches discovered.

We do not decide if the state judge should have authorized full searches of the phones based on these affidavits. We decide only that the officers acted in good faith when relying on the judge's decision to issue the warrants. This ruling hardly nullifies Riley as Morton, amici, and the dissent suggest. Before Riley, police could have searched Morton's phones on the spot after arresting him. Because of Riley, the officers had to obtain warrants. For better or worse, the warrant requirement and good-faith rule make the judge presented with the warrant application the central guardian of Fourth Amendment rights. That has long been true when officers seek to search a home; Riley makes it true for searches of cellphones incident to arrest. The judgment is AFFIRMED.

***U.S. v. Morton*, 5th Cir., No. 19-10842, Aug. 22, 2022.**

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3. EVIDENCE

EVIDENCE & ELEMENTS – Pill Mill

The prosecution of a medical clinic outside Dallas offers a window into the prescription drug epidemic that is plaguing America. At trial, the parties told a tale of two clinics. The government described a pill mill that prescribed patients more than a million doses of abusable drugs in just two years. The defense described a pain management clinic that helped people who appeared to suffer from chronic pain. A jury agreed with the government's account and found the clinic's doctor and office manager guilty of conspiring to distribute controlled substances. We consider a number of challenges to the convictions and sentences.

Theodore "Tad" Taylor and Chia Jean Lee, a married couple who met while earning their degrees at Yale, ran Taylor Texas Medicine in Richardson, Texas. Taylor was the clinic's only doctor while Lee, a nurse by training, was the clinic's office manager. An Eastern District of Texas grand jury indicted the couple for conspiring to distribute controlled substances. The indictment alleged that from 2010 through early 2012, Taylor and Lee conspired to illegally prescribe five controlled substances: oxycodone, amphetamine salts, hydrocodone, alprazolam, and promethazine with codeine.

A jury convicted both of them after a seven-day trial. It also made findings about the quantity of drugs the couple distributed, but those quantities did not trigger higher statutory minimum or maximum sentences. *See* 21 U.S.C. § 841(b)(1)(C). The district court then sentenced Taylor to the 20-year statutory maximum (his Guidelines range would have been higher but for the statutory cap) and Lee to just over 15 years.

Taylor and Lee challenge the sufficiency of the evidence, contend that they were convicted in an improper venue, and argue that three errors infected the trial: premature jury deliberation, unreliable expert testimony, and a deliberate ignorance instruction. They also appeal their sentences.

We start with the defendants' claim that there was not enough evidence to convict them. They moved for acquittal at the end of trial, so we review their sufficiency appeal *de novo.* That means we do not give deference to the district court's ruling denying the motion. But, like the district judge, we give great deference to the jury's factfinding role, viewing the evidence and drawing all inferences in favor of its verdict.

Because Taylor was a doctor with prescribing authority, he and Lee could distribute controlled substances as long as they did so for a legitimate medical purpose and within the scope of professional practice. Thus, when a conspirator has prescribing authority, the elements of conspiracy to distribute controlled substances are: "(1) an agreement by two or more persons to unlawfully distribute or dispense a controlled substance outside the scope of professional practice and without a legitimate medical purpose; (2) the defendant's knowledge of the unlawful purpose of the agreement; and (3) the defendant's willful participation in the agreement."
Even by the standards of our adversarial system, the difference in the parties' portrayals of the clinic is stark. The defendants' story is that they ran Taylor Texas Medicine as a legitimate pain management operation. Taylor says that he carefully examined patients, refused to prescribe to patients who tested positive for illegal drugs, and attempted conservative treatments before resorting to others prone to abuse. He acknowledges that, in retrospect, he may have made some mistakes. But he contends he acted in good faith and trusted his patients to accurately report their pain. Lee, for her part, asserts that she knew nothing about the prescriptions Taylor wrote. According to her, she was an innocent office manager. The government tells the story of a "pill mill"—a medical practice that serves as a front for dealing prescription drugs. It portrays a clinic packed with drug users and dealers, where one person would often pay for multiple patients' visits. Also consistent with patients' trafficking drugs is that, on follow-up visits, many tested negative for the medication Taylor had prescribed them. Others tested positive for illegal drugs like cocaine. Despite the red flags, Taylor kept prescribing these patients drugs. Even when a patient's wife begged Taylor to stop feeding her husband's drug addiction, he kept prescribing the husband drugs. And when a pharmacist who filled many of Taylor's prescriptions told him that some of his patients were also receiving scripts from other doctors, he kept prescribing them drugs too. The pharmacist was so troubled that she contacted the Drug Enforcement Administration for the first time in her career. The government contends that Lee was a key part of the scheme. It says she reviewed failed drug tests, knew some patients had substance abuse problems, and prewrote prescriptions for Taylor to sign. She was also in charge of the clinic's finances, which improved dramatically as the clinic concentrated its practice on pain management.

Because the jury found the defendants guilty, we must honor the government's telling if it is backed by evidence. It is. The government called seventeen witnesses, including the pharmacist who reported Taylor to the DEA, the patient's wife who asked Taylor to stop prescribing drugs to her husband, undercover officers who pretended to be patients, an actual patient, medical experts, clinic staff, and case agents. It also introduced documentary evidence like financial records, patient files, and prescription data. Taylor testified too. All this evidence was more than enough for the jury to convict on. What follows is just a sampling.

Taylor is not a pain management specialist, yet the clinic shifted its focus to pain patients when he and Lee began having financial difficulties. Eventually 80% of the clinic's patients were pain patients. The proportion of prescriptions Taylor wrote for the commonly abused drugs hydrocodone and alprazolam grew from about 50% of prescriptions in January 2010 to over 80% by August 2011. Almost all those prescriptions were for the maximum dosage. He seldom offered patients conservative treatments not prone to abuse.

Taylor did little to justify the prescriptions. By 2011, he was seeing 40 to 50 patients a day. The undercover visits confirmed the brevity of the examinations; Taylor spent between two-and-a-half and eleven minutes per visit with the pretend patients. One of the medical experts, Graves Owen, estimated that a pain doctor complying with the standard of care might spend 30 to 60 minutes with a new patient and between 10 and 15 minutes for an ordinary follow-up.

What time Taylor spent with patients often involved only a cursory physical examination. A patient, the undercover officers, and the medical experts all testified that Taylor's physicals were brief and that he rarely requested imaging to corroborate claims of pain. Sometimes Taylor would enter the examination room with a prefilled prescription form. Agents even found presigned (but otherwise blank) prescription forms when they searched the clinic. For some patients, Taylor wrote prescriptions without any examination at all; they could just stop by the clinic and pick them up.

For at least some of these prescriptions, Taylor had direct knowledge that the patients exhibited obvious drug-seeking behavior. Recall that a pharmacist told Taylor he was prescribing drugs to patients who were getting the same drugs from other doctors. And a patient's wife called and emailed, Taylor asking him not to prescribe to her husband because he had substance abuse problems and was getting prescriptions from other doctors. He ignored their concerns. The undercover operation again corroborated what was happening with clinic patients: Taylor prescribed drugs when the undercovers indicated their pain was fake. One testified that Taylor "coach[ed]" him to come up with an injury to "legitimize" a prescription.

The defendants' responses to patient drug tests are also telling. A positive test for an illegal drug, such as cocaine, is a warning sign in flashing neon. Less apparent but no less damning is a negative test for a prescribed drug: it is a red flag that the so-called patient is selling medications rather than using them. Yet when many of Taylor's patients "failed" drug tests— either testing positive for illegal drugs or testing negative for the drugs Taylor had prescribed them—he continued to sign off on scripts. More than that, the clinic's irregular pricing structure nakedly compensated Taylor and Lee for assuming the risk of prescribing to these patients with troubling drug tests. It charged a premium to patients who tested positive for illegal substances and gave a discount to patients who tested positive for the drugs they had been prescribed.

As the clinic built up its pain management practice, monthly revenues rose fivefold, from just over $20,000 in early 2010 to more than $100,000 by mid-2011. Most of the clinic's receipts were in cash. Pain patients could not use insurance for their first visit, and they could never use Medicaid. Still, patients traveled from all over the Dallas–Fort Worth metroplex to see Taylor. Many patients seemed to know each other, and one man would sometimes pay for several patients' prescriptions. To make matters worse for Taylor, the jury could have also concluded that he lied to try and hide his guilt. Taylor told DEA agents that he discharged patients who tested positive for illegal drugs (with the exception of marijuana). As we have discussed, the evidence told a much different story.

Then, when he took the stand, Taylor repeatedly claimed he could not remember key facts such as whether he continued to prescribe to the patients who were receiving pain medication from other doctors. Patient records show that he did. These statements that the jury could view as coverups are yet more evidence that Taylor knew what he was doing was wrong.

Lee fares little better in contesting her guilt. She knew some of the clinic's patients failed drug tests but facilitated their prescriptions anyway: she sometimes administered drug tests; she saw

that one of the undercover's drug tests came back negative for a drug Taylor had prescribed him; she agreed to let an undercover avoid taking a drug test; and she charged prices that depended on drug test results. The jury could have also determined that Lee, a nurse, knew Taylor saw more patients than he could treat under the proper standard of care. Nevertheless, she continued to help Taylor run the clinic.

When the woman who asked Taylor to stop prescribing to her husband emailed, Taylor made sure to copy Lee on the exchange. As the clinic's business took off, the couple discussed patient volume and pricing. Lee even kept a prescription pad in her office area and sometimes prewrote prescriptions for Taylor to sign. So despite her claim that she just the office manager, the jury could have concluded that she was in on the scheme.

All this evidence—and remember, there is more—is easily enough to support the jury's verdicts.

(*Discussion on Venue, experts, jury instruction, sentencing, and trial proceedings omitted*)

The judgments are AFFIRMED.

***U.S. v. Lee*, 5th Cir., No. 19-40435, July 14th, 2020.**

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EVIDENCE – KIDNAPPING

Redmond robbed a bank by threatening a teller with his pistol, telling another to get on her knees, and demanding money from the drawers operated by both tellers. He then instructed two tellers to walk to an adjacent room, close the door, and count to 100 before coming out. Redmond pleaded guilty to bank robbery, and at sentencing, the district court imposed a fourlevel enhancement to Redmond's base offense level for an "abduction" during the robbery. *See* U.S.S.G. § 2B3.1(b)(4)(A). Redmond argues that (1) the district court erred in applying the enhancement because he did not "abduct" the tellers when he robbed the bank because he did not "accompany" them to the adjacent room, (2) the error was not harmless, and (3) his 180-month sentence is substantively unreasonable. For the following reasons, we AFFIRM.

Redmond entered Comercia Bank on February 14, 2017, told the teller "no alarms, no phones, no nothing," and displayed the butt of a pistol in the pocket of his sweatshirt. He told another teller to get on her knees and demanded and received money from the drawers operated by both tellers. He then told the tellers to walk to an adjacent room, close the door, and count to 100 before coming out.

Redmond was indicted for one count of bank robbery pursuant to 18 U.S.C. § 2113(a), and he pled guilty without a plea agreement. The presentence report (PSR) noted that "[r]eliable FBI investigative material revealed the defendant engaged in three additional bank robberies" that were not grouped or considered as relevant conduct and described Redmond's pending charge of aggravated assault against his wife in which he beat and stabbed her.

Relevant to this appeal, the PSR included a four-level enhancement to Redmond's base offense level for an "abduction" during the robbery, under § 2B3.1(b)(4)(A) of the Guidelines. Redmond objected to the enhancement, arguing that he did not abduct the tellers under the Guidelines'

definition of "abduction" because he did not "accompany" them to the adjacent room. The government urged a "flexible" interpretation of the Guidelines definition of "accompany," and argued that the close proximity of Redmond to the tellers and the adjacent room satisfied the accompaniment requirement.

The district court overruled Redmond's objection and denied defense counsel's motion for a downward variance, explaining that it believed Redmond should receive a sentence "significantly above the top of the advisory
[G]uideline range," because Redmond "is a very violent person and his—the community would be ill-served if he was back in the community in the near future or anytime in the next 10 to 15 years." The district court then varied upward from Redmond's Guideline range of 78 to 97 months and imposed a 180-month sentence of imprisonment. The court then stated:

> I might add, as far as the length of the sentence is concerned, the sentence would be the same as I've imposed, without regard to what ruling I might have made or should have made on the subject of abduction, the increase in level for the objection. I'm basing my decision as to the ruling that should be made on the factors the Court should consider in sentencing under 18 United States Code Section 3553(a) without regard to what the advisory [G]uideline range might be in this case.

Redmond argues that the district court erred in applying the abduction enhancement because he did not "accompany" the tellers to the adjacent room. We agree.

The relevant Guidelines provision requires a four-level increase "if any person was abducted to facilitate commission of the offense or to facilitate escape." "Abducted," according to the Guidelines, "means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction."

Black's Law Dictionary defines "accompany" as "[t]o go along with (another); to attend." The Supreme Court has analyzed 18 U.S.C. § 2113(e) to determine whether an enhanced penalty "for anyone who 'forces any person to accompany him' in the course of committing or fleeing from a bank robbery" applied where a bank robber forced someone to move only a few feet within a home. Though the Court was focused on the distance required for the statute to apply, it shed light on the meaning of "accompany" for our purposes, stating: "In 1934, just as today, to 'accompany' someone meant to 'go with' him." The Court ultimately held "that a bank robber 'forces [a] person to accompany him,' for purposes of § 2113(e), when he forces that person *to go somewhere with him*, even if the movement occurs entirely within a single building or over a short distance."

Considering the term's plain meaning and Supreme Court's interpretation, then, it is clear that to have "accompanied" the tellers, at the very least, Redmond must have been "with" them when they

moved to the adjacent room. Though the Government emphasizes the short distance between Redmond and the tellers and the adjacent room, Redmond did not move "with" the tellers to the adjacent room, and he therefore did not "accompany" them there.

Based on the foregoing, we conclude that the district court erred in applying the abduction enhancement because a victim was not forced to accompany Redmond to a different location.

(*discussion of sentencing guidelines omitted. Ed*.)

Therefore, while these cases demonstrate that district courts often impose lighter sentences when confronted with a sentencing error no matter how emphatically they indicate otherwise, they do not help Redmond rebut the Government's "evidence in the record that convincingly demonstrates the district court would [have] impose[d] the same sentence for the same reasons" absent the Guidelines error.

(*more sentencing discussion omitted*.)

For the foregoing reasons, the judgment of the district court is
AFFIRMED.

***U.S. v. Redmond*, No. 19-10535, 5th Circuit, July 30, 2020.**

EVIDENCE – CHILD ENTICEMENT

Gary Glenn Peterson was convicted by a jury of attempted enticement of a minor to engage in illegal sexual activity under 18 U.S.C. § 2422(b) and sentenced to 240 months' incarceration. Peterson appeals his conviction and sentence on three grounds. First, he argues there was insufficient evidence to prove the enticement element of § 2422(b). Second, Peterson argues that the district court erred when it declined to give his requested jury instruction on the definition of enticement. Finally, Peterson challenges the procedural reasonableness of his sentence on two grounds: he argues that the district court erred when it failed to adequately consider a departure under U.S.S.G. § 4A1.3 prior to imposing an upward variance based on criminal history, and that it also erred by considering clearly erroneous facts at sentencing. We AFFIRM.

On March 5, 2015, Peterson responded to an online advertisement in the personals section of Craigslist posted by Investigator John Graham of the Taylor County, Texas, Sheriff's Office, who was posing as a 19-year-old woman named "Nikki."

Over the course of the next five days, "Nikki" and Peterson's conversation proceeded from e-mails to text messages. Peterson sent "Nikki" photographs of himself, and Investigator Graham as "Nikki" sent Peterson two images: a darkened picture of the body of a 25-year-old woman and a picture of a woman that had been age-regressed to look like a 13-yearold girl. During their text conversations, "Nikki" implied several times that she was not 18 years old, and she ultimately told Peterson that she was 13 years old. Despite learning that "Nikki" was 13 years old, Peterson

continued the text conversation. They discussed her sexual experiences, potential meetings, and prospective sexual encounters. At one point, Peterson suggested he would purchase "Nikki" a cell phone if she met with him in person so she could send him sexual videos and photos.

On March 18, 2015, "Nikki" told Peterson to meet her at a local park. Peterson arrived at the meet-up location with an empty condom box, erectile dysfunction medication, and a Victoria's Secret bag containing two pink pajama sets in size Petite Small and a receipt showing he had purchased the items that morning at the local mall. Peterson was arrested upon his arrival.
In February 2019, Peterson was indicted on a single count of attempted enticement of a child in violation of 18 U.S.C. § 2422(b) and, after trial, a jury convicted him. The district court sentenced Peterson to 240 months' incarceration followed by a life term of supervised release. Peterson timely appealed.

Peterson's first argument on appeal is that the evidence at trial was insufficient to support his conviction of attempted enticement of a minor under 18 U.S.C. § 2422(b). To support a conviction under 18 U.S.C. § 2422(b), the Government must prove that Peterson (1) "used a facility of interstate commerce to commit the offense," (2) "was aware that [the victim] was younger than eighteen," (3) "could have been charged with a criminal offense" by "engaging in sexual activity with [the victim]," and (4) "knowingly persuaded, induced, enticed, or coerced [the victim] to engage in criminal sexual activity." To prove attempted coercion or enticement of a minor, "the Government must establish beyond a reasonable doubt that the defendant (1) acted with the culpability required to commit the underlying substantive offense, and (2) took a substantial step toward its commission."

Peterson preserved the sufficiency issue . . . We therefore review *de novo* whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." We review the evidence, both direct and circumstantial, as well as any reasonable inferences drawn from the evidence, in "a light most favorable to the verdict."

Peterson challenges the sufficiency of the evidence only as to the fourth element of § 2422(b). Citing case law from other circuits, Peterson argues that the element of persuasion, inducement, or enticement requires a showing that he made an effort to "alter" or "affect" the minor's mental state, and that it is insufficient to show that he simply arranged, asked for, or made sexual activity "more appealing." "Whether there was inducement, persuasion, or enticement is a question of fact for the jury to decide. All this court must decide is whether or not enough evidence was presented for a reasonable jury to come to the conclusion that there was some form of inducement." Sending sexually explicit messages is probative evidence of intent to induce, persuade, entice, or coerce a minorto engage in illegal sex.

This court has also rejected arguments similar to Peterson's argument that the Government must show that the minor was unwilling until the defendant's actions persuaded the minor to engage in sexual activity.

Peterson engaged in conduct similar to the defendants' conduct in *Lundy* and *White*. He responded to a Craigslist advertisement posted by a law enforcement agent, exchanged sexually explicit text

messages for two weeks with the law enforcement agent posing as a minor female named "Nikki," continued these explicit text conversations even after "Nikki" told Peterson she was a 13-year-old girl and sent him a photo of a woman that had been age-regressed to look like a 13-year-old girl, suggested he would purchase "Nikki" a cell phone if she met with him in person so she could send him sexual videos and photos, agreed to meet "Nikki" at a public park to have sex, and arrived at the meet-up location with an empty condom box, erectile dysfunction medication, and a Victoria's Secret bag containing two pink pajama sets in size Petite Small and a receipt showing he had purchased the items that morning at a local mall. Given this evidence, we conclude that a rational trier of fact could have found that Peterson knowingly attempted to induce or entice a minor to engage in sexual activity.

Peterson's second argument on appeal is that the district court erred when it rejected his proposed jury instruction clarifying the definition of "enticement." (*discussion omitted*.)

Peterson's third argument on appeal is that his sentence was procedurally unsound in two ways. (*discussion omitted*.)

For the foregoing reasons, the judgment of the district court is AFFIRMED.

***U.S. v. Peterson*, No. 19-11143, 5th Circuit, Oct. 06, 2020.**

EVIDENCE – REASONABLE SUSPICION; MIRANDA – IN CUSTODY?

Vernon Nelson pleaded guilty pursuant to a conditional plea agreement to conspiracy to possess with intent to distribute 50 kilograms or more of marijuana, reserving the right to appeal the denial of his suppression motion. He claims that evidence seized from his vehicle and statements he made should have been suppressed because Border Patrol agents stopped him without reasonable suspicion and subjected him to custodial interrogation without first giving him *Miranda* warnings. We affirm.

Around 9:55 P.M. on October 30, 2018, Vernon Nelson approached the U.S. Border Patrol Laredo North checkpoint in a tractor-trailer. The checkpoint is located north of Laredo near the 29-mile marker on Interstate Highway 35. Border Patrol Agent (BPA) Yajaira Flores asked Nelson whether he was a United States citizen and if he would consent to a scan of his tractor-trailer. Nelson answered both questions affirmatively. Nelson went to a second area, where he was met by BPA Marcus Stauffiger. Stauffiger has worked as a Border Patrol agent for over nine years, performing various duties at the Laredo North station. For two of those years, he was detailed to the Drug Enforcement Administration (DEA) where he received specialized training and investigated narcotics crimes. Agent Stauffiger scanned Nelson's tractor-trailer using the "Vehicle and Cargo Inspection System" (VACIS), which he described in laymen's terms as "an x-ray machine" used on commercial vehicles. From his scan of Nelson's trailer, he observed only several bundle-shaped objects and the outline of a dolly. He initially suspected that these objects were equipment being stored by Nelson. But his assessment changed when he saw a seal on the back door of the trailer. From his experience, Agent Stauffiger knew that these seals are typically used

to ensure that nothing goes missing from a cargo load during transport. If the trailer contained only equipment, there would be no need for a seal. Given these anomalies, Agent Stauffiger typically would have directed the truck to the secondary inspection area. But ongoing construction at the checkpoint prevented him from doing so.1 Nelson left the checkpoint.

Now suspecting the scan revealed bundles of narcotics in Nelson's trailer, Agent Stauffiger showed the scan to BPA Abraham Cantu. The two agents decided to pursue the tractor-trailer to perform a roving-patrol stop. The agents left in separate marked vehicles and pulled Nelson over six miles north of the checkpoint. Once stopped, Nelson presented Agent Cantu with a bill of lading, indicating that he was carrying a load of five pallets of Kellogg's cereal. Agent Stauffiger doubted this account, believing that his scan revealed only two pallets at most. He also noticed inconsistencies in the bill of lading, including a misspelling of Kellogg, two seal numbers instead of one, and a misspelling of seal as "SeAl."

After reviewing the bill of lading, Agent Stauffiger asked Nelson if he would step out of the truck. He was neither handcuffed nor formally placed under arrest. Agent Stauffiger told Nelson: "It looks like there's bundles inside the trailer." He asked Nelson for consent to search the trailer and told him that, if he refused, a service canine would be requested. Nelson refused, and Agent Stauffiger called for a service dog, which had to be brought from the checkpoint.2 Agent Stauffiger informed Nelson that if the service canine did not alert, Nelson would be free to go. While waiting approximately five to ten minutes for the service canine to arrive, Agent Stauffiger asked Nelson several questions. The district court summarized the two-minute conversation based on the video recording from Agent Stauffiger's body camera and the agent's recollections at the suppression hearing:

BPA Stauffiger:	"How long you've been driving?"
Defendant:	"Thirty-one years."
BPA Stauffiger:	"How about for this company?"

Defendant: "I just recently purchased this truck."
BPA Stauffiger: "Is it registered to you?"
Defendant:"Yeah."
BPA Stauffiger: "How about the trailer, same thing?"
Defendant: Nods heads in an apparent 'yes.'
BPA Stauffiger: "How long ago did you purchase the trailer?"
Defendant: "About a year."
BPA Stauffiger: "Where did you get it from?"
Defendant: "Atlanta."
BPA Stauffiger: "Is that where you're from originally?"
Defendant: "Nah, I'm from Houston."
BPA Stauffiger: "Just got a better deal in Atlanta?"
Defendant: "I saw it on Facebook. I jumped on it."
BPA Stauffiger: "Well, how much did you get it for?"
Defendant: Inaudible.
BPA Stauffiger: "Did he already get your I.D.?"
(pointing at BPA Cantu)

Defendant: Shakes head in apparent 'no.'
BPA Stauffiger: "Is it in the truck? Or do you have it on you?"
Defendant: "It's on the dashboard."
BPA Stauffiger: "I notice a lot of the trailers get registered out of like Oklahoma, Kentucky? Why is that? Is it just cheaper?"
Defendant: "Yeah."

BPA Stauffiger:	"But it's still registered out of Houston?" "Yeah." "I notice a lot of the major companies do it out of Oklahoma. Maine is another big one. Nebraska. It's rare that ya get a Texas-plated trailer." "Right."

Within a few minutes, BPA Frederick Irizarry arrived with the service canine. It alerted on the trailer, at which point the BPAs searched it and found approximately 72 kilograms of marijuana, packed in tightly wrapped bundles, consistent with BPA Stauffiger's assessment of the VACIS images.

Nelson was charged with conspiracy to possess and possession with intent to distribute 50 kilograms or more of marijuana.3 He moved to suppress his statements to Agent Stauffiger, contending that Stauffiger interrogated him without first giving him *Miranda* warnings. At the suppression hearing, the Government called Agent Stauffiger as its only witness and submitted the video recording from the agent's body camera as an exhibit. After the suppression hearing, Nelson filed a supplemental motion, arguing for the first time that the stop violated his Fourth Amendment rights and therefore the evidence derived from the stop should be suppressed. The magistrate judge recommended denying Nelson's motion. Nelson filed objections to the magistrate judge's report, but the district court adopted the report in full and denied Nelson's motion to suppress. Nelson subsequently pleaded guilty to conspiracy to possess with intent to distribute 50 kilograms or more of marijuana. As part of his plea agreement, Nelson reserved the right to appeal the denial of his suppression motion and was sentenced to three years in prison with three years of supervised release.

On appeal, Nelson argues that the district court erred by denying his suppression motion for three reasons. First, Nelson argues that the BPAs lacked the reasonable suspicion required to conduct a roving-patrol stop, rendering all evidence obtained from the stop inadmissible. Second, Nelson argues that he was in custodial interrogation when questioned by Agent Stauffiger, making his statements inadmissible, because he was not given *Miranda* warnings. Finally, Nelson argues that Border Patrol agents lack authority to conduct investigative stops solely related to non-

immigration offenses—an argument he concedes is foreclosed under this Court's precedent.

When considering the denial of a motion to suppress, this Court reviews factual findings for clear error and legal conclusions, including whether an officer had reasonable suspicion to support a stop and whether *Miranda*'s guarantees have been impermissibly denied, de novo. Evidence is viewed in the light most favorable to the party that prevailed in the district court—in this case, the Government. And where, as here, "a district court's denial of a suppression motion is based on live oral testimony, the clearly erroneous standard is particularly strong because the judge had the opportunity to observe the demeanor of the witnesses." A district court's ruling to deny a suppression motion should be upheld "if there is any reasonable view of the evidence to support it."

Nelson first argues that the district court erred in denying his motion to suppress evidence obtained from the stop of his vehicle, contending the stop was unconstitutional because the BPAs lacked reasonable suspicion to make it. A Border Patrol agent on roving patrol "is justified in stopping a vehicle if he reasonably suspects, based on specific articulable facts together with rational inferences from the facts, that the vehicle might be engaged in illegal activity." In determining whether reasonable suspicion exists, we often consider the common sense factors set forth in *United States v. Brignoni-Ponce*: (1) proximity to the border; (2) characteristics of the area; (3) usual traffic patterns on a particular road; (4) agent's previous experience in detecting illegal activity; (5) behavior of the driver; (6) particular aspects or characteristics of the vehicle; (7) information about recent illegal trafficking in aliens or narcotics in the area; and (8) the number, appearance, and behavior of the passengers. "[E]ach case must be examined based on he totality of the circumstances known to the agents at the time of the stop and their experience in evaluating such circumstances."

The Government argues, and we agree, that the totality of the circumstances here support a finding that Agent Stauffiger had reasonable suspicion to justify stopping Nelson's vehicle. First, our Court has recognized that proximity to the border is "a paramount factor in determining reasonable suspicion." While there is no bright line test with regard to this factor, we have held that "[t]he proximity element is satisfied . . . if the defendant's car was first observed within 50 miles of the United States/Mexico border." It is undisputed that Nelson's vehicle was first spotted at the Laredo-North checkpoint less than 50 miles from the border, here 29 miles, a factor weighing in favor of the reasonableness of Stauffiger's suspicions.

Furthermore, "an officer's experience is a contributing factor in determining whether reasonable suspicion exists." "[A]fter proximity to the border, [experience] is likely the most important factor because the facts are to be viewed through the eyes of an objective officer with Agent [Stauffiger's] experience." Agent Stauffiger received five months of training at the Border Patrol Academy, and he received nine months of post-academy training after that. As a Border Patrol Agent, he worked various operations at Laredo North for nine years and worked at the DEA for two years investigating narcotics crimes. His training and experience at the border, as well as his specialized work investigating narcotics crimes support his suspicions here.

From this extensive experience, Agent Stauffiger noticed irregularities with Nelson's vehicle. He knew the seal on Nelson's trailer was likely incompatible with a scan that seemingly showed a small amount of personal equipment inside. He also knew the VACIS images of Nelson's trailer were consistent with images of bundles of narcotics, facts further supporting Stauffiger's suspicion that Nelson was engaged in illegal activity.

Nelson points out that his consent to the initial scan weighs against a finding of reasonable suspicion, and we agree; that the Government's failure to produce evidence related to other *Brignoni-Ponce* factors suggests that Stauffiger lacked reasonable suspicion to stop Nelson's vehicle. But we have repeatedly counselled that "not every factor must weigh in favor of reasonable suspicion for it to be present." Here, just 29 miles from the border, a highly experienced Border Patrol agent noticed anomalies with Nelson's vehicle and saw what appeared to be bundles of narcotics inside.

Accepting Nelson's compliant behavior, viewing the totality of the circumstances in the light most favorable to the Government, we are satisfied that Stauffiger's stop of Nelson's vehicle was supported by reasonable suspicion.

Next, Nelson challenges the district court's denial of his motion to suppress statements he made to Agent Stauffiger while waiting for the canine unit to arrive, arguing that he was in custody and therefore entitled to *Miranda* warnings prior to being questioned. Generally, a suspect's incriminating statements during a custodial interrogation are inadmissible if he has not first received *Miranda* warnings. "A suspect is 'in custody' for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." "The requisite restraint on freedom is greater than that required in the Fourth Amendment seizure context." Whether a suspect is in custody is an objective determination, depending on the totality of the circumstances, that looks to the circumstances surrounding the interrogation and whether, given the circumstances, a reasonable person would have felt he was at liberty to terminate the interrogation and leave. "[T]his court has repeatedly considered certain key details when analyzing whether an individual was or was not in custody," including (1) the length of the questioning; (2) the location of the questioning; (3) the accusatory, or non-accusatory, nature of the questioning; (4) the amount of restraint on the individual's physical movement; and (5) statements made by officers regarding the individual's freedom to move or leave.

These factors support the finding that Nelson was not in custody at the time Stauffiger questioned him. Nelson was only questioned for two minutes, on the side of the highway, visible to those driving past. Agent Stauffiger's questioning was never hostile or accusatory: his tone was cooperative and he never accused Nelson of lying or committing a crime. Finally, Nelson was not handcuffed or otherwise physically restrained—he answered Stauffiger's questions while leaning against the hood of the agent's vehicle.

While Nelson makes much of the fact that he was not free to leave while waiting for the canine unit, this Court has recognized that temporary detention, by itself, does not automatically rise to the level of custodial interrogation. A reasonable person in Nelson's position would have

understood that "so long as . . . everything checked out," he would be able to leave shortly. Such limited restraint is not the type associated with formal arrest.

We conclude that Nelson was not subject to custodial interrogation and therefore was not entitled to *Miranda* warnings. The district court did not err in declining to suppress his statements.

Finally, Nelson argues that Border Patrol agents lack authority to conduct roving stops related to non-immigration offenses. But as Nelson concedes, this argument is foreclosed by this Court's precedent recognizing that Border Patrol agents possess authority under *Brignoni-Ponce* to "make roving stops on the basis of reasonable suspicion of *any* criminal activity."

We affirm the district court's denial of Nelson's motion to suppress.

***U. S. v. Nelson*, No. 19-41008, 5th Circuit, Mar. 12th, 2021.**
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EVIDENCE – ASSAULT – LESSER INCLUDED OFFENSE – ear bitten: injury or serious injury?

After biting off his ex-wife's new boyfriend's earlobe, Appellant was charged with aggravated assault by causing serious bodily injury. During his trial, Appellant testified that, in his opinion, biting off a portion of the victim's ear, the aforementioned earlobe, did not cause serious bodily injury to the victim because it did not result in "serious permanent disfigurement." Appellant requested a jury instruction on the lesser-included offense of assault by causing bodily injury. The trial court denied Appellant's request, and the jury found Appellant guilty of aggravated assault causing serious bodily injury. The court of appeals held that there was legally sufficient evidence to establish that the victim had suffered serious bodily injury. However, the court of appeals also held that the trial court erred in denying Appellant's requested jury instruction because Appellant had presented more than a scintilla of evidence raising the lesser offense of assault.

We granted review to determine whether Appellant's testimony combined with other evidence introduced at trial could have provided the jury with a valid, rational alternative to the greater offense of aggravated assault. We hold that it could have. On the record presented in this case, there was more than a scintilla of evidence from which the jury could have rationally doubted that Appellant caused serious permanent disfigurement by biting off the victim's earlobe. Therefore, Appellant was entitled to his requested instruction on the lesser-included offense of assault.

As alluded to above, this case arises from a physical altercation between Appellant and Appellant's ex-wife's new boyfriend, Taylor Sughrue. In the early morning hours of July 17, 2016, Appellant went to the home he had previously shared with his ex-wife. Though the State and Appellant offered different versions of the sequence of events at trial and disputed whether Appellant or Sughrue was the primary aggressor, no one contests that a physical altercation between Appellant and Sughrue took place. Both parties agree that Appellant bit

Sughrue's ear during that physical altercation. And both parties agree that as a result, Appellant severed Sughrue's earlobe from the rest of Sughrue's ear. Appellant then left the residence. Appellant's ex-wife called 911, and police and EMS responded to the scene. After locating Sughrue's severed earlobe in the master bedroom, paramedics transported Sughrue and the earlobe by ambulance to St. David's Round Rock Medical Center. The doctors were unable to save the earlobe.

The State charged Appellant with aggravated assault, alleging that Appellant caused Sughrue serious bodily injury by biting off a portion of Sughrue's ear, namely his earlobe. The State further alleged that Appellant used or exhibited a deadly weapon, Appellant's teeth, during the commission of the offense. At trial, the State sought to prove serious bodily injury by showing Sughrue suffered serious permanent disfigurement.

James Baker, the paramedic who responded to the residence and initially treated Sughrue, testified that Sughrue's primary injury was the amputation of his left earlobe. According to Baker, Sughrue was alert and able to communicate when EMS arrived. While Baker testified that he saw "quite a bit of blood" at the scene, he also acknowledged that Sughrue's ear had almost stopped bleeding on its own by the time Baker arrived. Baker also testified that Sughrue was able to stand and walk to the ambulance for further treatment, after which Baker and his partner transported Sughrue to the hospital without lights and sirens. Baker explained to the jury that paramedics generally only transported a patient with lights and sirens when the patient's injuries were critical, or the patient was experiencing a life-threatening emergency. The State did not ask for Baker's opinion regarding the severity of the injury to Sughrue's ear, but on cross-examination Baker agreed that the injury was not life-threatening.
Taylor Sughrue also testified for the
State at trial. During his testimony, the State introduced photographs of Sughrue's injury taken the day of the assault, photographs of Sughrue's injury with stitches, and photographs of Sughrue's scarred ear taken shortly before trial.

Sughrue also stepped in front of the jury during his testimony and afforded the jurors the opportunity to assess the severity of the injury themselves. When asked whether he considered himself permanently disfigured as a result of the assault, Sughrue testified that he did. However, Sughrue did not express any opinion as to whether he considered the disfigurement to be serious. Sughrue further testified that he was able to return to work the day after the assault and that he continued to work each day following the assault, though he worked less hours each day than he did before the assault.

The State also introduced Sughrue's medical records. The EMS records reflected that Sughrue sustained a "traumatic injury," that his left earlobe had been amputated, that he had pain in his left ear, and that there was "quite a bit of blood" at the scene. The hospital records described the injury as 10 cm long and a "large complex laceration to the left ear externally with loss of the ear lobe." These records indicated that the injury extended into the cartilage and required 11 sutures.

But the hospital records also indicated that doctors determined Sughrue to be in a stable condition and discharged him from the hospital the same day as the assault. And while Sughrue received 11

stitches to close the wound on his ear, the only follow-up medical care was for the removal of the stitches. Sughrue also refused pain medications. The State introduced no other medical or expert testimony.

After the State rested, Appellant testified in his own defense. Appellant's primary defensive theory at trial was that he acted in self-defense after Sughrue attacked him, but Appellant also sought to undermine the conclusion that the injury in this case amounted to serious permanent disfigurement. On cross examination, Appellant agreed with the prosecutor that he used his teeth to bite Sughrue's earlobe, which caused the earlobe to be detached. Appellant also agreed that Sughrue's ear was disfigured as a result. But Appellant twice refused to agree with the prosecutor that he had caused "serious" bodily injury by biting off Sughrue's earlobe. He further stated that if he saw Sughrue on the street and did not know who Sughrue was, he would be unable to notice any difference between Sughrue's two ears.

At the charge conference, Appellant requested the jury be instructed on the lesser-included offense of assault. The trial court denied the request and instructed the jury on only the greater offense of aggravated assault by causing serious bodily injury. After deliberations, the jury found Appellant guilty of aggravated assault as charged in the indictment. The court of appeals held that the evidence was legally sufficient to support Appellant's conviction for aggravated assault because the jury could have made reasonable inferences from the evidence presented at trial to conclude that Sughrue suffered serious permanent disfigurement. Appellant does not challenge this part of the court of appeals' opinion on discretionary review. Consequently, we accept the court of appeals' conclusion that the evidence was legally sufficient to establish that Appellant caused serious bodily injury. The issue of the sufficiency of the evidence to establish serious bodily injury is not before us.

The court of appeals also held that the trial court erred by denying the requested lesser-included instruction because Appellant's testimony that Sughrue did not sustain a serious bodily injury provided more than a scintilla of evidence that raised the lesser offense of assault. After conducting a harm analysis, the court further determined that Appellant had suffered some harm from the error. Accordingly, the court of appeals reversed and remanded for a new trial.
The State filed a petition for discretionary review, arguing that the court of appeals' analysis of the denial of the lesser-included offense instruction was incomplete. According to the State, the court of appeals erred in focusing solely on whether a scintilla of evidence raised the lesser offense of assault, rather than also considering whether the evidence provided a "valid, rational alternative" to the greater offense of aggravated assault. We granted review solely on this issue.

To determine whether a defendant is entitled to an instruction on a lesser-included offense, we apply a two-pronged test. First, a reviewing court must determine as a matter of law whether the lesser included offense is truly a lesser-included offense. Second, there must be some evidence in the record establishing that, if the defendant is guilty, he is guilty of only the lesser offense. In other words, the evidence must establish that the lesser-included offense provides the jury with "a valid, rational alternative to the charged offense."

The burden of producing evidence to satisfy the second prong is relatively low. Regardless of the strength or weakness of the evidence, if more than a scintilla of evidence, from any source, raises the issue that the defendant was guilty only of the lesser offense, then the defendant is entitled to an instruction on the lesser offense. We consider all the evidence admitted at trial, not just the evidence presented by the defendant. But, as this Court has previously recognized, a defendant's testimony alone may be sufficient to raise the issue. When determining whether a defendant is entitled to an instruction on a lesser-included offense, we view the facts in the light most favorable toward submitting the instruction, not in a light most favorable to the verdict. In making this determination, we evaluate the evidence in the context of the entire record, but do not consider whether the evidence is credible, controverted, or in conflict with other evidence.

As to the first prong of the test for determining whether Appellant was entitled to an instruction on a lesser-included offense, no one in this case disputes that misdemeanor assault is a lesser-included offense of aggravated assault. As for the second prong, the court of appeals correctly held that Appellant's testimony provided more than a scintilla of evidence that raised the lesser offense of assault by causing bodily injury. However, as the State notes, this conclusion does not end our analysis. Anything more than a scintilla of evidence can raise a lesser included offense, but to entitle a defendant to a jury instruction, there must be a scintilla of evidence that the lesser-included offense provides a valid, rational alternative to the greater offense.

Article 37.08 of the Code of Criminal Procedure provides that "in a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Article 37.09 defines a lesser-included offense as an offense established by proof of the same or less than all the facts required to establish the commission of the charged offense. The statute also allows that a lesser-included offense is an offense that differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission. Nothing in the statute requires a lesser-included offense to be a "valid, rational alternative" to the greater offense.

Nevertheless, the State argues that this Court requires that facts raising a lesser-included offense be a "valid, rational alternative" to a greater offense before a defendant is entitled to a jury instruction on that lesser-included offense. This "valid, rational alternative" test is a court-made doctrine we adopted to bring our jurisprudence in line with the federal standard for determining whether a defendant is entitled to a jury instruction on a lesser-included offense. The test determines whether there is evidence at trial that casts reasonable doubt upon the greater offense, not whether the evidence is legally insufficient to establish it. This second prong of the test is distinct from the jury's ultimate determination as to whether the defendant is guilty only of the lesser offense and not the greater offense.

Most importantly, when determining whether there is some evidence in the record that constitutes a "valid, rational alternative" to a greater offense, we view the evidence in the record in a light most favorable to giving the instruction, not in a light most favorable to the verdict. The "valid, rational alternative" test merely enhances the second prong of the test for determining whether a defendant is entitled to an instruction on a lesser-included offense. It is not an invitation for reviewing courts to weigh the strength or credibility of the evidence in the record.

In considering whether evidence of a lesser-included offense establishes a valid, rational alternative to the charged offense in this case, we compare the statutory elements of the greater offense of aggravated assault and the lesser offense of assault to determine whether some evidence exists in the record that could cast reasonable doubt upon a conviction for the greater offense of aggravated assault as charged in the indictment but not the lesser offense of assault.28 Under the Texas Penal Code, a person commits assault if he intentionally, knowingly, or recklessly causes bodily injury to another. A person commits aggravated assault if he commits assault and either:
(1) causes serious bodily injury to another, or (2) uses or exhibits a deadly weapon during the commission of the assault. In this case we are only concerned with the evidence concerning the degree of the injury caused not whether a deadly weapon was used during the assault given the ground for discretionary review before us.

There are no wounds that constitute "serious bodily injury" *per se*. We have long held that it is up to a jury to determine as a matter of fact whether a particular bodily injury can be said to be "serious." Whether an injury constitutes serious bodily injury is determined on a case-by-case basis. Therefore, there must have been some evidence that would have permitted the jury to rationally doubt that the injury to Sughrue's earlobe constituted serious bodily injury for Appellant to be entitled to the requested instruction on the lesser-included offense.

Here, the State charged Appellant with aggravated assault by causing serious bodily injury. Aggravated assault increases the penalty for simple "bodily injury" assault if the victim suffers a significantly greater degree of bodily harm—serious bodily injury, rather than mere bodily injury. "Serious bodily injury" means bodily injury "that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

By way of contrast, "bodily injury" means "physical pain, illness, or any impairment of physical condition." The Legislature intended that there be a meaningful difference or distinction between "bodily injury" and "serious bodily injury," and that difference is often a matter of degree. At trial, the State sought to prove serious bodily injury by showing that Sughrue had suffered serious permanent disfigurement as a result of the assault. Therefore, there must have been some evidence that would have permitted the jury to rationally believe that the amputation of Sughrue's earlobe did not constitute serious permanent disfigurement in order to support the requested instruction on the lesser-included offense.

As mentioned above, distinguishing between "bodily injury" and "serious bodily injury" is a matter of degree. The relevant issue in determining the degree of disfigurement is the damage caused by the wound when inflicted, not the disfigurement as exacerbated or ameliorated by medical treatment. However, bodily injury cannot be elevated to serious bodily injury by postulating potential complications that are not in evidence. There must be evidence of some significant cosmetic deformity caused by the injury. Ultimately, as intermediate courts have observed, a jury is free to apply common sense, knowledge, and experience gained in the ordinary affairs of life in drawing reasonable inferences from the evidence presented to it in order to conclude that a particular injury constitutes "serious bodily injury." But it is also up to the jury to resolve conflicting inferences.

Indeed, courts have also noted that not every scar amounts to serious permanent disfigurement.
….
While these cases involve the more demanding inquiry of legal sufficiency, they also demonstrate that jurors can rationally draw conclusions that some scars and injuries are not "serious" enough to rise to the level of serious bodily injury even though the scars unquestionably amount to "permanent disfigurement."

Moreover, "serious bodily injury" may be established without a physician's testimony when the injury and its effects are obvious. We have previously held that a lay witness's opinion testimony supported a finding of serious bodily injury, which suggests that lay opinion testimony can also be used to negate that element.

If lay witness testimony can rationally provide some evidence from which a jury can infer the severity of a particular injury, then the converse is equally true, at least under the facts presented in this case. In this regard, we agree with the court of appeals. Just as the State could rely in this case on Sughrue's lay opinion testimony to establish permanent disfigurement, Appellant could rely on lay opinion testimony to cast doubt upon whether that disfigurement was serious.
Moreover, Appellant's lay opinion testimony was appropriate under the facts of this case. Generally, a lay witness's observations which do not require significant expertise to interpret, and which are not based on a scientific theory, are admissible if they satisfy the requirements of Texas Rule of Evidence 701. Because the nature of the injury does not require significant expertise to understand and the requirements of Rule 701 were met, Appellant's testimony could provide a valid, rational alternative to the greater offense of aggravated assault.

First, the State's treatment of the nature of the injury at issue demonstrates that the injury did not require significant expertise to evaluate. Even events not normally encountered by most people in everyday life—such as someone biting off another person's earlobe—do not necessarily require the testimony of an expert. "It is only when the fact-finder may not fully understand the evidence or be able to determine the fact in issue without the assistance of someone with specialized knowledge that a witness must be qualified as an expert."

In this case, the jury would have been able to understand the nature and the seriousness of Sughrue's disfigurement without the assistance of expert testimony. In fact, the jurors had the opportunity to observe Sughrue's injury with their own eyes, both through photographs showing the injury at the time it was inflicted and through Sughrue exhibiting the healed injury during his testimony. Though the court of appeals correctly held that a jury could have rationally found that Sughrue's injury amounted to serious permanent disfigurement when viewing the bloody crime scene photographs, the jury could have also rationally found that Sughrue's injury was, as Appellant testified, not serious, when it viewed, for example, this photograph of Appellant's injured ear:
…
Accordingly, a lay witness could properly testify in the form of an opinion about whether the amputation of Sughrue's left earlobe constituted serious permanent disfigurement.
Second, Appellant's testimony was proper under Rule 701. Under Rule 701 of the Texas Rules of Evidence, a lay witness can testify in the form of an opinion if the opinion is (a) rationally based

on the witness's perceptions, and (b) helpful to the clear understanding of the testimony or the determination of a fact in issue. Perceptions refer to a witness's interpretation of information acquired through his or her own senses or experiences at the time of the event. Thus, the witness's testimony can include opinions, beliefs, or inferences as long as they are drawn from his or her own experiences or observations. An opinion is rationally based on perception if it is one that a reasonable person could draw under the circumstances. There is no bright line rule indicating when an opinion is helpful, but we have said that general evidentiary concerns, such as relevance and the Rule 403's balancing test, aid the determination.

Appellant's opinion was rationally based on his observations of the injury, both as it was inflicted and as the healed injury appeared at the time of trial. Appellant conceded he bit Sughrue's earlobe and caused the injury, which would have given Appellant the opportunity to personally observe the injury as it was inflicted. And, like the jury, Appellant was able to observe Sughrue's healed injury during Sughrue's testimony at trial. Under these circumstances, a reasonable person could form an opinion on whether the injury amounted to "serious permanent disfigurement" given the obvious nature of the injury. Appellant's opinion could also have been helpful to the jury's determination of a fact in issue, namely whether Appellant seriously disfigured Sughrue, given that it was the only evidence expressly addressing the issue. The medical records introduced by the State describe the injury and the treatment, but they do not contain any medical opinion or prognosis that the disfigurement was permanent or severe. The State offered no other medical or expert testimony to establish that Sughrue had suffered a serious permanent disfigurement.
And, while Sughrue testified that he considered himself to be permanently disfigured, he did not express an opinion on whether his disfigurement was serious. Accordingly, the jurors were left to determine, based on their evaluation of the nature of the injury and their common sense, knowledge, and experience, whether the loss of Sughrue's earlobe resulted in serious permanent disfigurement. Given that context, Appellant's own opinion, regardless of whether it was persuasive, was at least some evidence that was directly germane tothe lesser-included offense and could have rationally cast doubt upon evidence that the injury at issue amounted to serious bodily injury.

Because a lay witness could properly testify on the issue of serious bodily injury under these facts, Appellant's testimony was at least some evidence that could have provided the jury with a valid, rational alternative to the greater offense of aggravated assault. During his testimony, Appellant admitted that he bit Sughrue's earlobe hard enough to sever it from the rest of the ear and conceded that Sughrue's ear was disfigured as a result of the bite. However, Appellant disputed that this disfigurement was serious at the time it was inflicted and after it had healed. He also testified that he would not notice the injury if he did not know the victim and saw him walking down the street. Because the only distinguishing feature between assault and aggravated assault as charged in the indictment is the seriousness of the injury, Appellant's testimony, if credited by the jury, could have provided some evidence from which a jury could have rationally doubted an element of the greater offense—serious bodily injury—and raised the lesser included offense of assault by conceding his actions caused bodily injury.

Moreover, Appellant's opinion fit within the context of the record developed as part of his defense.70 Even though there was "quite a bit of blood" at the scene of the offense, Sughrue's ear had almost stopped bleeding on its own by the time EMS arrived. Sughrue was able to stand and

walk to the ambulance for further treatment, after which EMS transported Sughrue to the hospital without lights and sirens. This was because the injury was not life-threatening. Further, Sughrue was able to return to work the day after the assault, and he continued to work each day following the assault. The hospital records indicated that Sughrue was in stable condition after the assault and doctors discharged him from the hospital the same day. And while Sughrue received several stitches to close the wound on his ear, the only follow-up medical care indicated was for the removal of the stitches. Sughrue also refused pain medications. Sughrue's testimony also demonstrated that he was able to hear and respond to the questions asked by counsel without difficulty, which suggests that there was no loss or impairment of the function of the injured ear. Finally, the evidence showed that Sughrue was able to walk to the ambulance on his own, doctors determined him to be stable at the hospital and discharged him the same day, and Sughrue was able to return to work the next day, all of which support Appellant's opinion that the injury was not serious.

Essentially, the State argues that the court of appeals plucked Appellant's testimony out of the record and examined it in a vacuum. As discussed above, this is inaccurate. Appellant proceeded under two defensive theories at trial: self-defense and lack of serious bodily injury. Though Appellant focused primarily focused on self-defense, he marshaled testimony through cross-examination that undermined the conclusion that the injury in this case rose to the level of serious bodily injury. This culminated in Appellant's testimony, elicited by the State, that the victim had not suffered serious bodily injury. Appellant's opinion testimony in this regard was also the only direct evidence germane to the issue of the seriousness of the injury. Further, it was bolstered by several other pieces of evidence in the record undermining the seriousness of the victim's injury.

It is the jury's role—not ours—to determine whether to believe the evidence negating the greater offense and supporting the lesser. We have made clear that, in determining whether a defendant is entitled to an instruction on a lesser-included offense, the issue is not whether a rational jury could have found the defendant guilty of the greater offense, but rather, whether a jury could have reasonably interpreted the record in such a way that it could find the defendant guilty only of the lesser-included offense. Based on the totality of the record in this case, we conclude that there was at least some evidence from which a jury could have rationally done so regardless of how persuasive that evidence is. Accordingly, we agree with the court of appeals that the trial court should have granted Appellant's request and instructed the jury on the lesser-included offense of assault. It would then have been the jury's duty under the proper instructions to determine whether the testimony was persuasive, credible, and supported the lesser included offense.

Viewing the evidence in the light most favorable to the requested charge, Appellant's lay opinion testimony negating the seriousness of the injury, combined with other evidence supporting his defensive theory, amounted to more than a scintilla of evidence that could have provided the jury with a valid, rational alternative to the greater offense of aggravated assault. Therefore, the trial court erred in denying Appellant's requested instruction on the lesser-included offense. We affirm the judgment of the court of appeals.

***Wade v. State*, Tex. Crim. App., No. PD-0157-20, April 06, 2022.**

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EVIDENCE – THREAT TO OFFICER

As a prelude to the threatening-a-federal-official conviction at issue in this appeal, Daniel Polanco, a former agent for the United States Customs and Border Patrol, was convicted of conspiracy to possess, with intent to distribute, five kilograms or more of cocaine; possession, with intent to distribute, five kilograms or more of cocaine; and making false statements to a government agent. Following a post-trial hearing, the district court denied his motion for a judgment of acquittal and a new trial. In exiting the courtroom at the conclusion of that hearing, Polanco threatened a federal agent, who was involved in prosecuting Polanco. According to the agent, Polanco said to him: "This is going to come back to you motherfuckers. You
will see".

As a result of this conduct, he was convicted by a jury of threatening a federal official, in violation of, *inter alia*, 18 U.S.C. § 115(a)(1)(B). Polanco asserts: the trial evidence was insufficient to convict him of the charged offense; and the district court did not respond reasonably to a question the jury submitted to the court during its deliberations. Regarding the sufficiency issue, and because Polanco moved for a judgment of acquittal at the close of the Government's case and after both sides rested, he preserved that issue, and our review is, therefore, *de novo*. He claims: his statement to the agent was ambiguous and subject to interpretations that did not imply physical harm; and the evidence was insufficient for a reasonable jury to find the threat was made with the requisite intent.

For the following reasons, a reasonable jury could find Polanco threatened to assault a federal law enforcement officer, "with intent to impede, intimidate, or interfere with [him while he was engaged] in the performance of official duties, or with intent to retaliate against [him due to] the performance of official duties".

Although Polanco asserts his statement was ambiguous and subject to interpretations that did not imply physical harm, the record establishes that the jury: resolved the factual question as to the meaning of his statement; rejected an innocent interpretation of it; and found the statement was a threat to commit bodily harm. Our court defers to the jury's decision. Facts discernable from the record, including, *inter alia*, testimony regarding the context in which Polanco made his statement and the reaction of those who heard or learned about it, support that his statement could be reasonably inferred to constitute a threat to assault the agent. The resolution of any conflicts in the evidence is, of course, the sole role of the jury.

Further, there was sufficient circumstantial evidence for a reasonable jury to find Polanco made the threat with intent to retaliate against the agent due to his performance of official duties. The evidence supported that Polanco directed the remark to the agent because of his role in prosecuting Polanco for serious drug offenses.

Polanco also contends the evidence was insufficient to prove he had the subjective intent to threaten the agent. But, our court uses an *objective* standard in deciding whether a statement is a threat under 18 U.S.C. § 115(a)(1)(B) and considers the intent of the speaker only to evaluate whether the threat was made intentionally or knowingly. To the extent Polanco challenges our prior decisions or asserts decisions of other courts should be applied, his challenge fails because our court is bound by our precedent, absent a change in the law, reconsideration by our full court, or an intervening Supreme Court decision. He offers no basis for us to determine that *Elonis v. United States*, in which the Supreme Court considered whether a different statute using the word

threat—18 U.S.C. § 875(c)—required that the defendant know of the threatening nature of the communication, extends to an offense under § 115(a)(1)(B).

Turning to Polanco's other issue, his challenge to the court's response to a jury question during its deliberations, Polanco proposed referring the jury to part of the jury instructions, and did not object to the court's answer to the jury, which was a subpart of the part proposed by Polanco. Arguably, that proposal and lack of objection constitute waiver or invited error. We need not decide that question because, even if review is instead under the more lenient plain-error standard, the challenge fails. Polanco must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings".

Polanco has not shown that the court committed plain error in providing the unobjected-to answer to the jury's question, which focused on whether Polanco's remark constituted a "threat to assault". In answer, the court referred the jury to a sentence in the jury instructions that defined "threat to assault" as a threat to commit bodily harm. Polanco does not contend the original instruction was an incorrect statement of law or challenge the accuracy of the instruction. The court's answer was "reasonably responsive" to the jury's question and permitted the jury to understand the issue. Moreover, the court's written response that the jury refer to a sentence in the original instructions was proper.

AFFIRMED.

***U.S. v. Polanco*, 5th Cir., No. 20-20585, Feb. 28th, 2022.**

EVIDENCE – Official Oppression and Altering Government Records

Appellant Kevin Ratliff, the Llano chief of police, was convicted by a jury of two counts of official oppression, a class A misdemeanor, and one count of the misdemeanor offense of tampering with a governmental record. Tex. Penal Code Ann. §§ 39.03, 37.10. The question we are to resolve in this proceeding is whether the evidence is sufficient to support these three convictions.

The answer to the two counts of official oppression is yes. We conclude that a rational jury could find, beyond a reasonable doubt, that Appellant subjected Cory Nutt to an arrest that he knew was unlawful and intentionally subjected Cory Nutt to mistreatment, knowing that his actions were unlawful, by criminally trespassing in Nutt's home. We therefore affirm the judgment of the court of appeals as to those two counts.

However, the answer to the conviction for tampering with a governmental record is no. We conclude the court of appeals erred in relying on omissions to support its holding because including the specific facts of the arrest in an offense report is not required by any statute or rule, and any facts not stated in the offense report were provided through video evidence. We therefore reverse the judgment of the court of appeals and hold the evidence insufficient to support

Appellant's conviction for tampering with a governmental record and render a judgment of acquittal as to that count.

Background

This case involves four police officers—including Appellant—and the warrantless arrest for public intoxication of a man inside his recreational vehicle (RV). Cory Nutt lived in Riverway RV park. Llano police officer Grant Harden also lived at the park, three spaces down. On the night of May 2, 2017, Officer Harden left the RV park in his personal vehicle to respond to a call. Nutt and another neighbor, Alex Britton, were outside at the time. Although there is some dispute as to what exactly was said, Nutt yelled out to Harden that he was driving too fast. Harden backed up and argued with Nutt. Nutt told Harden to "slow the fuck down" and asked him if he thought he was above the law. Harden asked Nutt to identify himself, and Nutt refused. Harden explained that he was a Llano police officer on his way to a call and told Nutt to go back inside his RV. After Harden left, Nutt and Britton went back inside their own trailers.

About twenty-three minutes later, Harden returned to the RV park. He called the RV park manager, Christie Schutte, and told her that there was a guy "irate and upset" a "few trailers down from him." Harden also called for backup, saying he had a "public intox" interaction with Nutt. When Schutte arrived at the RV park, she asked Harden what was wrong, and Harden said he was taking Nutt to jail for public intoxication. Schutte asked, "Where is he at?" Harden responded, "He's in his trailer." Schutte replied, "Then what's the problem?" Harden also told dispatch that Nutt had gone back inside his trailer.
Officers Aimee Shannon and Jared Latta, as well as Appellant, responded to the call. The officers knocked on Nutt's door and, when Nutt opened the door, the officers demanded that he come out, but Nutt refused. Harden and Shannon repeatedly told Nutt to come outside, and he repeatedly refused to do so and denied the officers consent to enter his home. On the bodycam recording, Nutt expressly told police twice that he was not coming outside. Also, thirteen times he implied that he was not coming out:

• 00:11-00:13: "The best thing I can tell you is get off my door."
• 00:23-00:24: "I am not stepping out."
• 00:26-00:27: "You are not coming in."
• 00:28-00:34: "This is my personal owned property. I am not. And I am not."
• 00:56-00:56: "No sir." (In response to 'step outside')
• 01:24-01:25: "Get your hands off my door."
• 01:29-01:33: "Get your hands off my door. This is my property."
• 01:35-01:36: "Take your hands off."
• 01:40-01:42: "Take your hands off of my door."
• 01:49-01:51: "Take your hands off my door."
• 01:55-01:56: "Please take your."
• 04:11-04:13: "Why am I stepping out of my."
• 04:24-04:25: "For what." (In response to 'come down those steps')
• 09:31-09:34: "Are you coming in for what reason?"
• 10:48-10:50: "I don't wanna walk outside."

Harden told Nutt that he saw Nutt "out here intoxicated" earlier and that Nutt committed that offense twice. He also said that Nutt "quickly scurried into [his] trailer and shut [his] door." Harden threatened to call Nutt's supervisor, stated that he would come up the stairs to "get" Nutt if Nutt did not step outside, and said Nutt would be facing a charge of resisting arrest if Officer Harden had to fight him. Officer Shannon also told Nutt that by not complying, he was resisting arrest. She pointed her taser at Nutt—specifically, at his crotch—and she and Harden both said that Nutt would be tased if he did not exit the trailer. Officer Shannon's body camera reflected that, during the last 14 minutes of the confrontation, Nutt was standing inside the door of his trailer and was not wearing shoes. It is difficult to know when Appellant arrived at the scene. Jack Schumacher, chief investigator for the district attorney's office for Llano, Burnet, San Saba, and Blanco counties, testified that he believed Appellant was at the scene for most of the 14 minutes of the bodycam video. In the bodycam video, it appears that Appellant and Sergeant Latta are present at approximately the 10:15 marker, which is deduced via the additional flashlight shone on the trailer. Harden is on the trailer's steps. At the 10:38 marker, Appellant walks up the steps and enters the trailer and positions himself behind Nutt. The offense report seems to imply that Appellant arrived with the other officers. Specifically, Harden's report states that "Officer Shannon, Sergeant Jared Latta and [Appellant] arrived on scene a short time later." Chief Investigator Schumacher testified that he believed Appellant was at the scene for most of the 14 minutes of the video. Although Appellant never told Schumacher when he arrived on the scene, Schumacher inferred this by interviewing Cory Nutt, Alex Britton, and Christie Schutte. Britton, Cory Nutt's neighbor, testified "When he [Appellant] did get there he was kind of in the back kind of just watching everything." Britton also testified that Appellant showed up last, probably ten, 15 minutes after the rest of the officers, and that when Appellant showed up, he did not immediately go into Mr. Nutt's trailer. The RV park manager, Christie Schutte, testified that Appellant "pulled up right after Aimee [Officer Shannon]." And finally, Corey Nutt testified that he was aware of four officers on the scene before he was arrested. He heard Harden talking at the back of his trailer, and Mr. Nutt made the assumption he was telling his side of the story.

As seen on the bodycam, Appellant proceeded to walk up the steps, walk inside Nutt's trailer, move behind Nutt, places a hand on Nutt's back, tells Nutt to step out of the trailer, and directs him out the door and down the steps. While this is occurring, Nutt states, "I don't wanna walk outside." Nutt is handcuffed, and Harden and Latta arrest him for public intoxication.

The public intoxication charge was ultimately dropped. Afterward, Nutt contacted Schumacher to report the circumstances around his arrest. Schumacher and Texas Ranger Marquis Cantu interviewed Appellant. Appellant stated that he viewed the situation as "obviously a drunk guy that was refusing to come out after he went back in the trailer" and that there would have been no problem if Nutt had not run back into his trailer. When asked his basis for going into Nutt's RV, Appellant stated, "I didn't want to see a 300-something pound guy get tased standing in that doorway, and falling face first." At trial, Schumacher testified that there were no exigent circumstances present in this case to justify the warrantless arrest. He said that any potentially exigent circumstances

dissipated when Harden told dispatch that Nutt was in his trailer and, therefore, that the police were not in a continuous pursuit of an individual. He said that, by entering the trailer, Appellant "effected an illegal arrest."

Schumacher also testified that as part of Appellant's "occupational oversight" responsibilities, he could have ordered Shannon to "holster" her taser. And he said that several witnesses told him that Appellant was present for most of the exchange recorded on Shannon's body cam even though he is only seen on the recording near the end.

Lisa Bujnoch, a retired police officer, testified that, based on her review of the bodycam video, Harden and Shannon were not entering Nutt's home because they understood that they did not have legal authority to do so.

A copy of the offense report prepared by Officer Harden was admitted into evidence. The report was signed by Officer Harden and contains Appellant's initials as Officer Harden's supervisor. During Schumacher's interview with Appellant, Appellant admitted that he read Officer Harden's offense report regarding the incident. The report states:

1. On 2 May 2017 at approximately 10:50 pm, Llano PO Officers Shannon and Idol were answering a call for service at 1100 W Haynie St, Apt. 311 in reference to a physical domestic disturbance. The subject(s) had barricaded themselves [sic] inside the residence. When this information went out over the radio, I responded. As I was leaving the Riverway RV Park, located at 1907 W Ranch Road 152, I could hear a male subject yelling. I stopped my vehicle and asked the man if he was alright. The subject yelled at me "slow the fuck down". I immediately noticed the Subject to be speaking with slurred speech.
   2. I presented my officer's badge and asked the man his name, which he refused to give. He then asked for my name. I told him that my name was Grant Harden, that I was an officer with the Llano Police Department and that I was on my way to an officer's call for emergency assistance. The man said something that was unintelligible. I also noticed that the male was staggering heavily as he walked. The male was clearly intoxicated. I told the man to go inside his RV, due to my need to leave the area. I then left.
   3. After providing assistance to Officers Shannon and Idol, I returned to the RV park. I stopped behind the intoxicated male's RV in order to get his license plate number, in an attempt to identify him. I did not see the male and thought that he had probably retreated into his RV for the night. The license plate on the RV and the pickup truck parked next to it were both registered to a CORY DON NUTT (DOB: 12/1/1978). As soon as I had received this information, Nutt stepped out of the shadows and began speaking to me. I asked him his name, but he refused again. He then said to me "get out of the truck bitch".
   4. Given Nutt's slurred speech, inability to walk without staggering and the fact that he had chosen to begin using profane language in a public place, I made the decision that Nutt may be a danger to himself or others. I decided that Nutt was to be arrested for Public Intoxication. I exited my vehicle and requested a patrol unit for assistance.

> 5. Officer Shannon, Sergeant Jared Latta and Chief Kevin Ratliff arrived on scene a short time later. Ratliff placed Nutt in handcuffs and I notified him that he was under arrest for Public Intoxication. I transported Nutt to the Llano County jail and booked him in without further incident.

The report did not mention any of the facts surrounding Nutt's arrest. During trial, Investigator Schumacher testified that prosecutors rely on offense reports, in part, to determine what charges might be warranted and also to determine if the police engaged in any unlawful behavior that might result in evidence being suppressed. Schumacher said that there were omissions in Harden's offense report and discrepancies between what was in the report and what was captured on the recording from Shannon's body cam. He explained that there was no mention of the interaction between Nutt and the officers while he was in his home or of Appellant entering Nutt's home and escorting him out without a warrant and without consent. Also, the report listed no witnesses even though "some civilians involved . . . witnessed the event," including Britton and Schutte. The failure to mention the witnesses was a "significant" omission. Further, Appellant signed the report as the supervisor and, therefore, approved the report. He said that he could not think of a reason why Appellant would not ensure that the report accurately chronicled the events if he genuinely believed that the arrest was legal.

Lisa Bujnoch also testified that "[t]he purpose of an offense report is to account in an incident for everything that happens from the beginning to the end . . . whether it's good or bad" because "the offense report is the first document that . . . the prosecuting attorney sees in order to determine what charges are appropriate, if any." She said that offense reports "should be very comprehensive" and "should include witnesses that may or may not have information, both for the prosecutor and for the defense." Bujnoch testified that there were disparities between what occurred on the recording and what was listed in the offense report, including not listing any witnesses or mentioning that Shannon pointed her taser at Nutt, which Bujnoch said was a show of force that was required to be disclosed.

Bujnoch said that the omissions and misrepresentations were so great that they qualified as tampering with a governmental record. She said that "if all the elements of the incident had been included in the report[,] it would have been obvious that the arrest was illegal." Further, by signing the offense report, Appellant indicated that he read the contents, endorsed the description of the events on the night in question, and used the report to document the event. The jury found Appellant guilty of both counts of official oppression as well as the misdemeanor offense of tampering with a governmental record. In each case, the judge sentenced Appellant to six months in jail, probated for one year, all to run concurrently.

Court of Appeals

On appeal, Appellant challenged the sufficiency of the evidence supporting his conviction for tampering with a governmental record and two convictions for official oppression. As for the tampering conviction, Appellant asserted that the evidence was insufficient because the State did not provide any evidence regarding "what is required to be [included] in an offense report." He also argued that there was no statute requiring that a police officer fill out an offense report or that certain information be included on the report. As for the official oppression convictions, Appellant

argued that: (1) the evidence did not establish that he knew that the arrest and entry were unlawful; (2) the evidence established that his otherwise impermissible conduct was justified by the presence of exigent circumstances; and (3) the entry and arrest were authorized because he observed Nutt commit an offense.

The court of appeals affirmed all three convictions. It held that a rational jury could have concluded beyond a reasonable doubt that Appellant (1) "made or used a governmental record knowing that the report was false" and (2) "while acting under color of his office as a public servant, . . . subjected Nutt to an arrest that he knew was unlawful and intentionally subjected Nutt to mistreatment knowing that his actions were unlawful by criminally trespassing in Nutt's home."

We granted review to determine whether the circumstances were sufficient to prove that Appellant tampered with a governmental record and committed official oppression.

When reviewing the legal sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found each element of the offense beyond a reasonable doubt. The appellate court must give deference to "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Circumstantial evidence and direct evidence are equally probative, and either one alone can be sufficient to establish guilt. Juries are permitted to draw reasonable inferences from the evidence presented at trial "as long as each inference is supported by the evidence presented at trial."

Analysis

I. TAMPERING WITH A GOVERNMENTAL RECORD

Appellant was charged with tampering with a governmental record in violation of Texas Penal Code section 37.10(a)(5), which states that "A person commits an offense if he makes, presents, or uses a governmental record with knowledge of its falsity."4 The indictment alleged that Appellant: did then and there, with intent to defraud or harm another, namely, Cory Nutt, make or present or use a governmental record, namely, a Llano Police offense report, in case number 17-130, by omitting or misrepresenting facts of the arrest of Cory Nutt, and the Defendant made or presented or used the governmental record with knowledge of its falsity. The report was prepared by Officer Grant Harden, and the State's theory of the case was that when Harden made the report, he left out all the information about Appellant going into Nutt's trailer. Therefore, in the State's theory, the tampering occurred when Appellant initialed the report, indicating his approval.

The court instructed the jury on both felony and misdemeanor offenses of tampering with a governmental record. The jury charge specified that Appellant was guilty of misdemeanor tampering if he "ma[d]e or present[ed] or use[d] a governmental record, namely [Officer Harden's] Llano Police offense report, . . . by omitting or misrepresenting facts of the arrest of . . . Nutt . . . with knowledge of [the report's] falsity." The jury found Appellant guilty of misdemeanor tampering. The court of appeals agreed. It held that a rational jury could have concluded that when Appellant initialed the offense report that omitted events "pertaining to the legality of Nutt's arrest that Appellant himself witnessed, he made or used a

governmental record knowing that the report was false." In particular, the court relied on the testimony of Officers Schumacher and Bujnoch. They had testified similarly that the offense report failed to mention the interaction between Nutt and the officers while he was in his home and the fact that there was no mention of Appellant entering Nutt's home and escorting him out without a warrant and without consent. They also testified that there were no witnesses listed in the report, which Schumacher described as a "significant" omission. The court of appeals further relied on Officer Bujnoch's testimony that offense reports "should be very comprehensive" and "should include witnesses that may or may not have information, both for the prosecutor and for the defense." Additionally, the court of appeals noted "discrepancies between what was in the report and what was captured on the recording from Officer Shannon's body camera."

We now turn to the question of whether the court of appeals properly held that the evidence was sufficient to sustain Appellant's conviction for tampering with a government record. As discussed above, a sufficiency review rests on whether the evidence supports the elements of the charged crime as defined by the hypothetically correct jury charge. However, in some cases, sufficiency of the evidence also turns on the meaning of the statute under which the defendant has been prosecuted. The State introduced the testimony of retired peace officer Lisa Bujnoch, who testified that offense reports "should be very comprehensive" and "should include witnesses that may or may not have information, both for the prosecutor and for the defense." Bujnoch testified that there were disparities between what occurred on the recording and what was listed in the offense report, including not listing any witnesses or mentioning that Shannon pointed her taser at Nutt, which Bujnoch said was a show of force that was required to be disclosed.

Likewise, Investigator Schumacher said that there were omissions in Harden's offense report and discrepancies between what was in the report and what was captured on the recording from Shannon's body cam. He explained that there was no mention of the interaction between Nutt and the officers while he was in his home or of Appellant entering Nutt's home and escorting him out without a warrant and without consent. Also, the report listed no witnesses even though "some civilians involved . . . witnessed the event," including Britton and Schutte.

However, there was no testimony that anything included in Harden's report was false. The first four paragraphs of the offense report summarized the events that occurred prior to Appellant's arrival on the scene. When Appellant initialed the report, he would not have had personal knowledge of those events. In his interview with Schumacher, Appellant stated that he relied on Officer Harden's representations regarding those events ("That's what Grant told me"). None of the State's witnesses suggested that anything in these four paragraphs was false. Paragraph five was the only part of the report that involved events about which Appellant had personal knowledge and, like the preceding four paragraphs, there was no testimony or evidence presented indicating that this paragraph was false. At most, the State's witness testimony supports the proposition that these witnesses disagree with Harden's offense reporting style. But this testimony does not address the root of the issue—Appellant's knowledge that the account of the offense in the report were false. In other words, the State failed, not only to show that anything in Harden's statement

was false, but that Appellant was aware that it was false. It is difficult to conceive of someone being convicted of falsifying a governmental record when nothing in the record is, in fact, false. Therefore, the evidence is insufficient to prove Appellant used a governmental record knowing that the report was false.

However, the indictment in this case alleges that Appellant engaged in the conduct of "omitting or misrepresenting" the facts of Nutt's arrest. Appellant's sufficiency challenge requires us to determine whether the conduct of omitting or misrepresenting specifics of Nutt's arrest in an offense report constitutes an offense under the tampering statute. We hold that it does not.

The Texas Penal Code provides that a person commits an offense only if he commits an *act* or an *omission*. Tex. Penal Code Ann. § 6.01(a). An "act" is defined as "a bodily movement, whether voluntary or involuntary, and includes speech." Tex. Penal Code Ann. § 1.07(a)(1). By contrast, an "omission" is defined as a "failure to act." Tex. Penal Code Ann. § 1.07(a)(34). A failure to act—an omission—is not an offense unless the defendant has a legal duty to act.

The court of appeals erred by failing to address section 6.01(c)'s duty to act requirement in its analysis. Appellant argues that there was no requirement that the offense report document anything other than the offense itself; that the report at issue did document the alleged offense of public intoxication; that the report did not need to document Nutt's actual arrest; and that the report related to Nutt's conduct and, therefore, did not need to specify the basis for the charges against Appellant. We agree. As addressed above, a person who omits to perform an act does not commit an offense unless a law as defined by section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to act. As applied to the facts of this case, Texas Penal Code section 37.10(a)(5), under which Appellant was convicted, does not make an omission an offense within the meaning of Texas Penal Code section 6.01(c). Nor does the tampering statute prescribe a duty to act. Without a duty to act, any subsequent failure to act is not an offense.

There is no statute that prescribes any particular content in an offense report for a public intoxication offense. In fact, there are only a few circumstances that dictate the contents of an offense report. Articles 2.30(b) and 5.05(a) of the Texas Code of Criminal Procedure require a peace officer who responds to call about domestic violence or certain assaultive or terroristic offenses to prepare a written report with specific contents. Otherwise, in the preparation of any other offense report, there is no statute or code requiring anything more than the facts demonstrating that the arresting officer had probable cause to believe an offense had occurred. And while the State presented the opinion testimony of Schumacher and Bujnoch as to what information is advisable to include in an offense report, best practices do not create a duty to act.

The offense report generated by Officer Harden reported the facts of Nutt's commission of the offense of public intoxication. As his supervisor, Appellant had no statutory duty to ensure that particularized information was included in Officer Harden's report. Further, there is no evidence that any facts relating to the offense were false or intentionally omitted from the report with the intent to deceive. There was no evidence that Appellant attempted

to create a false impression or encouraged Harden to omit facts from his report with the intent to distort anyone's perception. Quite the contrary, the record shows that Appellant did not try to conceal anything that transpired on the evening of Nutt's arrest, but instead personally prepared and provided copies of the Llano Police Department's video footage of Nutt's arrest to the prosecutor.

Because the tampering statute does not create an offense through an omission or create a duty to include certain information in an offense report, the evidence is insufficient to support a conviction. Consequently, we reverse the judgment of the court of appeals and render an acquittal for the count of tampering with a governmental record.

II. OFFICIAL OPPRESSION

Under the Penal Code, "[a] public servant acting under color of his office or employment commits" the offense of official oppression "if he . . . intentionally subjects another to mistreatment or arrest . . . that he knows is unlawful" or "intentionally denies or impedes another in the exercise or enjoyment of any right . . . knowing his conduct is unlawful." Tex. Penal Code § 39.03(a).

In this case, the jury received the following instructions:

A police officer making an arrest without a warrant may not enter a residence to make the arrest unless: (1) a person who resides in the residence consents to the entry; or (2) exigent circumstances require that the police officer making the arrest enter the residence without consent of a resident or without a warrant.

This instruction is consistent with article 14.05 of the Texas Code of Criminal Procedure. Appellant does not dispute that he lacked Nutt's consent to enter his home. Therefore, to prove that the entry into Nutt's home was unlawful, the State must prove the lack of exigent circumstances.

This Court has defined these exigent circumstances as "(1) providing aid to persons whom law enforcement reasonably believes are in need of it; (2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; or (3) preventing the destruction of evidence or contraband."

…. no exigent circumstances supported a warrantless entry into Nutt's residence. First, Appellant was not there to provide Nutt aid; he was there to arrest him.6 Second, Appellant had no reason to believe that Cory Nutt was armed and dangerous.7 To the contrary, the record shows that Nutt was standing inside his trailer, shoeless, and there were no indications to suggest he was a threat. In fact, Nutt testified that he was sleeping when the confrontation began. Lastly, there was no need to preserve evidence, such as collecting Nutt's blood for analysis. While a defendant's blood alcohol content might be relevant in an investigation of driving while intoxicated, it is not necessarily so in a case of public intoxication. Even so, it is not clear that the need to preserve evidence of Nutt's blood-alcohol level would justify a warrantless home arrest.

However, in addition to the three warrant exceptions noted above, the jury instructions included a fourth: hot pursuit. The Supreme Court has held that police officers may enter premises without a warrant when they are in hot pursuit of—chasing—a fleeing suspect. *United States v. Santana*, 427 U.S. 38, 42–42 (1976). Appellant alleges that Officer Harden's hot pursuit of Nutt justified his warrantless entry into the residence. For reasons discussed below, the hot pursuit exception to the warrant requirement does not apply in this case.

Here, the jury instructions provided that exigent circumstances would justify a warrantless intrusion by police officers into a residence where the officer was in immediate and continuous pursuit of a person for a felony offense (emphasis added). This language is adapted from *Welsh v. Wisconsin*, in which the Supreme Court found that there were no exigent circumstances to justify a warrantless entry into the residence of a driver whom the police had probable cause to believe had been driving while intoxicated. Welsh was driving, swerved off the road, and came to a stop in a field. He then fled on foot to his residence. Shortly thereafter, police went to Welsh's residence and entered without an arrest warrant. The court reasoned that there was no "hot pursuit" because "there was no immediate or continuous pursuit from the scene of a crime." Furthermore, there was little remaining threat to public safety once the suspect arrived at home without his car. The Court noted that the gravity of the offense for which the arrest is being made is an important consideration in determining exigency. ("[I]t is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.").

Like the officers in *Welsh*, Appellant was not involved in a "hot pursuit" of Nutt as there was no continuity in pursuit. This is true whether the jury believed Nutt's version of events (that Nutt was asleep when the officers banged on his trailer door and began the standoff), or Harden's version of events (that Nutt "stepped out of the shadows" after Harden returned from his earlier, unrelated service call). After the alleged offense occurred, Officer Harden stopped pursuit by telling Nutt to go back into his residence and driving away from the scene. If there had been an immediate or continuous pursuit, Officer Harden would have entered the residence immediately when Nutt returned to his trailer. Even assuming *arguendo* that there was a hot pursuit, Appellant knew the arrest was going to be for public intoxication, a Class C misdemeanor, not a felony. As stated above, the jury instructions stated that an exigent circumstance to justify a warrantless entry into a residence could exist when the officer was in immediate and continuous pursuit of a person for a felony offense. Because the alleged offense was a misdemeanor, and there was no hot pursuit, no exigent circumstances justified the warrantless entry.

In conclusion, the evidence presented at trial including the bodycam video; testimony from Nutt, Schutte (RV Park manager), and Britton (Nutt's neighbor); and evidence of Appellant's experience in law enforcement and his position as chief, combined with the testimony from two very experienced officers (Officers Schumacher and Bujnoch) that there were no exigent circumstances for Appellant to enter Nutt's trailer, allowed a rational juror to conclude that the arrest and trespass were unlawful and that Appellant

knew the arrest and trespass were unlawful. Therefore, the evidence was sufficient to support the jury's determination that none of the warrant exceptions applied in this case and that Appellant knew his actions were illegal. We affirm Appellant's official oppression convictions. However, because the evidence was legally insufficient to support the tampering with a governmental record conviction, we reverse the judgment of the court of appeals and render an acquittal for the single count of tampering with a government record.

***Ratliff v. State*, Texas Court Crim. App., No. PD-0545-20, Mar. 16, 2022.**
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EVIDENCE – ASSAULT, DOMESTICE VIOLENCE. Dating relationship.

Appellant Duke Edward was convicted of felony assault for beating his girlfriend. *See* TEX. PENAL CODE § 22.01(a)(1), (b)(2)(A). The offense was elevated to a third-degree felony based in part on the existence of a "dating relationship" between Appellant and the victim. *see also* TEX. FAM. CODE § 71.0021(b) (providing applicable statutory definition for "dating relationship"). On appeal, the Fourteenth Court of Appeals reversed Appellant's conviction, finding the evidence insufficient to meet the statutory requirements under Family Code Section 71.0021(b) for establishing a dating relationship. We granted the State's petition for discretionary review to answer the following question: Did the court of appeals err in holding that evidence of a dating relationship was insufficient where the State presented evidence that the victim referred to Appellant as her "boyfriend" when speaking to law enforcement immediately after the assault, as well as other circumstantial evidence suggesting the existence of an intimate relationship? Yes, it erred. Therefore, we reverse the court of appeals' judgment and affirm the trial court's judgment of conviction.

Maggie Bolden called 911 to report a disturbance at her apartment. La Marque police officer Richard Hernandez responded and knocked on Bolden's door. Crying and "in a bit of a state of hysteria," she opened the door. Officer Hernandez observed blood on Bolden's shirt and face. When he asked her what was going on, Bolden stated that Appellant had hit her and was inside the apartment in the bedroom. Hernandez then told Bolden to walk down the hallway and sit down. From the doorway of the apartment, Officer Hernandez called for Appellant to come out and speak with him. After receiving no response, Hernandez entered the apartment and found Appellant in the bedroom sitting on a bed. Hernandez arrested Appellant and put him in the back of his patrol car. EMS eventually arrived on the scene to treat Bolden. Officer Hernandez later took photographs of Bolden's injuries, asked her some questions, and gave her a family-violence form, which she completed and signed. Appellant was subsequently charged with the third-degree felony offense of assault causing bodily injury to a person with whom he was in a dating relationship, second offense. *See* TEX. PENAL CODE § 22.01(a)(1), (b)(2)(A) (providing in relevant part that assault causing bodily injury is elevated to a third-degree felony if: (1) the offense is committed against a person with whom the defendant has a "dating relationship," as that term is defined by Family Code Section 71.0021(b), and (2) the

defendant has a prior conviction for certain types of dating-violence or family-violence offenses).

By the time of Appellant's jury trial, the State was unable to locate Bolden. Thus, she did not testify. Instead, the State relied on the testimony of Officer Hernandez and another first responder dispatched to the scene following the 911 call, as well as a portion of Officer Hernandez's body-camera footage and the EMS report.

In his testimony on direct examination, Officer Hernandez stated that when he arrived on the scene and initially made contact with Bolden, she referred to Appellant as her "boyfriend" and identified Appellant as the person who hit her. Officer Hernandez's body-camera video played for the jury, however, was not entirely consistent with this account. The video showed his arrival at Bolden's apartment; his initial conversation with Bolden at the door during which she identified Appellant by name and said Appellant beat her up; his entry into the apartment and arrest of Appellant; his placing of Appellant in the squad car; and his return to the apartment where Bolden was then being treated by EMS, at which point he states he is going to take photographs of her injuries and "ask her a couple of questions." The excerpt of the body-camera footage then ends. Thus, the portion of the video played at trial did not capture Bolden referring to Appellant as her boyfriend. On cross-examination, defense counsel focused on this apparent inconsistency between Officer Hernandez's testimony and the events depicted on the body-cam video. The following exchange occurred:

	And taking you back to when you first made contact, we saw a portion of your body cam video; and as Ms. Bolden came out of her residence, she immediately began speaking with you? Correct. And she referred to this person, she identified this person hitting her, correct?	
	Correct.	
		But as we saw in your video cam—and at that particular stage when she first made contact with you—she didn't identify Mr. Duke Edward as her boyfriend, correct? At some point during our contact— Answer my specific question: At that time— No. —she didn't say that at that particular time when you first made contact with her? Upon initial contact, no. That's my question. She didn't say

	that, correct? Correct.
And, again, I'm asking a very, very specific question. So please answer the specific question. On the video that we just watched—on that particular video, at no point in time did Ms. Bolden ever state to you that Mr. Duke Edward was her boyfriend; is that correct? I believe that's incorrect. On that specific video that we just saw—I'm not talking about—I'm talking about specifically what we just watched. Did Ms. Bolden ever say on that particular video we just watched that Mr. Duke Edward was her boyfriend? I believe that's correct. Okay. So you're telling us from the portion we just saw, we heard her state, "That's my boyfriend, Duke Edward"? I believe that's incorrect. You believe that's incorrect she said that? I believe it's incorrect. She didn't identify him as her boyfriend.	

Despite this apparent impeachment, Officer Hernandez clarified on re-direct that the body camera footage did not capture his entire interaction with Bolden and that some of the footage had been "taken out." Following Officer Hernandez's testimony, the State called Amanda Black, a La Marque EMT who treated Bolden after the incident. On direct examination, Black described Bolden's injuries and indicated that Bolden "stated her boyfriend beat her up." In support of Black's testimony, the State moved to admit into evidence the EMS incident report. The unredacted report contained a reference to Appellant as Bolden's "boyfriend." Defense counsel then took EMT Black on *voir dire* outside the presence of the jury to address the admissibility of the information in the report.

On *voir dire*, Black admitted that her partner wrote the report and that Officer Hernandez had provided EMS personnel with the information about the dating relationship between Appellant and Bolden. Black qualified her statement, however, by indicating that Bolden could have also provided this information to her partner while EMS was transporting Bolden to the hospital. Ultimately, Black could not recall whether Bolden ever directly conveyed to EMS personnel that she was in a dating relationship with Appellant. She acknowledged that her testimony about the existence of such a relationship was based solely on the report and not on her personal recollection. The trial court ultimately admitted the report but ordered that any references to a dating Relationship between Appellant and Bolden be redacted on the basis of hearsay. After the trial court's ruling, during the defense's cross-examination of Black in front of the jury, the following exchange occurred regarding Black's knowledge of Appellant's and Bolden's relationship:

> And you, yourself, have no firsthand knowledge of the relationship—at least you didn't have it at the time of [Appellant] or Ms. Bolden at the time?
> Firsthand, her telling me?
> Yes, ma'am.
> No, she didn't tell me.
> So any information regarding the relationship between Ms. Bolden and [Appellant] you received from someone else, correct?
> Correct.
> And you have no way to verify if the information that you received regarding the relationship is true or correct; is that correct?
> I'm sorry? Say it again.
> You have no way of verifying the information you received at the scene as true and correct?
> No. As far as the relationship, no.

After Black's testimony, the State and defense rested. Defense counsel moved for a directed verdict, arguing that there was insufficient evidence for the jury to rationally conclude that a dating relationship existed between Appellant and Bolden. The trial court denied the motion. The jury returned a guilty verdict, and after Appellant pleaded true to two enhancement paragraphs, the jury sentenced him to 60 years in prison.

B. Court of Appeals' opinion

On direct appeal, Appellant again urged that the evidence could not rationally support a finding that he and Bolden were in a "dating relationship" under the definition in Family Code Section 71.0021(b). In a plurality opinion, the Fourteenth Court of Appeals agreed and held the evidence was insufficient on this basis. In reaching its conclusion, the court of appeals rejected the State's argument that the jury could have relied on Officer

Hernandez's and EMT Black's testimony stating that Bolden referred to Appellant as her boyfriend.

The court reasoned that the jury was "not permitted to disregard Officer Hernandez's Later testimony [that he gave] after viewing the body-camera video . . . [in which he admitted] that the complainant did not identify appellant as her boyfriend[.]" Nor was the jury permitted to disregard Black's "admission during cross-examination that the complainant did not tell her that appellant was her boyfriend." The court also noted that Bolden never referred to Appellant as her boyfriend during the portion of the body-camera video that had been played for the jury. With respect to the State's alternative argument that other circumstantial evidence could support a finding of a dating relationship—i.e., that Appellant was found in Bolden's bedroom and that the two were alone in her apartment—the court of appeals also rejected that argument, reasoning that "based on this evidence, a factfinder could do no more than speculate on the existence of a dating relationship[.]" While the court found the evidence insufficient to support the existence of a dating relationship, it held that the evidence was nevertheless sufficient to support all other elements of assault, such that reformation of the judgment, rather than acquittal, was the proper remedy. Therefore, the court reversed Appellant's conviction for third degree felony assault and remanded the case with instructions for the trial court to reform the judgment to reflect a conviction for the lesser-included offense of misdemeanor assault and to hold a new punishment hearing.

Justice Christopher dissented, opining that the record contained "ample evidence of a dating relationship" between Appellant and Bolden. In support, she cited the evidence that had been discounted by the plurality, namely, the testimony from EMT Black and Officer Hernandez stating that Bolden referred to Appellant as her boyfriend, as well as the circumstantial evidence showing that Appellant was found in Bolden's bedroom. She also noted that Officer Hernandez had provided Bolden with the family-violence form, which "supports a logical inference that [the victim] informed the officer that she and appellant were involved in a dating relationship." Regarding the plurality's disregard of Officer Hernandez's testimony based on the contents of the body-cam video, Justice Christopher noted that the plurality's analysis "fails to recognize that the body cam video did not capture the entire interaction" between Officer Hernandez and Bolden. Because the video ended while Hernandez was still in Bolden's apartment documenting her injuries, Justice Christopher reasoned that "the jury could have reasonably concluded that the complainant identified appellant as her boyfriend after the body cam had stopped recording." Similarly, with respect to the plurality's disregard of EMT Black's testimony, Justice Christopher noted that such reasoning "flies in the face of our standard of review, which provides that when there is a conflict in the evidence, we must presume that the jury resolved the conflict in favor of the verdict." Thus, Justice Christopher would have affirmed Appellant's conviction for felony assault.

II. Analysis

Agreeing in large part with Justice Christopher's dissenting opinion, we reject the court of appeals' conclusion that the evidence was insufficient to support the jury's finding of a dating relationship between Appellant and Bolden. Viewing the evidence in a light most favorable to the verdict, and applying the plain language of Texas Family Code Section 71.0021(b), we find that the jury could have rationally inferred that Appellant and Bolden had "a continuing relationship of a romantic or intimate nature" based on Officer Hernandez's testimony that Bolden identified Appellant as her "boyfriend" and the remaining circumstantial evidence. *See* TEX. FAM. CODE § 71.0021(b). By disregarding the evidence supporting the jury's verdict, the court of appeals deviated from the appropriate standard of review that permits the jury to draw reasonable inferences from the evidence and evaluate the witnesses' credibility. Affording a proper level of deference to the jury's verdict here, we conclude that its finding of a dating relationship between Appellant and Bolden was not irrational or based upon impermissible speculation.

When reviewing the sufficiency of the evidence to support a conviction, we consider the evidence in the light most favorable to the verdict. The verdict will be upheld if any rational trier of fact could have found all the essential elements of the offense proven beyond a reasonable doubt. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." The jury is the sole judge of the weight and credibility of the evidence. When considering a claim of evidentiary insufficiency, we must keep in mind that a juror may choose to believe or disbelieve all, some, or none of the evidence presented. Further, while jurors may not base their decision on mere speculation or unsupported inferences, they may draw reasonable inferences from the evidence. The evidence is sufficient to support a conviction, and thus the jury's verdict is not irrational, if "the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict." When faced with conflicts in the evidence, a reviewing court shall presume that the fact finder resolved those conflicts in favor of the verdict and defer to that determination.

We measure the sufficiency of the evidence against the hypothetically-correct jury charge, defined by the statutory elements as modified by the charging instrument. Here, Appellant was charged with felony assault causing bodily injury, which was elevated from a Class A misdemeanor to a third-degree felony based on the existence of a "dating relationship" with the victim and a prior conviction for dating-violence assault. TEX. PENAL CODE § 22.01(a)(1), (b)(2)(A). Section 22.01(b)(2) provides that a person commits a third-degree felony if he: (1) commits bodily injury assault against "a person whose relationship to or association with the defendant is described by Section 1.0021(b), 71.003, or 71.005, Family Code"—i.e., a person with whom the defendant has a "dating relationship," a family member, or a member of the defendant's household; and (2) the prosecution proves that the defendant has a previous conviction for one of several

enumerated types of offenses, including assaultive offenses, against a person with whom the defendant has a dating relationship, a family member, or a member of the defendant's household. *Id*. § 22.01(b)(2)(A). Appellant does not contest the sufficiency of the evidence showing that he assaulted Bolden or that he has a prior conviction for assault of a person with whom he was in a dating relationship; rather, his sole complaint is that the evidence was insufficient to show he was in a "dating relationship" with Bolden. Thus, we consider only that statutory element going forward.

In defining the offense, Penal Code Section 22.01(b)(2) expressly incorporates the definition of "dating relationship" found in Family Code Section 71.0021(b). *Id*. § 22.01(b)(2). Because the statute expressly incorporates this definition and it constitutes an element of the offense, it is part of the hypothetically-correct jury charge against which the sufficiency of the evidence must be measured.

Section 71.0021(b) states:

> (b) For purposes of this title, "dating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of:
> (1) the length of the relationship;
> (2) the nature of the relationship; and
> (3) the frequency and type of interaction between the persons involved in the relationship.

TEX. FAM. CODE § 71.0021(b). Subsection (c) additionally provides that "[a] casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a 'dating relationship' under Subsection (b)." § 71.0021(c).

Having set forth the relevant statutory requirements, we now turn to an analysis of the evidence in this case to determine whether it meets the statutory definition for establishing a "dating relationship."

We, like Justice Christopher, conclude that the jury could have rationally found beyond a reasonable doubt that the requirements of Family Code Section 71.0021(b) were satisfied here. At the outset, contrary to the court of appeals' suggestion, it was not irrational for the jury to credit Officer Hernandez's testimony regarding Bolden's description of Appellant as her "boyfriend." While Officer Hernandez clarified on cross examination that Bolden did not make that statement during the admitted portion of his body-camera video, he never wavered from his assertion that she did at some point tell him Appellant was her boyfriend. Further, the admitted portion of Officer Hernandez's body camera did not capture his entire interaction with Bolden. In fact, the admitted portion of the video ends when Officer Hernandez re-entered the apartment for the purpose of interviewing Bolden. Thus, we find, as Justice Christopher did, that based on these facts, the jury was permitted to draw the reasonable inference that Bolden at some point told Officer Hernandez that Appellant was her boyfriend and that such statement was simply

not included in the portion of the video that was played for the jury. To the extent that the court of appeals believed this evidence to be conflicting or lacking in credibility, it was the jury's "responsibility . . . fairly to resolve conflicts in the testimony" and to evaluate Officer Hernandez's credibility with respect to what Bolden told him. Accordingly, by disregarding Officer Hernandez's testimony, the lower court deviated from the appropriate standard of review and thus erred.

After resolving that issue, we are still presented with the question of whether the totality of the evidence in the record showed that Appellant and Bolden had "a continuing relationship of a romantic or intimate nature" as is required to establish a dating relationship under the Family Code. *See* TEX. FAM. CODE § 71.0021(b). We observe that the statute instructs that "the existence of such a relationship *shall be determined based on consideration of*: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship." § 71.0021(b)(1)–(3) (emphasis added). While Appellant contends that the record must contain affirmative evidence as to each factor under Section 71.0021(b), we disagree because the statute merely requires that the fact-finder *consider* the listed factors. In other words, these factors are not standalone elements of the offense which the prosecution must prove beyond a reasonable doubt. Instead, they are guideposts for the jury to weigh in evaluating whether the broader definition in Subsection (b)—a "continuing relationship of a romantic or intimate nature"—is met. Further, Subsection (c) limits the scope of the definition in Subsection (b) by providing that a "casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a dating relationship." § 71.0021(c).

Applying these statutory requirements here and viewing the evidence in the light most favorable to the verdict, the dating relationship element was satisfied. First, we take note of the fact that Officer Hernandez testified that Bolden called Appellant her "boyfriend" at some point during their interaction. Common usage of the word by itself implies a continuing relationship of a romantic or intimate nature. Second, there was also circumstantial evidence supporting the "dating relationship" element: (1) Appellant and Bolden had been alone together inside Bolden's apartment and clearly knew each other prior to the incident in question; (2) Appellant was found sitting on Bolden's bed; and (3) Bolden completed and signed the family-violence form that Officer Hernandez gave her. We agree with Justice Christopher that the circumstance of Appellant being found in Bolden's bedroom was one factor that, viewed holistically with the other evidence, would permit the jury to rationally infer that there was an intimate relationship between Appellant and Bolden.

Additionally, the fact that Officer Hernandez gave Bolden the family-violence form supported a logical inference that she told him that she and Appellant were in a dating relationship. Although this evidence was circumstantial, it is just as probative as direct evidence in establishing Appellant's guilt. Thus, the court of appeals further erred by

disregarding the circumstantial evidence in support of the jury's verdict. In sum, considering the cumulative force of all the evidence through the appropriate lens of deference to the jury's verdict, we hold that the evidence was sufficient for the jury to have rationally determined that Appellant and Bolden "have or have had a continuing relationship of a romantic or intimate nature," rather than just a "casual acquaintanceship or ordinary fraternization." TEX. FAM. CODE § 71.0021(b), (c).

Under Family Code Section 71.0021(b), the evidence is sufficient to establish a dating relationship where it supports a finding that there is or has been "a continuing relationship of a romantic or intimate nature." Here, the evidence showed that: (1) Bolden referred to Appellant as her boyfriend; (2) the two were alone together inside Bolden's apartment; (3) Appellant was found sitting on Bolden's bed; and (4) Bolden completed and signed a family-violence form that had been provided to her by the responding officer. Considered together in a light most favorable to the jury's verdict, this evidence is sufficient for a rational jury to conclude beyond a reasonable doubt that Appellant and Bolden were a dating relationship, and the court of appeals erred in holding otherwise. We therefore reverse the judgment of the court of appeals and affirm the trial court's judgment of conviction.

***Edward v. State*, Tex. Crim. App., No. PD-0325-20, December 8, 2021**

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EVIDENCE – VERBAL ASSAULT

Appellant was charged with aggravated assault. The indictment alleged the underlying assault as assault by threat, with the threat being verbal. The court of appeals held that the evidence did not show a verbal threat and that the nonverbal use of a deadly weapon varied from the allegations in the indictment. In its petition for discretionary review and initial briefing, the State contended that the nonverbal use of a deadly weapon sufficiently conformed to the indictment. On our own motion, we granted review of whether or not the evidence showed a verbal threat. Specifically, we asked the parties to brief whether a particular statement alleged to have been made by the defendant—"I need to hit"—constituted a verbal threat. We now conclude that a rational trier of fact could have found the statement to have constituted a verbal threat. Consequently, we hold that the court of appeals erred in concluding that the evidence did not show a verbal threat, and we remand the case for further proceedings. Because of this disposition, we need not reach the State's contention regarding the nonverbal use of a deadly weapon.

Appellant was indicted for the offense of family-violence aggravated assault. The indictment alleged that he "did then and there intentionally or knowingly threaten Lisa Grayson . . . with imminent bodily injury by telling her that he was going to end her life, and the defendant did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood." A police officer testified that Grayson said that Appellant hit her with a wooden board.

Grayson testified that Appellant beat her with a two-by-four, that she tried to protect herself with her arms, that he hit her on her arms and her hand, and that he was "just constantly hitting" her. Grayson's written statement to the police was admitted into evidence, and the part that described the offense was read to the jury as follows: He grabbed my neck, started choking me so hard I couldn't breathe, and then he grabbed a board and started hitting me so hard I told Jessie he was hurting me. So he told me I need to hit -- I believe -- so he kept hitting me with the board. Then after started hitting my fingers until they started bleeding.
The jury found Appellant guilty.

On appeal, Appellant challenged the sufficiency of the evidence to prove the "threat" element of the offense. He conceded that "the State need not have proven the exact words of the verbal threat in the indictment" but argued that it had to prove a verbal threat of some kind.

The court of appeals observed that the key to identifying different offenses is pinpointing the allowable unit of prosecution for each offense. The court concluded that the aggravated assault offense in this case was a "nature of conduct" offense, with threatening conduct being the unit of prosecution, because the base offense was assault by threat. The court further concluded that the "telling her that he was going to end her life" language in the indictment required a verbal threat of some sort and that there was no evidence of a verbal threat. The court acknowledged Grayson's statement that Appellant told her "I need to hit," but the court held that no rational juror could discern a threat in that statement. The court conceded that the evidence showed a nonverbal threat (with a board), but it concluded that that threat was separate conduct from a verbal threat and so was a separate crime from the one charged in the indictment. Consequently, the court of appeals found a material variance between the allegations in the indictment and the proof at trial. After concluding that the conviction could not be reformed to a conviction for a lesser-included offense, the court of appeals reversed the judgment of conviction and rendered a judgment of acquittal.

In its petition and initial briefing, the State contended that a nonverbal threat from the deadly weapon alleged in the indictment sufficiently conformed to the indictment's allegations. On our own motion, we granted review of the following issue: "Does the statement 'I need to hit,' that the victim said that Appellant told her, constitute a verbal threat?" We ordered the parties to brief this issue, and they have done so.

The State argues that the statement constituted a verbal threat in the context in which it was made—Grayson being hit by a board, Appellant uttering the statement, and Appellant continuing to hit the victim with the board.
Appellant contends that the words "I need to hit" might or might not constitute a threat, depending on the context in which the words are uttered. The short answer, he says, is, "It depends." Appellant contends that the words do not constitute a threat in his case because they were uttered after the assault occurred. He further contends that the State offered no nexus to connect the utterance to a verbal assault. He further argues that Grayson's written statement relating what he said is ambiguous and that she could have been saying that Appellant was telling her to hit him back. He also contends that, because (according to Grayson's testimony) he had already commenced hitting her with the board, she was already in fear of bodily injury when he said, "I need to hit."

Appellant cites several cases in which the phrase "I need to hit" was included in a defendant's statement as examples of the phrase being a verbal threat, but he contends that the facts of those cases are distinguishable from the facts of his case because the words were uttered before any assault. Finally, he argues that threats are "forward looking" statements about what the actor intends to do and that the utterance in his case was a "backward looking" statement about why he physically attacked Grayson.

We agree with the State that a rational trier of fact could have found, under the evidence in this case, that the statement "I need to hit" was a verbal threat. In a sufficiency review, the reviewing court must consider all of the evidence in "the light most favorable to the prosecution." And the reviewing court must "consider the combined and cumulative force of all admitted evidence and reasonable inferences therefrom." In concluding that it could not discern a threat from the victim's statement that Appellant "told me I need to hit," the court of appeals failed to adhere to these principles. A rational jury could have concluded that Appellant verbally conveyed to Grayson that he would continue hitting her with the board because he needed to hit her.
Appellant's position is that the utterance "I need to hit" is ambiguous both in the abstract and in the context of his own case. Viewing evidence in the "the light most favorable to the prosecution" ordinarily means resolving any ambiguities in the evidence in the prosecution's favor.

The evidence is sufficient if "any" rational trier of fact could have so concluded. Even assuming Appellant is correct that Grayson's rendition of Appellant's statement could be construed as an invitation to Grayson to fight back, a rational jury did not have to construe it that way. A rational jury could have, instead, viewed the statement as an expression of the *Appellant's* "need to hit."
Further, we disagree with Appellant's characterization of the utterance as occurring after the physical assault. The phrase, "I need to hit" occurred during Appellant's physical assault on Grayson. Appellant beat her, told her "I need to hit," and beat her some more. The nexus between the utterance and the physical assault is obvious, and a rational jury could have concluded that the utterance was a threat to continue physically assaulting Grayson—a threat that Appellant carried out. And contrary to Appellant's suggestion, the fact that Grayson was already in fear of serious bodily injury did not preclude her from being threatened again. And even if the statement could be construed as a backward-looking explanation for why the defendant had already hit Grayson, it could also be seen as a forward-looking statement of Appellant's intent to continue to hit her—an intent that he carried out.

We conclude that a rational jury could have concluded that the statement "I need to hit" constituted a verbal threat by Appellant to Grayson. We reverse the judgment of the court of appeals and remand the case for further proceedings consistent with our opinion.

***Brooks, Jr. v. State*, Tex. Crim. App., NO. PD-0703-20 Nov. 10, 2021.**

EVIDENCE – Capital Murder

Sara Cassandra Nelson ("Cassie") witnessed her boyfriend, Kris Maneerut ("Jimmy"), being shot. Immediately afterward, Appellant Santhy Inthalangsy and associates escorted her from the crime scene. Later that day, she was killed. Appellant was charged with capital murder of Jimmy while in the course of kidnapping Cassie. Was evidence of Cassie's death admissible for a proper purpose and sufficiently relevant to the charge of capital murder? We hold that the evidence was relevant, tended to prove an element of the charged offense, and provided necessary context for the charged offense. Furthermore, we hold that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Therefore, the trial court did not abuse its discretion in admitting the evidence.

Cassie Nelson panicked when drug profits worth $70,000 were stolen. Appellant's girlfriend Lindapone Phanprasa ("Linda"), the drug dealer, held Cassie responsible. On May 1–2, 2015,1 Linda and Appellant held Cassie captive at Linda's house. Cassie texted her landlord, "un [sic] being held hostage . . .," "huge deal gone bad," and "I need to help find the 70,000 that was stolen. I like my face." Later, she texted to him the address where she was being held, which was Linda's house. Cassie offered to give Linda and Appellant her father's speed boat as compensation, and they released her the next day.

A few days later, on May 6, Cassie was evicted from her apartment for nonpayment of rent. Around 10 a.m., she and her boyfriend Jimmy, an auto mechanic, drove to the home of their friend Frank Garza. At first, they slept in their cars, but later Frank invited them inside.

Meanwhile, Linda was unable to transfer title to the boat to herself, so she and her associates went looking for Cassie. On May 6, at about 4 p.m., three Asian men came to Cassie's former apartment asking for her. When her landlord said she wasn't there, they left with her TV. The landlord testified that he saw a man cock a gun in the car as they drove off. Late that night, two men and a woman asked for Cassie at her mother's house. They spoke Thai. A fourth person waited by the car outside the fence. Cassie's mother later identified two of the people as Linda and Appellant.

Syla Sengchareun ("Monk") lived in the same neighborhood as Jimmy and Frank and had gone to school with Jimmy. Linda asked Monk several times about Cassie's whereabouts. She said she wanted to speak to Cassie and Jimmy about money. On May 7, Monk phoned Frank and asked if Cassie and Jimmy were at his house. Frank said yes. Monk told Frank that somebody was coming to talk to Cassie and that he must not alert her. Monk immediately called Linda to report the news. Appellant, Linda, and a man named Amalinh Phouthavong drove to Monk's house, and Monk led them to Frank's house.

When both cars arrived, Frank walked out of his house and sat in Monk's car to buy some Xanax. Appellant and Amalinh got out of Linda's car and opened the trunk. Watching from his car, Monk saw one of the men put something behind his shirt, and Monk thought it was a gun. Appellant and Amalinh walked into Frank's house. About a minute later, Frank heard a sound resembling a gunshot or a screen door slamming. Appellant and Amalinh walked out of the house with Cassie between them. Monk observed that Cassie "looked like she was fixing to cry"—Frank described her as appearing "confused." Appellant and Amalinh were seated in the back seat of the car on either side of Cassie as they drove off.

Frank walked into his house and saw Jimmy lying on the floor, gasping for breath, and bleeding from a large hole in his face. Paramedics transported him by helicopter to a hospital, where he was pronounced dead shortly after arrival.

Early the next morning, a fisherman found Cassie's body in a damp, wooded area near the San Jacinto River. She had eight or nine gunshot wounds to the head, neck, chest, back, and left wrist. An assistant medical examiner estimated that she had died twelve to twenty-four hours before her body was discovered, the same day as Jimmy's death.

A grand jury indicted Appellant for capital murder for shooting Jimmy while in the course of kidnapping Cassie. Appellant pleaded not guilty. Before the trial, defense counsel moved the court to order the State to refrain from mentioning Cassie's death or introducing any evidence of her death. The State said it planned to use the evidence to prove the element of deadly force and the defendant's intent to kill Jimmy. The judge denied the motion, saying, "I think these are part of the operative fact of the offense." During the trial, the State presented evidence of Cassie's death, including a photograph of the lower portion of her body lying in the brush and testimony about her bullet wounds. The defense made timely objections. The jury found Appellant guilty of capital murder and assessed a sentence of life imprisonment without parole.

In his appeal, Appellant cited five points of error:
1. Erroneous admission of hearsay statements by Cassie;
2. Erroneous admission of evidence of Cassie's murder;
3. Finding that the probative value of Cassie's murder was not substantially outweighed by a danger of unfair prejudice;
4. Denial of his motion for continuance to investigate possible exculpatory and mitigating evidence disclosed mid-trial; and
5. Insufficient evidence that a murder was committed in the course of a kidnapping.

The Fourteenth Court of Appeals did not reach the issues of Cassie's alleged hearsay statements or the motion for continuance. The court held that the evidence was legally sufficient for conviction but that the trial court abused its discretion by admitting evidence of Cassie's murder. A majority of the court concluded that Cassie's murder "had no logical tendency to make a fact of consequence concerning her kidnapping more or less probable" because there was insufficient evidence connecting Appellant to her death. The opinion of the court found that because Cassie's death was violent, reference to it caused prejudice that substantially outweighed its probative value under Texas Rule of Evidence 403. *Id.* The court was unable to assess the impact the evidence had on the jury and concluded that such uncertainty rendered the error harmful. The court determined that the error impacted Appellant's substantial rights and consequently reversed the trial court's judgment and remanded for a new trial.

Writing in dissent, Justice Christopher asserted that the majority "achieves [its] holding by not crediting the reasonable inferences that may be drawn from the circumstantial evidence," contravening the abuse-of-discretion standard of review. She reasoned that evidence of Cassie's murder was admissible under Texas Rule of Evidence 404(b) on several possible grounds including (1) same-transaction contextual evidence and (2) evidence tending to prove elements of

the charged offense (that Appellant restrained Cassie without her consent or prevented her liberation by use of deadly force). On these grounds and others, Justice Christopher concluded that the trial court could have reasonably credited the evidence with a high probative value and low risk of unfair prejudice, and she found no abuse of discretion.

Echoing Justice Christopher's dissent, the State petitioned this Court on three grounds: (1) the court below misapplied Texas Rules of Evidence 401 and 402 by disregarding evidence connecting Appellant to Cassie's murder, showing insufficient deference to the trial court; (2) the lower court failed to consider whether evidence of Cassie's murder was admissible for noncharacter-conformity purposes under Rule 404(b)(2); and (3) the court below failed to conduct a meaningful assessment of the balance of probative value and prejudice under Rule 403.

In reply, Appellant argues alternatively that evidence of his involvement in Cassie's murder was "speculative at best" and that there was "no evidence" of his involvement. He says that Cassie's kidnapping and murder are not sufficiently intertwined to serve as same-transaction contextual evidence. Then he asserts that evidence of her murder fails the Rule 403 balancing test under *Montgomery v. State*, 810 S.W. 2d 372 (Tex. Crim. App. 1990) Applying the four *Montgomery* factors, he cites the evidence's potential to impact the jury's emotions and distract from the charged offenses and the amount of time the State spent developing the evidence of her murder.

Considering that the trial court has the best view of the evidence, an appellate court will uphold a trial court's ruling on admissibility so long as it is within the "zone of reasonable disagreement."

In response to the State's first point of error, we hold that the court of appeals failed to give proper deference to the trial court's ruling and erred in concluding that the evidence of Cassie's death was irrelevant to the charged offense under Rules 401 and 402. A trial court may not admit irrelevant evidence. Tex. R. Evid. 402. Evidence is relevant if it tends to make a fact "of consequence in determining the action" more or less probable than it would be otherwise. Tex. R. Evid. 401. There must be a "direct or logical connection" between the evidence and the fact the proponent is trying to prove. Circumstantial evidence is as probative of guilt as direct evidence. Pieces of evidence that may seem weak in isolation become stronger when they are consistent with one another. The relevance of evidence is not always clear cut, and reasonable people may disagree about whether certain evidence leads to a particular inference. If the relevance of evidence depends on the existence of another fact, then the court may admit the evidence contingent upon the introduction of sufficient evidence to prove that fact.

With evidence of Cassie's death, the State sought to prove that Appellant kidnapped Cassie. By charging Appellant with the kidnapping of Cassie, the State was required to prove that she had been abducted. One way in which abduction can be proven is to demonstrate that the victim is restrained with the intent to prevent liberation by using or threatening deadly force. Shooting Cassie to death constitutes deadly force and necessarily establishes Cassie's lack of consent to her restraint and Appellant's intent to prevent her liberation by using deadly force. In this way, there is a logical connection between the violent death of Cassie and the kidnapping charge. Thus, the fact that Cassie was killed is a fact of consequence in the action.

Still, the relevance of Cassie's death to the charged offense depends on whether sufficient evidence exists to prove that Appellant is responsible for her death. The State introduced extensive circumstantial evidence supporting Appellant's culpability for Cassie's death including:

- Appellant and his girlfriend Linda kidnapped Cassie twice within a week prior to her death.
- Linda held Cassie responsible for the theft of $70,000.
- Cassie feared that someone would hurt her if she didn't find the money.
- After releasing Cassie from the first kidnapping, Appellant went to look for her at her parents' house.
- The day before the murders of Cassie and Jimmy, three Asian men, one of whom held a gun, looked for Cassie and Jimmy at Cassie's apartment.
- Cassie witnessed Appellant or Amalinh shooting her boyfriend Jimmy.
- After the shooting, Cassie walked out of the house, flanked by Appellant and Amalinh, looking "nervous" and "fixing to cry."
- No one testified to seeing Cassie alive again after she left with Appellant, Amalinh, and Linda.
- Cassie was killed the same day as Jimmy.
- Both Jimmy and Cassie were shot in the face, though with different guns.

The court of appeals held that a reasonable jury could have found, based on the evidence above, that Appellant intended to kidnap Cassie. Whether this circumstantial evidence is sufficient to support the further inference that Appellant used deadly force to restrain Cassie, thereby causing her death, is within the zone of reasonable disagreement. Therefore, the trial court did not abuse its discretion in admitting the evidence.

The court of appeals erred by failing to recognize that the evidence of Cassie's death was admissible for at least one of two proper purposes: as evidence of an element of the charged offense and as same-transaction contextual evidence.

Though Appellant characterized Cassie's death as an extraneous offense, the trial judge correctly recognized it as part of the offense and not extraneous.
…
Similarly, in this case, the State introduced evidence of Cassie's death to prove the aggravating feature of a capital murder—kidnapping. The indictment did not allege that Appellant kidnapped Cassie in a particular way, so the State was not constrained in its proof. "The offense of kidnapping is complete when the restraint is accomplished and there is evidence that the defendant intended to restrain the victim by either secretion or the use or threat to use deadly force."

The court of appeals did not engage with this argument and instead continued to analyze Cassie's murder only as an extraneous offense. The court of appeals implied that because Frank's testimony describing the events at his house on May 7 provided legally sufficient proof of kidnapping, it was an abuse of discretion to allow more evidence of kidnapping. This Court rejected that reasoning in *Ramirez*. While the offense of kidnapping may have been complete when Cassie left Frank's house, the trial court did not err by allowing the State to present evidence

of multiple ways the offense may have been committed. Here, the evidence shows that Appellant and associates kidnapped Cassie by restraining her in two ways: by secreting her and by using deadly force. The offense of kidnapping may have begun at Frank's house, but it did not end there. It ended only when Cassie was killed because, at that point, it was no longer possible to liberate her.

Even if evidence of Cassie's death were not relevant to prove an element of the offense, it would be relevant as same-transaction contextual evidence. Evidence of a crime, wrong, or act other than the offense charged is not admissible to prove that the defendant acted in conformity with his character but may be admissible for other purposes. Tex. R. Evid. 404(b). These purposes include proving intent and motive as well as illustrating other aspects of an "indivisible criminal transaction," also known as same-transaction contextual evidence.

Same-transaction
contextual evidence "illuminate[s] the nature of the crime alleged." A jury is entitled to know all the facts that are "blended or closely interwoven" with a continuous criminal episode. Yet, such same-transaction contextual evidence must be "necessary to the jury's understanding of the offense" such that the charged offense would make little sense without the same-transaction evidence.

The standard for admission of extraneous-offense evidence is high: "a trial court cannot admit extraneous-offense evidence unless a jury could find beyond a reasonable doubt that the defendant committed the extraneous offense."

Applying the proper deferential standard of review to this case, it is within the zone of reasonable disagreement to find both that (1) evidence of Cassie's death provides necessary context to a continuing course of conduct including capital murder and (2) Appellant was responsible for her death beyond a reasonable doubt. One cannot tell the story of Cassie's kidnapping without revealing the end of the story. A juror would naturally wonder what happened to Cassie after she left Frank's house and why she did not testify about what happened to her on May 7. The evidence shows that Cassie was worried about her personal safety. She texted to her landlord that she was being held hostage and needed to find $70,000 soon because "I like my face." She told him that to save her life, she offered to convey her father's speed boat, which she neither owned nor possessed. She said she was scared to involve anyone other than Jimmy. From this text exchange, the landlord observed that her state of mind was "panicky and frazzled." A few days later, when she left the scene of Jimmy's murder, witnesses observed that she looked nervous and about to cry.

Putting the evidence together illuminates the nature of the crime—that Appellant and associates killed Jimmy because he interfered with a plan to shake down Cassie for the missing funds or retaliate against her. If Cassie had later turned up alive and unharmed, perhaps a different inference would have been drawn. The fact that Cassie was killed the same day as Jimmy told the jury more about how the charged offense of kidnapping was accomplished. It is consistent with other facts in evidence. Shooting Cassie to death resolved the "debt" she owed to Linda. No evidence contradicts that theory of events. In addition, as discussed earlier, substantial circumstantial evidence supports Appellant's culpability for her death. It is hard to see how a jury would necessarily have held a reasonable doubt.

The court of appeals did not give the proper deference to the trial court's ruling and erred by concluding that the evidence of Cassie's death was substantially more prejudicial than probative.
Even when evidence is relevant, a court may exclude it "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

Before excluding evidence, a court must assess the balance of factors in Rule 403 including:

• how compellingly evidence of the extraneous misconduct serves to make more or less probable a fact of consequence—in other words, its inherent probativeness . . .
• the potential the 'other crimes, wrongs, or acts' have to impress the jury in some irrational but nevertheless indelible way . . .
• how much trial time . . . the proponent need[s] to develop evidence of the extraneous misconduct, such that the attention of the factfinder will be diverted from the indicted offense . . .
• how great . . . the proponent's '*need'* [is] for the extraneous transaction.

The fact that an item of evidence shows the defendant in a negative light is not sufficient to justify its exclusion on Rule 403 grounds: "Almost all evidence offered by the prosecution will be prejudicial to the defendant. Only evidence that is *unfairly* prejudicial should be excluded." Unfair prejudice is the "tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." If the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice, the court should admit the evidence.

Applying and balancing the factors of Rule 403 to the facts of this case:

• *Probative value*—As discussed above, the evidence of Cassie's death tends to make it more probable that Appellant restrained her without her consent and used deadly force in the process, which are elements of the charged offense. Substantial circumstantial evidence supports the inference that Appellant was responsible for her death. This factor weighs heavily in favor of admission.
• *Unfair prejudice*—There is a slight risk that the jury would be confused that Appellant was on trial for murdering Cassie instead of Jimmy. However, it is unlikely that any such confusion would have had an irrational effect on the jury or led the jury to make its decision on an improper basis. Other evidence strongly supported a finding that Appellant and Amalinh cooperated to murder Jimmy, who was the murder victim listed on the indictment. Appellant's appeal challenged the evidence for kidnapping, and that is an issue to which Cassie's death is directly related because of the deadly-force element. While evidence of Cassie's death may have had a slight emotional impact on the jury, there is no reason to think it outweighed the emotional impact of evidence proving Jimmy's death. Jimmy was a sympathetic victim in his own right because he seemed to be an innocent bystander protecting his girlfriend from harm. The State

showed the jury a disturbing photograph of Jimmy's face with a bullet wound and one eye half-open. The State introduced only one photograph of Cassie's corpse, and it is not inflammatory; it shows the lower portion of her body lying in the brush, and no wounds are visible. This factor weighs slightly in favor of admission.

• *Amount of trial time consumed*—The State did not spend an inordinate amount of time on evidence of Cassie's death. The State called a total of sixteen witnesses. The number of witnesses who testified partially or exclusively about Cassie's death was four. They described the location where her body was found, her gunshot wounds, and the forensic evidence collected from her body. In the transcript of the State's closing argument, discussion of Cassie's death comprises two paragraphs out of the twenty-page argument. The great majority of the testimony and argument concerned the events leading up to May 7, the murder of Jimmy, and the abduction of Cassie at Frank's house. At the hearing for the motion in limine, the State agreed to limit the number of photos and drawings of her corpse and exclude any photos of her face and the more gruesome images. Accordingly, the State only showed the jury seven photographs of the scene where Cassie's body was found, including one photograph of Cassie's body. By comparison, the State showed to the jury approximately 100 photos of the crime scene for Jimmy's murder and Cassie's abduction, including a photo of Jimmy's face after death. This factor weighs in favor of admission.

• *State's need*—The State's need for the evidence was moderate. The court of appeals held that the evidence was sufficient for kidnapping without the evidence of Cassie's murder. However, without an eyewitness testifying to actual physical restraint, threats, or secretion of Cassie, a finding of guilt for kidnapping depended on a logical inference from the circumstances—namely Cassie's drug debt and prior kidnapping, her facial expression when walking out of Frank's house, and the fact that she had just witnessed her boyfriend being shot. One could see how the State would want to strengthen its case of kidnapping by showing that Cassie's abductors used deadly force against her. The evidence was not cumulative of other evidence presented because it showed a different way of committing the offense of kidnapping. This factor weighs in favor of admission.

On balance, the court of appeals erred by finding that the probative value of the evidence of Cassie's death was substantially outweighed by the risk of unfair prejudice.

CONCLUSION

The trial judge did not err by finding that evidence that Cassie was murdered was relevant to the charge of capital murder in the course of kidnapping. It was within the zone of reasonable disagreement for the court to find that the evidence was admissible either as proof of an element of the offense or as an extraneous offense illustrating the context in which the charged offense occurred. We reverse the judgment of the court of appeals and remand the case to that court to address Appellant's remaining points of error regarding Cassie's alleged hearsay statements and the motion for continuance.

***INTHALANGSY v. State*, Tex. Crim. App., No. PD-1000-20, November 10, 2021.**

EVIDENCE – ASSAULT ON PUBLIC SERVANT

After a jury trial, Appellant David Earl Spillman, Jr. was convicted of two counts of assault of a public servant and one count of possession of methamphetamine. The court of appeals affirmed. We granted Appellant's petition for discretionary review to determine whether the evidence is sufficient to support his assault of a public servant convictions. Because the evidence could enable a rational jury to conclude beyond a reasonable doubt that Appellant committed assault of a public servant, we affirm.

At around 9:45 PM on August 12, 2016, Officer William Carper pulled Appellant over for a routine traffic stop in Hunt County, Texas. Carper smelled burnt marijuana coming from Appellant's vehicle and requested backup. Officer Kendall Reeves responded. Upon Carper's request, Appellant exited the car and allowed Carper to pat him down. Carper searched the car and found marijuana remnants and an unlabeled pill bottle. After inspecting the vehicle, Carper searched Appellant again. When Carper asked Appellant to remove his shoes, Appellant removed his left shoe by sliding the heel off and putting his fingers in the shoe while balancing on one leg. Carper grabbed Appellant's arm to see what he was doing because he had never seen anyone remove their shoe in that manner. According to Carper, Appellant then "immediately began resisting" by tensing his arm, putting his foot down, and moving his hand (set in a clenched fist) up and forward above Carper's head. Carper then escalated his use of force as he was trained to do. He seized Appellant, and Reeves began to assist. According to Carper's testimony, Appellant had "ahold" of Carper and was "pulling and jerking." Reeves pushed against the pair, and Appellant was "trying to go between" the officers. Carper maintained his grip on Appellant and planted his outside leg. Carper then felt pain, popping, and grinding in his leg and fell to one knee. Reeves performed a "hip throw" on Appellant, forcing both Appellant and Reeves to the ground. Reeves scraped his elbow, drawing blood. About ten seconds elapsed from the time Appellant took off his shoe to the time he and Reeves fell. Appellant was arrested. The officers discovered that he had been holding a clear bag containing methamphetamine in his clenched fist. Appellant claimed he was trying to give Carper the bag when Carper grabbed him. He also claimed he did not grab Carper. Carper's leg began swelling shortly after the incident. A doctor later determined that Carper tore his anterior cruciate ligament (ACL) in the altercation. Appellant was charged with two counts of assault of a public servant and one count of possession of methamphetamine. At trial, the State showed two videos. Most of the action that forms the basis for Appellant's convictions occurred off camera. Accordingly, the testimony of the involved officers was heavily relied on throughout the trial. Carper demonstrated the "fight" at trial. As the State points out, the record fails to "capture exactly what Carper was showing the jury[.]" 5 The jury received an instruction on resisting arrest; however, they found Appellant guilty of the two counts of assaulting a public servant and the possession count. Appellant pled true to enhancements and was sentenced to fifty years confinement for each assault charge and sixty years for the possession charge, to run concurrently. On appeal, Appellant argued the evidence was insufficient to support his assault convictions. Specifically, he argued: (1) the prosecution failed to show he had the requisite mental state for assault of a public servant; and (2) it was the officers' own actions—not his—that caused their injuries. The appellate court disagreed and found that Appellant, by "struggling" with the officers, "disregarded a substantial risk" of bodily injury to Reeves and Carper—even if his only intent was to "conceal evidence and prevent his arrest[.]"

We review the sufficiency of the evidence supporting Appellant's convictions under the Jackson v. Virginia standard. Under this standard, reviewing courts "'consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt.'" As the reviewing court, we defer to the jury in undertaking their responsibility to "'fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" The Court balances this deference to the jury with our duty to ensure the evidence "actually supports a conclusion that the defendant committed the crime that was charged." We resolve evidentiary inconsistencies in favor of the verdict.

To measure the sufficiency of the evidence, the reviewing court compares the evidence produced at trial to "the elements of the offense as defined by the hypothetically correct jury charge for the case." The hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." The law authorized by the indictment consists of the offense's statutory elements as modified by the indictment.

The indictments here alleged Appellant committed assault of a public servant by intentionally, knowingly, or recklessly causing bodily injury to Carper and Reeves while they were lawfully discharging their official duties. The jury charges correctly tracked this language. Appellant challenges the *mens rea* and causation elements of the offenses.

One commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another[.]" TEX. PENAL CODE Ann. § 22.01(a)(1). If the individual assaults one "the actor knows is a public servant while the public servant is lawfully discharging an official duty," it is assault of a public servant—a third-degree felony. Id. § 22.01(b)(1). The State put forth no evidence or argument that Appellant acted intentionally or knowingly. The mens rea at issue is recklessness.

"A person acts recklessly, or is reckless, with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur." Id. § 6.03(c). "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

Appellant argues the evidence is insufficient to show that he possessed the requisite recklessness mens rea. The State argues that recklessness depends on whether Appellant "could clearly see [what] [sic] might happen[.]"
The State's argument appears to conflate recklessness with foreseeability, and we caution that this is not the proper standard for recklessness. Nevertheless, a rational juror could have found the element of recklessness beyond a reasonable doubt as judged by the sufficiency standard.

"Bodily-injury assault is a result-oriented offense." For Appellant to have been reckless, he must have been aware of a risk that his actions could result in Carper and Reeves being injured and

consciously disregarded the risk of injury. See TEX. PENAL CODE Ann. § 6.03(c). Disregarding this risk must be a gross deviation from the care an ordinary person would exercise in Appellant's circumstances. At trial, there was evidence that Appellant did the following: • Tensed when Carper grabbed his arm and "immediately began resisting"; 8 • Jerked his hand in a clenched fist forward and above Carper's head; • Grabbed Carper; • Pulled and jerked Carper; • Attempted to bring his arm up and over Carper's shoulder; and • Tried to "go between" Reeves and Carper. While Carper contradicted himself by first testifying that Appellant grabbed him and later saying Appellant did not grab him, Reeves testified that he saw Appellant grab Carper—corroborating Carper's initial testimony.

A rational jury could find that by grabbing and pulling Carper—with Reeves pushing the pair—Appellant was aware of and disregarded a substantial and unjustifiable risk that he could hurt the officers. Recklessness does not require Appellant to consciously disregard the risk of specific injury to the officers. Rather, recklessness requires the result of a bodily injury in general to be consciously disregarded. Appellant and the officers were on the side of the road at night, and a rational jury could find that an ordinary person in the same circumstances would not continue to resist arrest and would not "pull and jerk" or try to go between officers while they are attempting to restrain him.

The jury heard, on video, Appellant claim that he was trying to give Carper the bag in his hand. They also heard him say that he did not grab Carper. However, there is evidence to the contrary, and it is within the purview of the jury to resolve inconsistencies in the evidence. Carper and Reeves testified to Appellant's actions, and the jury was free to believe them. The video evidence does not contradict their testimony. Under these circumstances, a rational jury could find Appellant's actions to be reckless.

Appellant also argues that the evidence is insufficient to show he caused Carper's and Reeves's injuries. As mentioned above, the relevant test for criminal responsibility, or causation, is contained in Texas Penal Code § 6.04(a): "A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." There must be "a 'but for' causal connection . . . between the defendant's conduct and the resulting harm." If there are concurrent causes, the but-for requirement can be satisfied if 1) the defendant's conduct alone was clearly sufficient to cause the harm; or 2) the defendant's conduct and the other cause together were sufficient to cause the harm. However, if the other cause alone was clearly sufficient to cause the resulting harm, and the defendant's conduct by itself was clearly insufficient to cause the resulting harm, the defendant is not criminally responsible.

Appellant argues that Carper's and Reeves's actions were the cause of their injuries. He posits that his conduct could not have caused their injuries—meaning he cannot be considered criminally responsible. We disagree.

While Appellant's conduct alone may not have been sufficient to cause Reeves's and Carper's injuries, neither can the officers' actions alone be considered sufficient to cause the resulting harm. Carper's and Reeves's actions cannot be characterized as "alone" because they were acting in

response to Appellant's conduct. We cannot isolate the officers' actions and view them as a wholly independent cause of their injuries—they would not have responded in the manner they did had it not been for Appellant's conduct in reacting to Carper's search. Because Appellant's conduct and the officers' conduct together caused the harm, the but-for causation requirement is satisfied. Appellant's actions, when considered in conjunction with Carper's and Reeves's actions, were sufficient to have caused the officers' injuries.

Nonetheless, a determination that Appellant's actions were a but-for cause of the officers' injuries does not settle the matter. Criminal offenses require voluntary acts.

Concern has been expressed that "any minor scuffle during an arrest will result in a defendant being charged solely with assault on a public servant." However, this is not the case.

Mere resistance to an officer's contact, detention, search, or arrest cannot be considered assault of a public servant without more. Injuries to officers that occur while they are performing their law enforcement duties can be the result of non-voluntary and accidental forces. This can be true even if the resulting injuries would not have occurred but for a suspect's actions. For assault on a public servant to occur, the defendant must have been a but-for cause of an officer's injuries, and his actions that are considered the but-for cause of the injury must have been performed voluntarily. Physical movements that are the nonvolitional result of someone else's act or that are set in motion by an independent non-human force, physical reflex, convulsion, unconscious act, act under hypnosis, and other "nonvolitional impetus" are not voluntary acts.

In this case, the jury heard evidence that after Carper grabbed Appellant's arm, Appellant tensed up, jerked his hand in a clenched fist forward and above Carper's head, grabbed Carper, pulled and jerked, and tried to go between the officers. Although the jury could have interpreted these movements as reflexive responses to Carper and Reeves's use of force, the jury also could have viewed the evidence—including the testimony from Reeves and Carper and Carper's demonstration of the altercation—and rationally decided that Appellant's motions were voluntary. We find the evidence sufficient to uphold Appellant's convictions for assault of a public servant. The jury was able to judge the credibility of both officers involved in the altercation. Moreover, the jury witnessed a demonstration of Appellant's actions which the record cannot capture. A rational jury could have found that Appellant voluntarily and consciously disregarded the risk of bodily injury to Carper and Reeves when he participated in the altercation. Further, Appellant was criminally responsible for the injuries Carper and Reeves sustained. We affirm the judgment of the court of appeals.

***Spillman, Jr. v. State*, Tex. Crim. App., No PD-0695-20, March 30, 2022**

EVIDENCE – Abuse of child

Appellant was convicted of continuous sexual abuse of a child. Holding that the evidence was insufficient to support the conviction, the court of appeals reversed the judgment. The question in this case is whether the State proved that Appellant's sexual abuse of the victim occurred over a period of thirty days or more.1 Everyone agrees that there is evidence that the last instance of abuse occurred on July 26, 2018, two days before the child was examined by medical personnel. For the evidence to be sufficient to show a period of abuse of thirty days or more, then, there must be some evidence from which a rational jury could infer that the abuse began on or before June 26, 2018. There was evidence that the abuse began when the victim's brother went to jail and that he went to jail "around" June 10, 2018. The court of appeals concluded that a rational jury could only speculate from this evidence that the abuse began on or before June 26. We disagree and hold that a rational jury could have inferred it from the evidence.

A. The Testimony

The victim's sister testified as follows about when their brother (known as "Dayday") went to jail:
Q. In June of – maybe June 10th , give or take, did Dayday get arrested and end up in the Bowie County jail?
A. Yes, ma'am. The victim testified about when the abuse began as follows:
Q. When Dayday moved out and Cornell was still staying at the house, did he start doing things to you that were not right.
A. Yes. * * *
Q. When did he start coming into the room and doing those things to you? A. When my brother went to jail. * * *
Q. So, [Mary], just to be clear, he started coming in your room when Dayday went to jail; is that right?
A. Yes.

Sheriff's investigator Dustin Thompson testified as follows about when the brother went to jail:
Q. The period of time alleged in the indictment, the on or about date, June 10th , 2018 through July 28th , 2018. The testimony in this courtroom in front of this jury is that the abuse started in June when Dayday went to jail, okay?
A. Correct. * * *
Q. And, in fact, did you confirm that Dayday went to jail and was incarcerated around that time in 2008[sic]?
A. Yes, ma'am. * * *
Q. Okay. So from June 10th, 2018 to July 28th, 2018, that was a period of time 30 days or more in duration; is that correct?
A Correct. * * * Q. Okay. Those dates, when Dayday went to jail, the June 10th, 2018 through July 28th, when they confronted him, 2018, those are the dates as close as possible that you could get to confirm by [Mary] and the other evidence in the case? A. Correct.

Appeal

The court of appeals concluded that certain testimony, when viewed in the light most favorable to the jury's verdict, established that the last instance of sexual abuse occurred on July 26, 2018. But

the court found that the testimony about the first instance of abuse was sparse and ambiguous. The court of appeals concluded that the date the victim's brother went to jail was uncertain and speculative because the questions eliciting affirmative answers on the matter used the words "at some point," "around," "about," "maybe," and "give or take." The court of appeals further concluded that, even if the testimony could support a finding that the brother went to jail on or before June 26, the victim's testimony did not establish that the abuse began on the same day the brother went to jail. The court found that the word "when" can "mean both a specific time or a general reference to a time span. For these reasons, the court of appeals concluded that there was nothing in the record that would allow a jury to "infer rather than speculate" that the first instance of abuse occurred on or before June 26.

Because the jury charge did not require the jury to unanimously agree on which act of sexual abuse occurred, the court of appeals concluded it could not reform the conviction to a lesser-included offense. Therefore, it remanded the case for a new trial on the lesser-included offenses of aggravated sexual assault of a child and indecency with a child.

The question here is whether the evidence is sufficient to support the "30 or more days" element of the continuous sexual abuse offense. In reviewing the sufficiency of the evidence under the standard set forth by the Supreme Court in Jackson v. Virginia, we determine whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." This standard accords with the jury's responsibility "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." A jury is permitted to draw "reasonable inferences" from the evidence but may not come to conclusions "based on mere speculation."
First, the victim's testimony was that Appellant started abusing her when her brother "went to" jail, not when he "was in" jail. From this testimony, a rational jury could conclude that the date the victim's brother went to jail is the date the abuse began.

Second, the victim's sister testified that their brother went to jail on June 10th "give or take." Investigator Thompson testified that the period of time alleged in the indictment was June 10, 2018 through July 28, 2018, and that he had confirmed that the brother was incarcerated "around that time." We conclude that this testimony is sufficient for a rational jury to infer that the brother was incarcerated on June 10th or at worst a few days afterwards. Given the context of the testimony, "around" could not have meant sixteen days or more later. And "give or take," means "approximately"—it would mean at most a few days out of the forty-eight day span from June 10 to July 28. It would not mean one third or more of the relevant time period.

Consequently, the jury could have rationally inferred, without resorting to speculation, that the abuse began on June 26 or earlier. We reverse the judgment of the court of appeals and remand the case to that court for further proceedings consistent with this opinion.

***Witcher v. State,* Tex. Crim. App. No. PD – 0034-21, January 26, 2022**

EVIDENCE – Confession, only, may support a conviction.

If a defendant confesses to the offense of indecency with a child against a child who can't communicate and the conduct resulted in no apparent injury, should a conviction be overturned because there is no evidence of the crime itself besides the defendant's confession? No. When sufficient evidence exists in the record to support the conviction for a sexual offense with no perceptible harm against a pre-verbal child victim and a defendant's confession is sufficiently corroborated, the failure to satisfy the corpus delicti rule should not bar conviction.

In this case, Appellant voluntarily confessed to his pastor and then later to his wife. In each confession, he admitted that he pushed aside a pre-verbal, seventeen-month-old infant's diaper and touched her genital region with his hands, mouth, and penis. While the State corroborated the confessions by presenting details showing opportunity, motive, and a guilty conscience, the confessions themselves were the only evidence that the touching had occurred. Appellant challenges his dual convictions for indecency with a child by arguing that the State's evidence was not sufficient to satisfy the corpus delicti rule. The State responds that the evidence did satisfy the corpus delicti rule, but, in the alternative, the State also argues that we should recognize an exception to the rule "for cases involving trustworthy admissions of sexual offenses committed against victims incapable of outcry."

We disagree with the State's first argument but agree with its second. Crimes against children, such as indecency with a child, often involve victims who lack the ability to relate the occurrence of the crime. In addition, indecency with a child is not an offense that would ordinarily cause perceptible harm. Failing to recognize an exception to the corpus delicti rule under such circumstances would result in the inability to prosecute such crimes despite the existence of a voluntary, reliable, and corroborated confession. Because the record contains evidence sufficiently corroborating facts in the Appellant's confessions, the corpus delicti rule should not bar his convictions.

In September of 2016, Appellant reached out to Thad Jenks, his bishop, to "make a confession[.]" As a bishop, Jenks regularly provided spiritual advice to members of his congregation and sought to "help those who confess and are wanting spiritual advice to go through the repentance process and try to change who they are as people[.]" Jenks didn't know what Appellant wished to discuss prior to the meeting, but Appellant soon made clear that he wished to discuss "improper contact with a young child." Appellant told Jenks that he and his wife watched two children over a weekend for their friends. While the children were at Appellant's home, "he took the young daughter into his bedroom and moved aside her - - pulled down a little bit her diaper and touched her in her genital region with his hands, with his tongue, and with his penis." Jenks knew of the child because her parents had previously gone to church in his ward. The child was seventeen months old at the time of the confessed conduct. After this meeting, Jenks asked the child's parents

to come speak with him regarding Appellant's confession. The child's mother was very surprised to learn about the confession because she and her husband had been family friends with Appellant and his wife for many years. After the meeting, the parents contacted law enforcement to investigate. Meanwhile, after his meeting with Bishop Jenks, Appellant voluntarily told his wife that he needed to talk to her about something that happened while he was watching the child in early August of 2016. During their conversation, he confessed that, "while they were here I touched [the child]'s genitals with my hand, my mouth, and my penis." Specifically, he said that he took the child to his bed in the master bedroom, left the door open, and touched the child with his penis, mouth, and hand. He admitted to reaching underneath the child's vagina and "using one of his fingers there," but he couldn't recall "how far it went in." He claimed that he ultimately stopped because he was interrupted by the foul smell of the diaper as he was using his mouth. Then, while "using his hand a little bit later," he realized that he was doing something very wrong. He admitted to doing all this while his wife was talking to their daughter on the back patio and he was inside watching the child alone. Appellant initially attempted to justify his conduct by explaining that he was "curious whether it would give him an erection or not." He went on to point to his feelings of anger at perceived sexual and emotional neglect from his wife. According to Appellant, he resented his wife for going to lunch with her friends during the weekend and leaving him in charge of watching the children. Appellant blamed his wife for not putting shorts back on the child after changing her diaper and leaving her to run around in her diaper. Appellant's wife remembered keeping the child in early August at a time consistent with Appellant's confession and remembered talking with her daughter outside on the back patio that weekend for fifteen to twenty minutes while Appellant watched the child inside. She specifically remembered both going to lunch with friends that weekend and leaving shorts off of the child because the available shorts were too constrictive. She also remembered Appellant "fasting a lot and [being] somewhat withdrawn" after the weekend.

At the urging of law enforcement, specifically Sergeant Jody Armstrong of the Montgomery County Sheriff's Office, the child's parents took her for an exam at Children's Safe Harbor, a multi-disciplinary group designed to be a "one-stop shop to make things easier for the families and to collect information on" crimes against children. At Children's Safe Harbor, the child was examined by Jamie Ferrell, a forensic medical examiner and clinical director of forensic nursing services for the Memorial Hermann Healthcare system. Children's Safe Harbor required children to be three years old or older before they could conduct an interview because a child younger than three is considered "pre-verbal." Ferrell noted that the child was pre-verbal at seventeen months old and that the child's primary mode of communication was "pointing" and "making unidentifiable sounds." Although the child "knew a few words," she did not speak in sentences and was never able to relay information about the incident to either Ferrell or her mother. Because the infant was pre-verbal, Ferrell asked the child's mother basic intake questions for the exam. The child's mother noted that she and her husband left their kids with Appellant and his wife and, after this, Appellant told his Bishop that "he was going to change [the child]'s diaper and he touched

her over the diaper with his tongue and hands and penis, but it was all done over at [sic] the diaper." As expected, Ferrell's examination provided no evidence of a sexual assault. According to Ferrell, evidence collection is usually only done within 96 hours of an assault and the exam was scheduled "some time from when it had happened." Because of the time lapse and the age of the child, Ferrell was unable to determine whether there was "any kind of penetration or ejaculation." She also noted no body surface injuries or injuries to the child's genital areas. Ferrell explained that she would not have anticipated finding injuries because the assault was described as "touching to the area" and "rubbing to the area," which would not realistically cause injury. Finally, Ferrell noted that even if there had been penetration she would not expect there to be apparent injury because "this part of the body is very similar to the cells on the inside of your cheek, and it heals very, very fast." The State charged Appellant with aggravated sexual assault of a child and indecency with a child. At the trial, Sergeant Armstrong, Bishop Jenks, Appellant's wife, Ferrell, and the child's mother testified to Appellant's double confessions,their memories from the surrounding time period, and the results of the medical examinations. At the close of the State's case, Appellant moved for a directed verdict and argued that the State had failed to show independent evidence of the crime under the corpus delicti doctrine because it failed to present independent evidence of the sexual touching other than the Appellant's confessions. The Appellant specifically pointed to the lack of eyewitness testimony, DNA evidence, injury, or outcry from the victim. The State argued that the Appellant's confessions were sufficiently corroborated by pointing out details within the confession, such as the date and the child's lack of shorts, that lined up with testimony from other witnesses. After listening to the arguments, the trial court denied Appellant's motion.

The jury found Appellant not guilty of aggravated sexual assault, returning instead a verdict of guilty on the lesser-included offense of indecency with a child by contact. The jury also returned a verdict of guilty on the separate count of indecency with a child. Appellant waived jury punishment and, after a punishment hearing in which both sides presented evidence, the trial court sentenced Appellant to twenty years confinement with a $5,000 fine on each count to run consecutively.

In his sole point of error on appeal, Appellant argued that there was insufficient evidence of the corpus delicti of the charges of indecency with a child. Appellant contended that his two extrajudicial confessions were not legally sufficient evidence of guilt "absent independent evidence that a crime was committed by someone." The State argued that the two confessions and substantial evidence corroborating those confessions were sufficient proof of the corpus delicti. Alternatively, the State argued that Texas courts should recognize an exception to the corpus delicti rule for cases involving trustworthy admissions of sexual offenses committed against victims incapable of outcry.

The court of appeals held that there was some evidence outside of the extrajudicial confession which, considered alone or in connection with the confession, showed that the crime actually

occurred. The court highlighted details of Appellant's wife's testimony that tended to corroborate Appellant's confessions, including her taking the child's shorts off because they were too small, her being on the patio with her daughter while Appellant and the child were in the house, and Appellant's fasting. In addition, the court summarized the general testimony given by Jenks and the child's mother. According to the court of appeals, the testimony of Jenks, Appellant's wife, and the child's mother "rendered the commission of the offense more probable than without such evidence."

Appellant filed a petition for discretionary review that presented four grounds for review. In sum, Appellant asks this Court to reverse the judgment of the court of appeals because it improperly applied our corpus delicti case law. The State argues that we should uphold the court of appeals' judgment because we have long recognized that a confession may be used to aid in the establishment of the corpus delicti and the court of appeals reached the correct conclusion. In the alternative, the State re-urges its arguments for an exception to the corpus delicti rule for sexual offenses committed against victims incapable of outcry. While we disagree with the State's first argument, we agree that a narrow exception to our traditional application of the corpus delicti rule is warranted, as illustrated by the unique circumstances presented in this case. Given this, we will affirm the judgment of the court of appeals.

The corpus delicti rule is a judicial rule of evidentiary sufficiency "affecting cases in which there is an extrajudicial confession." It requires that, "[w]hen a conviction is based on a defendant's extrajudicial confession, that confession does not constitute legally sufficient evidence of guilt without corroborating evidence independent of that confession showing that the essential nature of the offense was committed." The corpus delicti rule essentially adds an additional requirement to our traditional Jackson v. Virginia legal sufficiency analysis for cases involving extrajudicial confessions.

Under the corpus delicti rule, the corroborating evidence does not need to independently prove the crime, but must simply make the occurrence of the crime more probable than it would be without the evidence. Courts have traditionally applied the corpus delicti rule to ensure that a person is not convicted "solely on his own false confession to a crime that never occurred." The rule has been applied in Texas for at least one hundred sixty years and originated over three hundred years ago in England. It first developed in reaction to a slew of cases in which defendants admitted to the "murder" of missing persons, were executed, and, naturally, were not around for exoneration when their "victims" later turned up, much more alive than their self-admitted "murderers."

The corpus delicti of a particular crime is simply "the fact that the crime in question has been committed by someone." It does not require proof that the specific defendant committed the criminal act, just that the crime itself occurred. The corpus delicti of indecency with a child is the

occurrence of a sexual touching of the child with the intent to arouse or gratify the sexual desire of a person.

We recently reaffirmed the general application of the rule in Texas after considering arguments in favor of alternative corroboration requirements. In Miller v. State, we highlighted the importance of the policy behind the corpus delicti rule but also acknowledged the real possibility that the rule could "result in the exclusion of reliable confessions." We expressed concern that "when the case involves 'the most vulnerable victims, such as infants, young children, and the mentally infirm,' the corpus delicti rule can be used to block convictions for real crimes that resulted in no verifiable injury." Ultimately, we adopted a "closely related crime" exception to strike a balance between stark public policy concerns and the risk of diluting the rule to a nullity. The "closely related crime" exception applies when a defendant confesses to multiple, closely-related offenses, but the corpus delicti of only some of the offenses is shown. With our adoption of the "closely related crime" exception, the corpus delicti rule was reaffirmed, but we also recognized the Court's ability to craft an exception to the rule when public policy considerations outweigh concerns about undermining the efficacy of the rule itself.

In this case, Appellant argues that his convictions for indecency with a child should be overturned because the corpus delicti rule requires some evidence of actual sexual touching, rather than evidence merely corroborating the Appellant's confessions. While we agree with Appellant that our precedent does not allow a confession alone to be used to establish the corpus delicti, we also agree with the State's argument calling for an exception to the rule that applies in situations like the one presented in this case. Accordingly, we recognize a narrow exception to the strict application of the corpus delicti rule when the evidence introduced at trial shows that the confessed conduct was committed against a child who was incapable of outcry and constituted a sexual offense that did not result in perceptible harm. In such a case, if the record reflects that the confession itself is sufficiently corroborated, then reviewing courts will not be required to overturn a conviction that is otherwise based upon legally sufficient evidence due to a failure to satisfy the corpus delicti rule.

We have long held that "in the establishment of the corpus delicti, the confessions are not to be excluded, but are to be taken in connection with the other facts and circumstances in evidence." For example, in Kugadt v. State, we upheld a murder conviction in the face of a challenge to the sufficiency of the corpus delicti. Specifically, we used the defendant's statement to tie together other facts and circumstances surrounding the death of his sister to satisfy the corpus delicti rule. We recognized that the confession, rather than being completely ignored, could be used to help analyze other available evidence—a concept that we have noted well over one hundred years later. But the traditional "Kugadt Rule" is not an end run around the basic requirements of the corpus delicti rule. There still must be "proof of the corpus delicti, outside of the confession." This is illustrated by recent elaborations of the corpus delicti rule that require "evidence independent of a

defendant's extrajudicial confession show[ing] that the 'essential nature' of the charged crime was committed by someone." Although a court can use the confession in its analysis, there must be some evidence outside of the confession that, standing alone or in conjunction with the confession, provides proof "that the crime charged has been committed by someone." Essentially, the Kugadt Rule simply allows a confession to "render sufficient circumstantial evidence that would be insufficient without it," but it still requires "other facts and circumstances" outside of the confession.

In terms of sufficient facts and circumstances outside of the confession, we have historically required something more compelling than the type of non-confession facts presented in this case. For example, in Cokeley v. State, the State charged the defendant with the rape of a "mentally unsound" woman. To prove its case, the State introduced a confession from the defendant admitting to having intercourse with the victim, but the State could not call the victim to testify because of her mental condition. We held that the non-confession evidence was insufficient to corroborate the confession or allow the corpus delicti to be proved with the aid of the confession. We specifically looked to evidence that the defendant was seen at the victim's home and walked away from officers when they approached to arrest him, but we concluded that these circumstances were insufficient in the absence of some proof of "intimacy that would show the fact of intercourse." In doing so, we specifically cited to Kugadt for the "fairly recognized rule" that "the confession may be used to aid in proving the corpus delicti, subject, however, to the above statement that it cannot of itself prove the corpus delicti." We noted that "[u]nless there were facts and circumstances independent of the confession which showed the intercourse of appellant with [the victim], the confession would not be sufficient."

In cases in which we did find sufficient facts of the sexual act, apparent injury or a resulting pregnancy helped satisfy the rule. For instance, in Fredericson v. State, a case of rape, we held that, in the absence of testimony from the mentally ill victim, testimony that the victim was two or three months pregnant "indicates that some one had had carnal intercourse with her" and "[t]his established that some one had committed the offense upon her." While we also noted the defendant's confession and cited to the Kugadt case, it was only in conjunction with the independent evidence of carnal knowledge presented by the pregnancy. Following the Fredericson logic, in Kincaid v. State, a case of incest, the State proved the necessary element of intercourse with evidence that the niece had given birth. This provided a circumstance, aside from the defendant's confession, that the defendant had "carnally known his niece[.]"

Even though these are admittedly older cases, they are largely in line with our fairly recent handling of the corpus delicti rule. For instance, in Salazar v. State, we held that the corpus delicti rule simply requires independent evidence of the "essential nature" of the charged crime, and the corpus delicti of aggravated sexual assault on a child was satisfied by evidence that "someone had

sexual contact with [the victim's] private part and that the act was performed with criminal intent." This "essential nature" would still require some independent proof of the actual criminal conduct. Here, even if we accept that Appellant's confessions could be used in aid of establishing the corpus delicti, there was no independent evidence of the criminal act for them to aid. The State presented evidence that Appellant had opportunity to commit the crime when he was watching the child without his wife. The State also presented evidence of Appellant's guilty conscience by showing that Appellant was emotionally withdrawn after the weekend and that he was fasting as part of some spiritual experience. But the State presented no independent evidence supportive of the sexual touching itself. It couldn't. By the State's own evidence, the victim of the assault could not relate the circumstances of the offense. The assault was described as "touching to the area" and "rubbing to the area," which did not result in any injury. The State's own medical witness noted that there would likely be no injury resulting from penetration because "this part of the body is very similar to the cells on the inside of your cheek, and it heals very, very fast." While the State points to evidence of opportunity and consciousness of guilt, these circumstances do not provide independent proof of the sexual contact. That makes this case similar to Cokeley, in which there was no "intimacy that would show the fact of intercourse," even though there was evidence that the defendant had opportunity and had a guilty conscience. It also distinguishes this case from Kincaid and Fredericson, cases where physical evidence combined with the defendant's confession proved that the act itself had occurred.

Even though our precedent does suggest that we can look to the confession in aid of establishing the corpus delicti, our precedent still requires some evidence outside that confession. Under a strict application of the rule, the State did not satisfy the corpus delicti rule in this case. But this does not end our analysis.

The State also argues that this Court should recognize an exception to the corpus delicti rule for cases involving trustworthy admissions to sexual offenses committed against infants who are incapable of outcry. The State points out that strict application of the rule could effectively incentivize the victimization of non-verbal infants, especially through conduct unlikely to result in any perceptible injury, such as inappropriate sexual contact. Upon considering the alternative, illustrated by cases such as Cokeley, we agree. We recognize a discrete exception to strict application of the corpus delicti rule for cases in which a defendant provides a well-corroborated confession to a sexual offense that was committed against a child who was incapable of outcry and that did not result in perceptible harm. When the State presents sufficient corroborating evidence underlying a confession in such a case, the corpus delicti rule will not bar conviction. We have already expressed concern that an unyielding application of the corpus delicti rule could be used to "block convictions for real crimes that resulted in no verifiable injury" against our society's most vulnerable victims. Specifically, in many sex-related crimes against infants, a defendant's admission will often be the only evidence that the crime occurred. And even recent clarifications to the rule, such as the "closely-related crimes" exception acknowledged in Miller, only operate

when the defendant has confessed to multiple crimes and when at least one of those crimes results in independent evidence of the criminal conduct. 57 Strict application of the corpus delicti rule would seem to render some crimes—such as indecent contact with a child—unprovable when committed against infant children.

Some courts have embraced an alternative to the traditional corpus delicti rule for cases in which the confessed criminal conduct would not result in a perceptible harm. For instance, in State v. Dern, the Supreme Court of Kansas recognized that an alternative analysis was required when "the nature and circumstances of [a] crime are such that it [does] not produce a tangible injury." In doing so, the Kansas court looked to its own prior precedent, which often provided an "alternative path" to satisfaction of the corpus delicti rule in cases involving "no tangible injury." The Dern court cited to State v. Cardwell, a case of rape, in which "there was no direct evidence in court of the corpus delicti—that the crime had in fact been committed" and "[t]he case for the state rest[ed] upon extrajudicial admissions and upon circumstantial evidence as to these essential facts." In reaction to this lack of tangible evidence, the Cardwell court adopted "the reasonable rule that the law demands, and only demands, the best proof of the corpus delicti which, in the nature of the case, is attainable." The Cardwell court elaborated that the corpus delicti "may be established by evidence of admissions of guilt by the accused supported by circumstantial evidence tending to corroborate the admissions; provided all the evidence is sufficient in the estimation of the jury and trial court to establish the guilt of the accused beyond a reasonable doubt." As the Kansas Supreme Court later admitted in Dern, the Cardwell logic plotted an "alternate course" from the strict application of the corpus delicti rule but found that this alternate approach was appropriate when the "nature and circumstances of [a] crime are such that it did not produce a tangible injury."

This understanding recognizes that "certain crimes—for example, when there is a clear and tangible physical injury or harm as there is in a homicide—should by their nature produce substantial independent evidence of the corpus delicti." However, "different types of crimes—for example, when the harm may be inchoate as it is in certain instances of sexual abuse—are by their nature less likely to producing [sic] evidence of the corpus delicti apart from the defendant's confession itself." Cardwell recognized that in such cases, the corpus delicti rule only demands the best proof of the corpus delicti which, in the nature of the case, is attainable.

The record in the present case presents a stark illustration of the concerns recognized by this Court in Miller and addressed by the Kansas Supreme Court in Dern and Cardwell. The victim in this case, a seventeen-month-old infant, was incapable of communication and the underlying criminal conduct was not the kind that would result in perceptible harm. At the same time, the State provided numerous pieces of evidence that corroborated contextual facts contained in Appellant's confessions sufficient to vindicate the underlying purpose of the rule to protect against false confessions. Such a situation illustrates the need for a discrete exception to the traditional application of the corpus delicti rule in Texas. First, the record shows that the child in this case

was exactly the kind of uniquely vulnerable victim that justified the exception we recognized in Miller. Sergeant Armstrong testified that the child was not verbal and did not meet the requirements for a Safe Harbor interview due to her age. Armstrong noted that the general requirement for an interview through Safe Harbor was three years old, but the child was just under eighteen months old at the time of the investigation. Nurse Ferrell confirmed that the child was "pre-verbal" and was not able to tell her what happened due to her age. In fact, medical paperwork admitted at trial listed the child's primary mode of communication as "pointing" and "making unidentifiable sounds." The child's mother clarified that the child "knew a few words" but did not speak in sentences. She also confirmed that the child was not able to relay any information about the incident. This evidence highlights the particular vulnerability of this discrete subgroup of victims and shows why the lack of perceptible harm is particularly dangerous when the victim can't relate that a crime has occurred.

Second, the record shows why the offense of indecency with a child, as committed in this case, could not be reasonably expected to result in independent evidence of the offense such as perceptible harm. Nurse Ferrell's testimony established that, medically speaking, it would not be reasonable to expect to find any kind of injury because "that history of what was provided, that of touching to the area, rubbing to the area, that's not any different than really if you're cleaning your child in this area." Ferrell testified that, even if there had been some kind of penetrating trauma, "I would not expect there to be injury, because this part of the body is very similar to the cells on the inside of your cheek, and it heals very very fast." Ferrell further noted that, in general, the presentation of injury in a child's genital area is incredibly rare and based that conclusion on publications within her field and her own experience of examining over 5,000 children. This testimony demonstrated the lack of perceptible evidence resulting from the improper sexual touching of an infant or young child.

Combining the inability of the child victim to communicate the harm with the absence of perceptible harm, the discrete facts in this record starkly illustrate the concerns that we acknowledged in Miller and the Kansas Supreme Court dealt with in Dern. In circumstances such as this, we must balance the need to protect society's most innocent victims from an actual crime only provable by a defendant's confession against the need to protect those who might confess to a crime that never occurred.73 We cannot condone a reversal when a defendant voluntarily confesses—in great and corroborated detail—to abusing an infant child simply because the infant child cannot provide independent evidence of the abuse and the crime itself leaves no trace.

As we have said in the context of a murder case with no body: "'The notion that the careful and meticulous murderer might escape punishment by destroying or forever concealing the body of his victim is a distasteful one,' and the murderer's successful disposition of the victim's remains should not be rewarded." In the same way, we cannot say that a defendant should be rewarded because he picked a particular victim and crime that would result in his word being the only

evidence of the 'body of the crime,' which could be forever concealed by strict application of the corpus delicti rule. Accordingly, we agree with the State and recognize a discrete and limited exception to the corpus delicti rule in Texas. This exception applies in cases in which the evidence introduced at trial shows that the defendant voluntarily confessed to a sexual offense against an infant who was incapable of outcry and that the confessed conduct did not result in any perceptible harm. In such a case, if the record reflects sufficient corroborating facts and circumstances of the confession itself, then reviewing courts should uphold the conviction so long as there is legally sufficient evidence under the standard set out in Jackson v. Virginia.

In the present case, the State introduced sufficient evidence to meet both preliminary requirements. The infant child was not able to communicate that a crime occurred against her and the specific criminal conduct to which Appellant confessed was a sexual offense that would not have resulted in any perceptible harm. The State also corroborated key facts of Appellant's confessions through the testimony of other witnesses, including: (1) Appellant watched the child at a time consistent with his confession; (2) Appellant's wife took the child's shorts off for a portion of the weekend; (3) Appellant's wife left Appellant with the child while she was in the backyard with her daughter; and (4) Appellant's wife left Appellant to watch the children while she met with friends for lunch during the weekend. In addition, the State presented evidence that Appellant was fasting after the target weekend (which signaled some internal religious turmoil); Appellant was emotionally withdrawn after the weekend (which also signaled that something in fact had occurred); and Appellant confessed consistently and voluntarily to two separate individuals (neither of whom held coercive powers of the State over him). These facts and circumstances provided sufficient corroboration of the confessions at issue in this case.

When the evidence introduced at trial shows that a defendant confessed to committing conduct against a pre-verbal child, who is incapable of outcry, and the confessed conduct constitutes a sexual offense that would not result in any perceptible harm, a defendant's sufficiently corroborated confession to the conduct should not result in an acquittal simply because of an inability to satisfy the corpus delicti rule. As shown in this particular case, the victim was unable to provide independent evidence of the crime due to her inability to relate the existence of the crime and the crime constituted a sexual offense that did not result in any perceptible harm. Because the State presented sufficient corroborating evidence of the confessions, the corpus delicti rule should not bar Appellant's convictions. We affirm.

***Shumway v. State*, Tex. Crim App., Nos. PD-0108-20 & PD-0109-20, February 2, 2022.**

EVIDENCE – accomplice.

Appellant was convicted of aggravated robbery by a jury and sentenced to life imprisonment by the trial court. With respect to the testimony of an accomplice in fact, the trial court instructed the jury that it must find an accomplice in fact to be an accomplice beyond a reasonable doubt. The court of appeals determined that the reasonable doubt portion of the accomplice-witness application paragraph in the jury charge was erroneous, and that Appellant suffered egregious harm from the error. We exercised our discretionary authority to review this decision, and now reverse.

On May 10, 2016, four men entered Timeless Ink, a two-story tattoo and piercing shop in New Braunfels. The plan to commit a robbery originated with Gustavo Trevino1 ("Trevino") and Olanda Taylor ("Taylor"). Taylor's cousin owned Timeless Ink. With Trevino and Taylor, Appellant, Kenneth McMichael ("McMichael"), and Robert Ruffins (Appellant's relative, hereinafter, "Robert"), agreed to participate in the robbery. On the day of the robbery, Trevino drove Appellant, Taylor, and McMichael from the Palms Apartments ("the Palms") in San Antonio to New Braunfels in Trevino's white Volvo. On the way to Timeless Ink, the group picked up Robert, stopped at Wal-Mart to get zip ties, and then parked in a lot nearby the tattoo parlor. Inside the Volvo, the group put on masks, gloves, and hats to conceal their identities. Trevino stayed in the car as Appellant, Taylor, McMichael, and Robert entered Timeless Ink. Inside the shop, Sarah Zamora and her husband Anthony can be seen working a late night shift upstairs. Anthony was working on a tattoo for one of their regular customers, Tony Hernandez, when Sarah heard someone enter the shop downstairs. When Sarah got to the top of the stairs to greet them, she saw Taylor standing on the steps pointing a gun in her direction. Sarah ran back into the room where Anthony was working on Tony's tattoo and said, "Anthony, gun." Taylor, Robert, and Appellant came upstairs and entered the room and told Sarah, Anthony, and Tony to put their hands up and get on the ground. Anthony told Taylor to take whatever they wanted, but Taylor hit Anthony and knocked him to the ground, knocking him unconscious. Appellant stomped on Anthony's head. Then all four men repeatedly kicked Tony's head and hit his head with pistols before dragging him around the floor. Appellant then kicked Sarah in the face, forced her downstairs by her hair, and commanded her to open the cash register. It was empty. Appellant then removed the shop's safe that was located next to the cash register, placed it in a bag, and took it. Appellant again grabbed Sarah by the hair, walked her halfway up the stairs, pointed the gun at her, and told her not to look at them or move until they left or they would kill her. Anthony, Sarah, and Tony's wallets and cell phones were taken in the robbery. Detective Richard Groff with New Braunfels Police Department ("NBPD") observed the four suspects on the Timeless Ink surveillance video. The surveillance footage showed four black men wearing masks and gloves and carrying handguns. One man, later identified as Appellant, was wearing a white hat, another was wearing a dark shirt, the third individual was wearing shorts with a red stripe, and the fourth was wearing shorts with a white stripe. The footage also captured a unique tattoo on one of the suspect's arms which was identified at trial as belonging to McMichael.

Detective Groff tracked Tony and Sarah's stolen phones using the Find My iPhone application and learned the phones were located in San Antonio at the Palms Apartments. Detective Groff sent a message through the app asking for whoever found the phones to call him. Shortly thereafter, a woman named Rosa Garcia called Detective Groff and he went to the Palms to meet her. Rosa and her son had Sarah and Anthony's cell phones. Rosa told the detective she received the phones from "Tazz Ruffins." Rosa showed Detective Groff "Tazz's" Facebook page. NBPD Detective John Mahoney used the Facebook profile Detective Groff obtained for "Tazz," and identified "Tazz" as Olanda Taylor.3 Detective Mahoney learned Taylor lived at the Palms. While speaking with sources at the Palms, Mahoney learned that an individual named David Hogarth was acquainted with some of the suspects. When Detective Mahoney went to the Palms to try to talk with Hogarth in person, he observed Hogarth standing with Appellant. Appellant quickly walked away and Detective Mahoney asked Hogarth to come with him to the San Antonio police station. Hogarth was reluctant, but he agreed to go and ultimately assisted in identifying the robbers based on the surveillance video screenshots. Hogarth also told Mahoney that he, Trevino, and Taylor had gone to New Braunfels prior to the robbery and that Trevino and Taylor had discussed the robbery during the trip. Hogarth admitted that he was present during conversations in which Taylor, Robert, Appellant, and Trevino made plans to commit a robbery and that Appellant recruited McMichael to help. On the night of the offense, Hogarth saw McMichael, Trevino, Taylor, and Appellant drive off in a white Volvo. When Hogarth was shown a photo from the surveillance footage of the masked man in the white hat, Hogarth stated that he knew the man in the photo was Appellant because Appellant always wore that particular hat. When Hogarth was interviewed by police, he informed Detective Mahoney that Trevino had been telling Hogarth what to say to police. When Trevino was interviewed by police, he provided an alibi that Mahoney's investigation revealed to be false. Mahoney obtained a search warrant for Hogarth's phone that revealed text messages that confirmed Hogarth's account. Detective Mahoney obtained surveillance footage from other businesses near Timeless Ink and observed a white, box-shaped vehicle with a distinctive side blinker traveling in the vicinity shortly before the robbery. Trevino's white Volvo matched the description of the vehicle Mahoney observed in the footage. Detective Mahoney later interviewed Taylor regarding the Timeless Ink robbery. Taylor provided information to assist in the investigation, including identifying information for the other suspects. Detective Mahoney obtained arrest warrants for the remaining suspects, including Appellant, who denied involvement in the Timeless Ink robbery and claimed he had an alibi. However, Appellant also made comments such as "if you say I did it, I did it. If you say that's me, it's me" and refused to provide any information that would enable the detectives to follow up on his alibi information. A search of Appellant's father's apartment at the Palms led to the discovery of a gun and a pair of gloves. Co-defendant Trevino testified at Appellant's trial in exchange for the State's abstention from recommending punishment in his case. Trevino told the jury that he decided to commit robbery at his cousin's shop because he needed money. He testified that, before the robbery, he drove by the tattoo shop with Hogarth and co-defendant Taylor; that he discussed the possibility of the robbery; that Hogarth was not part of the plan; that Hogarth had merely overheard the conversation

concerning the robbery between Trevino and Taylor; that Hogarth did not help anyone commit the robbery; and that he told Hogarth to get a lawyer and not talk to the police after the robbery. Trevino testified that he drove to the tattoo shop in his white Volvo with Appellant and codefendants Taylor, McMichael, and Robert. He further testified that the four passengers put on masks and gloves and had their guns ready. He confirmed that Appellant was wearing a white hat. At trial, Appellant called an ex-girlfriend to testify that she had been dating Appellant for several years and that he was with her on the night of the robbery. She admitted, however, that Appellant had asked her to provide an alibi at trial. She never provided the alibi information to investigative authorities, despite the fact she knew he had been in custody for two years awaiting trial.

Ultimately, the charge contained an accomplice-as-a-matter-of-law instruction for Trevino and the accomplice-as-a-matter-of-fact instruction for Hogarth. After considering the evidence, the jury found Appellant guilty of aggravated robbery.

…

On appeal, Appellant argued, among other things , the charge regarding Hogarth was erroneous because it instructed the jury that it had to find Hogarth to be an accomplice beyond a reasonable doubt.

…

Next, the court below agreed with Appellant that the charge was erroneous and reversed. It concluded that "a proper accomplice instruction should inform the jury that if they have a reasonable doubt regarding whether or not the witness acted as an accomplice, then corroboration is necessary."

The court found that the charge "essentially inverts this requirement by only requiring corroboration if it is shown beyond a reasonable doubt that Hogarth is an accomplice." The court noted that, while Appellant failed to object to the instruction, he was egregiously harmed by the error. Justice Baker concurred in the court's opinion but wrote separately to point out an additional error in the charge – the failure to instruct the jury that "it must determine whether or not Trevino and Hogarth's testimony was both true and showed [his] guilt before using the testimony to convict." Justice Baker found this omission "compounded the harm," and the charge errors "individually and in aggregate egregiously harmed" Appellant. Justice Goodwin dissented. Assuming that the charge was erroneous, she concluded that the majority's harm analysis was problematic because, in its review of the facts, the majority placed itself "too far in the role of factfinder." She said that "at some point an appellate court crosses the line when it substitutes its own credibility assessments and fact determinations for those of the jury," and she feared that "that line has been crossed here."

She also stated that the Appellant "must have suffered some actual – rather than merely theoretical – harm." Here, the majority's conclusion "that the jury could have had a reasonable doubt

regarding whether Hogarth was an accomplice" was a finding of "merely theoretical harm." Justice Goodwin also disagreed with Justice Baker's concurrence, concluding that "language in the accomplice-witness instruction directing the jury to first find the accomplice-witness testimony to be true is not required by law."

The majority's rationale is problematic on two points. First, its conclusion that defense counsel was actually requesting "an instruction specifying that there must be evidence corroborating Hogarth's testimony if the jury had a reasonable doubt as to whether or not Hogarth was an accomplice" is not supported by the record. When Appellant first objected and requested a reasonable-doubt instruction, the trial court responded that a reasonable-doubt instruction was in the jury charge: "[I]t says in there they have to find that he is an accomplice beyond a reasonable doubt." However, counsel expressed that he did not think such an instruction was in the charge: "But I don't think there's been an instruction that they need to believe—when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice. I don't think that's in here." Once more, the trial judge indicated that he "thought it was." The instruction was then read verbatim by the State, and defense counsel said, "I'm good." The State then informed the trial judge which page the instruction was on, and the judge said, "Yeah. Okay. I thought it was in there." While defense counsel's initial statement did refer to the language "if you have a reasonable doubt or not," counsel later clarified that he wanted an instruction "that they need to believe—when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice." When he learned that this language was already in the charge, he stated, "I'm good." The appellate court's conclusion that defense counsel was actually requesting a different charge is unpersuasive. Second, the appellate court erred when it insinuated that invited error is the sole form of estoppel. To the contrary, while Appellant might not have invited error since the instruction was already in the charge, invited error is only one form of estoppel. Under the more general principle of estoppel, "a party may be estopped from asserting a claim that is inconsistent with that party's prior conduct."

…

As in the above cases, judicial estoppel is implicated here. Regardless of whether Appellant invited the error, his present claim is "inconsistent" with his "prior conduct." Appellant "at the very least" had "some responsibility for the jury instruction," more than "just simply not objecting to the charge or just stating 'no objection' to the charge." Instead, by taking issue with the reasonable doubt instruction that he specifically requested, Appellant is presently asserting an inconsistent position and would derive an unfair advantage if not estopped. More plainly, Appellant is taking advantage of his own wrong. Appellant accepted the reasonable doubt instruction. He did not remain silent on the issue, fail to object, state he had no objections to the charge, or withdraw his objection. Instead, he affirmatively communicated to the court that he was "good" with the instruction, thereby accepting the reasonable-doubt instruction in the court's jury charge. Appellant is therefore estopped from bringing this jury instruction complaint on appeal because by his objection, request for a reasonable-doubt instruction, and affirmative assent to the

instruction, Appellant "at the very least" had "some responsibility" for the error of which he now complains.

The record reflects Appellant specifically asked the trial court to ensure that the jury be instructed they had to agree "beyond a reasonable doubt" that Hogarth was an accomplice. We hold that Appellant, once he stated "I'm good" with the instruction, is estopped from thereafter claiming that the instruction was improper. We reverse the judgment of the court of appeals and remand the case to that court to address Appellant's remaining points of error. We need not address the State's remaining issues.

***Ruffins v. State*, Tex. Ct. Crim. App., No. PD-0862-20, March 29, 2023.**

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EVIDENCE – exclusionary rule

After legally detaining Appellant for lack of a proper registration sticker on his truck, an officer conducted an investigative pat-down search of Appellant's person. When Appellant forcefully resisted that search, the officer tased and handcuffed him. The officer subsequently discovered methamphetamine on the ground near where Appellant had been standing. In the trial court, Appellant filed a motion to suppress the methamphetamine. In response to that motion, the trial court decided that the officer's investigative pat-down search (also known as a Terry search) was illegal.1 But the trial court nevertheless concluded that the taint of the illegal Terry search was attenuated by Appellant's commission of the dual offenses of resisting search and evading detention.2 As a result, the trial court denied his motion. The Second Court of Appeals reversed Appellant's conviction. It explained that Appellant's commission of resisting search and evading detention in response to the officer's unlawful pat-down did not constitute "a severe departure from the common, if regrettable, range of responses" that should be expected. It therefore concluded that these offenses did not "constitute intervening circumstances" for purposes of an attenuation-of-taint analysis …

1 Whether the investigative pat-down search was valid under the criteria announced by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), is not before us. For purposes of resolving the State's petition for discretionary review, we assume without deciding that it was not valid.

Appellant pled guilty to possession of methamphetamine in an amount more than one gram but less than four grams. Pursuant to a plea agreement, he was sentenced to five years' confinement in the penitentiary. TEX. HEALTH & SAFETY CODE § 481.116(c). Appellant preserved his right to appeal the trial court's ruling on his pretrial motion to suppress the methamphetamine, which he contended was obtained illegally because the arresting officer, among other things, conducted an illegal pat-down search. At a hearing on Appellant's motion to suppress, Sergeant Richard Lukowsky was called to testify. Lukowsky worked with the Azle Police Department, just

outside of Fort Worth. In addition to his testimony, his body-cam footage was admitted showing his interactions with Appellant on the day of the arrest. The evidence showed that Lukowsky was patrolling at 11 a.m., on February 16, 2020, when he spotted a pickup truck without a proper registration sticker. Lukowsky followed the truck into a gas station/convenience store parking lot. By the time Lukowsky caught up with Appellant, Appellant was already out of his truck, near the entry to the store. Lukowsky asked Appellant "to step over to where [Lukowsky] was." Appellant complied and walked over. Appellant then asked what was going on, and Lukowsky told Appellant that "his registration was out" on his truck. With Appellant's permission, Lukowsky retrieved Appellant's wallet from the truck and handed it to Appellant, who in turn handed his driver's license back to Lukowsky. According to Lukowsky, in the course of that exchange, he noticed that Appellant's hands were shaking more than what he considered normal for such an encounter, and Appellant otherwise appeared very nervous. Knowing that this was a "high drug area," that narcotics arrests had been made at this location on "several" occasions, and that he was by himself, Lukowsky instructed Appellant "to turn around so [he] could pat [Appellant] down just for [Lukowsky's] safety."

At first, Appellant seemed ready to comply, turning around and raising his arms slightly at the elbow. But when Lukowsky began to pat on the outside of the right-hand pocket of Appellant's cargo shorts, Appellant reached down toward his left-hand pocket. Lukowsky grabbed Appellant's hand and ordered him not to go into his pocket. But Appellant persisted in moving toward the pocket, "ripped" away from Lukowsky's hand, and turned around to face Lukowsky, while slowly backing away from him. At this point, Lukowsky called for backup and drew his weapon, intending to handcuff Appellant. Appellant told Lukowsky "something along the lines" of "I'm not going to go with you," and "you're just going to have to shoot me." Eventually Appellant approached and began to move around an air pump machine, which he grasped in such a way that Lukowsky could not see his left hand. At that point, an off-duty Fort Worth police officer arrived and tried to assist Lukowsky in taking Appellant into custody. Lukowsky ordered Appellant to comply several times, and after he then warned Appellant and the off-duty officer that he was about to tase Appellant, Lukowsky carried through on his warning and tased Appellant, who then fell to the ground. With the continuing help of the off-duty Fort Worth officer, Lukowsky handcuffed Appellant. Lukowsky then discovered a bag of methamphetamine on the ground next to the air pump machine. As Lukowsky's body-cam footage confirms, the bag had not been there only moments before. Lukowsky believed that Appellant had retrieved it from his left-hand pocket unseen and then dropped it as a result of being tased. In its written findings of fact and conclusions of law, the trial court found that the initial detention of Appellant was justified— because of the absence of a valid registration sticker on Appellant's truck. In spite of that, the court found that Lukowsky's initial Terry pat down search of Appellant was illegal because he lacked reasonable suspicion to justify it. But the trial court also found that Appellant's conduct in response to Lukowsky's illegal Terry pat-down search constituted the offenses of: (1) resisting search, and (2) evading detention. And as a result, the trial court concluded, the "taint" from the primary misconduct was effectively "purged" by Appellant's commission of the new offenses. The court of appeals rejected the trial

court's conclusions. Citing court opinions from other jurisdictions, the court of appeals essentially held that "milder cases of resisting arrest [do] not constitute intervening circumstances" for purposes of an attenuation of taint analysis. The court explained that "[o]ther courts have held that simply running away from the detaining officers or attempting to dispose of evidence will not necessarily dissipate the taint." To hold otherwise, the court observed, would simply encourage the police to engage in improprieties in the hope that a suspect's adverse reaction (so long as it was not too extreme) would generate incriminating evidence. Having found no intervening circumstance, the court of appeals then emphasized the temporal proximity of the discovery of the evidence of the primary misconduct over the purposefulness and flagrancy of the police misconduct and concluded that the taint was not attenuated.

The federal exclusionary rule requires the suppression of evidence obtained either directly or derivatively ("fruit of the poisonous tree") from police conduct that violates the Fourth Amendment. But whether the discovery of evidence was the "fruit" of Fourth Amendment misconduct is not a strictly "but/for" inquiry. Suppression of evidence is a "last resort," not a "first impulse." Accordingly, the United States Supreme Court has identified exceptions to the exclusionary rule, one of which is the attenuation-of-taint doctrine.

Under the attenuation-of-taint doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the discovery of evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" To determine whether this connection is sufficiently "remote or has been interrupted," the United States Supreme Court has required courts to consider three factors known as the Brown factors: (1) the temporal proximity between the misconduct and discovery of the evidence; (2) the presence of any intervening circumstances; and (3), the purpose and flagrancy of the police misconduct. Also, this Court said, in Mazuca, that either the first factor ("temporal proximity") or the third factor ("purpose and flagrancy") will take on greater significance in any given case, depending upon whether the second factor (any "intervening circumstances") is present. So, when there is an intervening circumstance as contemplated by Brown, the Brown inquiry emphasizes the third factor—the purpose and flagrancy of the police misconduct.

Many courts, including this Court, have recognized that "new offenses" committed by a person who is the focus of alleged police misconduct are necessarily intervening circumstances as contemplated by Brown. In addition, many of those courts seem to have concluded that the commission of a new offense, when considered as an intervening circumstance, will almost invariably outweigh both of the other two Brown factors and establish a per se attenuation of taint, at least with respect to evidence of the new offense itself. Thus, if a defendant commits a new offense in response to police misconduct, the police misconduct will almost never result in suppression of evidence of the new offense that was committed in reaction or in response to it.

In *State v. Iduarte*, , for example, a suspect pulled a gun on a police officer who had entered his apartment without a warrant during a domestic-dispute call. The trial court found that "the officer's actions overstepped the limits of his authority." Although the new offense would likely not have occurred "but for" the alleged police misconduct, this Court decided that acquisition of evidence pertaining to this new aggravated assault "was not causally connected to the officer's allegedly illegal entry." The Court explained:

> The exclusionary rule] does not . . . provide limitless protection to one who chooses to react illegally to an unlawful act by a state agent. If that were allowed, the genuine protection that the exclusionary rule provides would be undermined. Here, evidence of the charged offense did not exist before the officer's challenged actions because the charged offense had not yet occurred; the evidence showed a subsequent independent criminal act that was not causally connected to an unlawful entry by a state agent. Therefore, the exclusionary rule does not apply to this case.

The Court essentially treated the suspect's illegal response to the police officer's alleged misconduct as an intervening circumstance that was sufficient, by itself, to break the causal connection—even without reference to the other two Brown factors.

Other courts, both before and since this Court decided Iduarte, have ruled similarly, that evidence of the commission of an offense in response to unconstitutional police conduct will not be suppressed under the exclusionary rule. Like this Court in Iduarte, these courts seem to have reached that conclusion without explicitly considering any Brown factors other than the second one—"presence-of-intervening circumstances." They almost seem to treat that intervening circumstance offense as all-by-itself determinative of whether the exclusionary rule applies.

Of course, the question in this case is not whether to suppress evidence of Appellant's new offenses of resisting arrest and evading detention. Insofar as we know, Appellant has not even been formally charged with either of those offenses. Instead, the question is whether Appellant's commission of those new offenses constitutes an intervening circumstance under Brown, so as to attenuate the taint of police misconduct with regard to evidence of still another, different offense—possession of a controlled substance—discovered subsequent to the alleged police misconduct. In similar circumstances, some courts have seemed to consider the new offense—committed in response to the original alleged police misconduct—as independently determinative in favor of attenuation. Those courts appear to conclude that the new offense brakes the causal connection, not only between the alleged police misconduct and the new offense committed in response to it, but also between the misconduct and the subsequent discovery of evidence of even another, different offense. But we ultimately conclude that, at least until the United States Supreme Court

says otherwise, the admissibility of this category of evidence—of a still different offense—should be considered with continued reference to all three of the Brown factors. This approach, we think, is to be preferred, since it considers the temporal proximity of the discovery of the evidence to the original misconduct, the intervening circumstance of the new offense, and also the purpose and flagrancy of the primary misconduct leading to the discovery of the "different offense" evidence.

…

The way we see it, when evidence pertaining to a different offense is discovered subsequent to some police misconduct, but after the commission of a new offense by the accused, the new offense is still an intervening circumstance—regardless of its seriousness or predictability. The reasons that would justify an almost invariable rule for cases involving only evidence of the new offense itself—committed in response to police misconduct—do not apply, at least not as firmly, when the evidence discovered relates to a different offense. Therefore, we conclude that a faithful deference to the United States Supreme Court's decision in Brown requires this Court, under these circumstances, to conduct an attenuation-of-taint analysis, giving full consideration to all three of the Brown factors, but with particular emphasis placed on the third factor, which asks how purposeful or flagrant the police misconduct may have been.

This approach more effectively serves the core exclusionary rule interest. It will deter police from deliberately engaging in misconduct in the manifest hope of provoking some illegal response, only to exploit that response by conducting an otherwise unwarranted search or seizure for the purpose of uncovering evidence of still different offenses unrelated to the suspect's illegal response. And it also fits in well with the analyses that this Court undertook in Jackson and Mazuca.

…

In short, we agree with the State that the court of appeals erred to conclude that, because Appellant's new offenses were both "petty" and "relatively predictable" as a reaction to Lukowsky's misconduct, they simply do not count as intervening circumstances in the Brown attenuation-of-taint analysis. The court of appeals should have acknowledged that any "new offense" may constitute an intervening circumstance, even when it leads to evidence of some offense other than, and different from, the "new offense" itself. And as a result, the court of appeals should have focused its attention less on the first "temporal proximity" Brown factor and more on the third "purpose-and-flagrancy" Brown factor.

…

Appellant's "new offense" of resisting the search was an intervening circumstance. Because we also find no evidence that Lukowsky purposefully or flagrantly flouted Appellant's Fourth Amendment rights, we conclude that any taint from the illegal Terry pat-down search was attenuated. The trial court properly denied Appellant's motion to suppress the methamphetamine.

Accordingly, we reverse the judgment of the court of appeals and affirm the trial court's judgment.

***Massey v. State*, Tex. Crim. App., No. PD-0170-22, Apr. 26, 2023.**

4. ELEMENTS

FEDERAL ROBBERY

Alfredo Avalos-Sanchez served as lookout during an armed home invasion gone awry. The plan was to steal drugs and money from a known drug dealer. But Avalos-Sanchez and his crew invaded the wrong house. Instead of hightailing it, as some might have done,1 they robbed the four non-drug-dealing occupants anyway. Avalos-Sanchez pleaded guilty to, and was convicted of, interference with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a). The district court sentenced Avalos-Sanchez to 87 months in prison.

1 *See* Jenna Laine, *Bad House Call: Buccaneers' Tom Brady Mistakenly Enters Wrong Home*, ESPN (Apr. 23, 2020), https://www.espn.com/nfl/story/_/id/29086979/buccaneers-tom-brady-mistakenly-enters-wrong-home ("Brady immediately apologized before darting out the door.").

Avalos-Sanchez challenges his guilty-plea conviction and sentence on two grounds: (1) that the factual basis for his guilty plea was insufficient, in violation of Federal Rule of Criminal Procedure 11, because the Government failed to establish the commerce element of the Hobbs Act robbery charge; and (2) that his guilty plea was not knowing and voluntary, in violation of the Due Process Clause of the Fifth Amendment, because he did not know the factual basis for his guilty plea was insufficient. Neither argument has merit, and we affirm.

In June 2017, Avalos-Sanchez and several others attempted to rob a McAllen, Texas residence. Avalos-Sanchez and his crew "believed that hundreds of pounds of marijuana and/or over five kilograms of cocaine were being stored at the private residence," and they intended to obtain by force, and then distribute, those controlled substances. The plan was straightforward: Some of the crew would enter the home to steal the controlled substances at gunpoint, while Avalos-Sanchez and others would watch for law enforcement. But the June 6 robbery went sideways; the crew had hit the wrong house. Instead of fleeing, the robbers held the four occupants at gunpoint and stole $700 cash and two cell phones.

The next day, some of the crew—not including Avalos-Sanchez—ran the same play and tried to rob the correct residence. The crew never made it to the front door. They encountered law enforcement on their way. A grand jury issued a four-count indictment against Avalos-Sanchez and several other defendants involved in the June 6 robbery and the June 7 attempted robbery. Count Three of the indictment charged Avalos-Sanchez with violating the Hobbs Act:

> On or about April 24, 2017 through June 7, 2017, . . . [Avalos-Sanchez] did unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by robbery and attempt to obstruct, delay, and affect commerce and the

> movement of articles and commodities in commerce by robbery, as the terms robbery and commerce are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully take and attempted to take controlled substances and drug proceeds from individuals against their will by means of actual or threatened force, violence, or fear of immediate or future injury.

Avalos-Sanchez pleaded guilty to Count Three and entered a written plea agreement with the Government. At his re-arraignment, AvalosSanchez admitted that he had conspired with other defendants with the intent to steal and sell controlled substances. Avalos-Sanchez also admitted that he was involved in the June 6 robbery and that, even though no drugs were stolen, the intent had been to enter the residence and steal drugs believed to be there. Avalos-Sanchez admitted that he and his crew believed that hundreds of pounds of marijuana or five-plus kilograms of cocaine were stored at the targeted residence. Avalos-Sanchez denied that he attended or knew the plan for the June 7 attempted robbery. But he did not refute the Government's statement that a June 7 telephone call among many of the crew alerted Avalos-Sanchez and others to the planned robbery that day. The district court sentenced Avalos-Sanchez to 87 months in prison. Avalos-Sanchez timely appealed, challenging his guilty-plea conviction and sentence.

Avalos-Sanchez raises two issues on appeal. First, he contends that the factual basis supporting his guilty plea is insufficient as a matter of law because it does not establish an effect on interstate commerce, an element of a Hobbs Act robbery. Second, he argues that his guilty plea was not voluntary and knowing because he did not know that the factual basis for his guilty plea was insufficient. We address, and reject, each in turn.

Before accepting a guilty plea, a district court must first determine there is a factual basis for the plea. This factual basis must be in the record and "sufficiently specific." To analyze the sufficiency of the factual basis under plain-error review, we must first determine if the district court erred in accepting Avalos-Sanchez's guilty plea. To do so, we compare the elements of the crime for which Avalos-Sanchez was convicted to the conduct he admitted in the factual basis.

First, we consider the elements of the crime. A Hobbs Act violation has two elements: (1) robbery, extortion, or an attempt or conspiracy to rob or extort (2) that affects commerce. Avalos-Sanchez only challenges the commerce element. The Hobbs Act's language is "unmistakably broad," however, and the scope of its commerce element is no exception: The Act "reaches any obstruction, delay, or other effect on commerce, even if small," and defines "commerce" to its constitutional limit. For the Government to satisfy the Act's commerce element, then, "it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds."

At the re-arraignment hearing, the Government orally presented the factual basis for Avalos-Sanchez's guilty plea. Avalos-Sanchez admitted he knew of the unlawful purpose of the conspiracy to rob the home for controlled substances and joined in it willingly. He also admitted involvement in the June 6 robbery. And, importantly, he admitted that he intended to steal drugs—the hundreds of pounds of marijuana or five-plus kilograms of cocaine believed to have been there. Based on Avalos-Sanchez's admissions, the Government satisfied the Hobbs Act's commerce element, and there was a sufficient factual basis to accept Avalos-Sanchez's guilty plea.

Avalos-Sanchez's admissions at re-arraignment, standing alone, support his conviction under the Hobbs Act in light of the Supreme Court's decision in *Taylor v. United States*. There, the defendant was charged with two Hobbs Act violations for robbing drug dealers' homes, although neither drugs nor proceeds from drug sales were stolen. Even though the defendant procured no drugs or drug money, the Supreme Court held that the prosecution met its burden by introducing evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds.18 When "robberies were committed with the *express intent* to obtain illegal drugs and the proceeds from the sale of illegal drugs," this "is sufficient to meet the commerce element of the Hobbs Act."

Like the defendant in *Taylor*, Avalos-Sanchez did not obtain drugs or drug proceeds from the June 6 home robbery. More importantly, like the defendant in *Taylor*, Avalos-Sanchez expressly *intended* to obtain illegal drugs and proceeds from drugs from the June 6 robbery. For purposes of the Hobbs Act's commerce element, it does not matter whether Avalos-Sanchez's robbery in fact affected interstate commerce. The prosecution need only show that Avalos-Sanchez committed a robbery with the intent to obtain controlled substances, which it did when Avalos-Sanchez admitted exactly that in his re-arraignment hearing.

[*discussion of appeal contesting the guilty plea is omitted.]*

For all these reasons, we AFFIRM.

***U.S. v. Avalos-Sanchez,* No. 19-40668, 5th Cir., Sept. 11th, 2020.**

ELEMENTS - CATTLE RUSTLING, Value, Sentencing.

The question presented is "Where's the beef?" Williams pleaded guilty to four counts of wire fraud for purporting to broker cattle deals worth millions of dollars, pocketing the money, and then disappearing the herd. The district court ordered more than $2 million in restitution. Williams challenges that award on the ground that the Government failed to prove which cattle he sold and which he stole. We affirm.

For three years, Williams brokered cattle sales between Jones Alto Colorado Ranch and Wyatt Ranches of Texas. Wyatt Ranch bought the cattle. Jones Ranch sold them. And Jones Ranch paid Williams one third of its profits from the sales.

The transactions began in late 2015. The first sale went off without a hitch. A few months later, in January of 2016, Williams made a second sale to Wyatt Ranch. This sale did not go as smoothly as the first order, but Wyatt Ranch received the cattle. So far, so good.

In March of 2016, Williams made a third sale to Wyatt Ranch. Wyatt Ranch purchased black cows. But when the cows arrived, Wyatt Ranch was dissatisfied. Not only were they delivered late, they had "problems." Some were the wrong color, some were barren and had no udders, and some were sick or had died. Wyatt Ranch said no dice; it returned the defective cattle. Bradford Wyatt, the administrator of Wyatt Ranch, complained to Williams and threatened to sue Jones Ranch based on the defective cattle. Williams made excuses and persuaded Wyatt Ranch not to sue by promising to provide additional cattle to make up for Wyatt Ranch's losses. Williams eventually finalized the purchase, and he even threw in an extra $30,000 worth of cattle. But Bradford Wyatt remained dissatisfied and decided Wyatt Ranch was "done with Williams."

Williams, however, wasn't done with Wyatt Ranch. Though Bradford Wyatt stopped ordering cattle, Williams didn't tell that to Jones Ranch. Instead, Williams pretended *to be* Bradford Wyatt. Williams got a new phone number and an email address (Bradford.a.Wyatt@outlook.com) and gave them to Jones Ranch. Then Williams used his fake identity to purchase more cattle from Jones Ranch. Williams forged Bradford Wyatt's signature on purchase orders. And when Jones Ranch attempted to contact Wyatt Ranch personnel, Williams responded—pretending to be Bradford Wyatt.

Under the pretense that "Bradford Wyatt" could not afford to prepay Jones Ranch for the cattle, Williams convinced Jones Ranch to front almost $2,000,000 to facilitate the sales. Jones Ranch paid some of that money to Williams directly; it paid some to various other ranches to purchase cattle for "Bradford Wyatt"; and it paid some to facilitate the storage, transportation, and feed of cattle that Williams fraudulently ordered. Jones Ranch's losses included:

- December 8, 2015: Jones Ranch transferred $105,000 to Williams;
- February 2, 2016: Jones Ranch transferred $61,224 to Williams (including $25,244 for a feed mixer);
- March 21, 2016: Jones Ranch transferred $285,000 to Williams;
- April 18, 2016: Jones Ranch transferred $85,200 to Jordan Cattle Auction;
- May 12, 2016: Jones Ranch transferred $601,150 to Williams;
- July 25, 2016: Jones Ranch transferred $303,000 to Williams;
- September 7, 2016: Jones Ranch transferred $369,175 to Jordan Cattle Auction;
- March 24, 2017: Jones Ranch transferred $143,500 to Maddux Cattle Co.;
- July 18, 2017: Jones Ranch issued a cashier's check in the amount of $185,000 to Cross M. Cattle; and
- August 24, 2017: Jones Ranch issued a cashier's check in the amount of $58,500 to Williams's company, Casa Cattle.

Although Jones Ranch made these transfers to Williams and other entities, "Bradford Wyatt" missed several payments. So Jones Ranch sought a promissory note and security agreement to protect itself. Williams signed the promissory note and security agreement—again doing so under the false pretense of being Bradford Wyatt.

Eventually, Jones Ranch contacted Wyatt Ranch about its failure to pay. Bradford Wyatt was confused—he hadn't authorized an order or received any cattle since March of 2016. Jones Ranch called the number Williams had provided. When Williams answered, he pretended to be Bradford Wyatt. But upon learning that the *real* Bradford Wyatt was on the line, Williams confessed.

A grand jury charged Williams with four counts of wire fraud in violation of 18 U.S.C. § 1343 and one count of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). Williams pleaded guilty to the wire fraud counts. Under his plea agreement, Williams waived his right to appeal. In exchange, the Government dropped the aggravated-identity-theft charge.

The principal dispute at sentencing was how to quantify the losses Williams imposed on his victims. To determine the custodial sentence, the district court turned to the U.S. Sentencing Guidelines. Under those Guidelines, the offense level for wire fraud is based on the greater of the actual *or intended* loss.

Using that definition of the loss amount, the Pre-Sentence Report ("PSR") recommended an offense level of 25. The district court accepted the PSR's loss estimates. Using an offense level of 25 and Williams's criminal-history category of II, the PSR recommended a Guidelines range of 63 to 78 months. After hearing passionate victim impact testimony about the "devastating" effect of Williams's fraud on Jones Ranch, the district court imposed a within-Guidelines sentence of 70 months in prison.

The district court then scheduled a separate hearing to determine its restitution award. The Mandatory Victim Restitution Act ("MVRA") mandates restitution to victims of offenses under Title 18 that are "committed by fraud or deceit." The MVRA also requires restitution for offenses "in which an identifiable victim or victims has suffered a . . . pecuniary loss." That obviously includes Jones Ranch. But unlike the Guidelines—under which *intended* losses can affect a custodial sentence—"[t]he MVRA limits restitution to the *actual* loss directly and proximately caused by the defendant's offense of conviction." At its restitution hearing, the district court examined the disputed losses. For each line item, the district court credited a victim-impact statement averring that the expense constituted an actual loss. It then gave Williams an opportunity to rebut the Government's evidence. Williams responded that he couldn't show which payments resulted in a loss and which didn't: "[I]n a sense my hands are somewhat tied in being able to rebut these things . . . it's almost impossible to parse out what is legitimate and what allegedly is not."

The district court noted that the Government submitted evidence, victim-impact statements, and the PSR to justify each of its loss amounts— with two exceptions. First, Jones Ranch received the mixer it purchased from Williams. And second, the district court concluded that the $105,000 payment made in December of 2015 fell outside of Williams's fraudulent scheme. The district court excluded those two amounts from Jones Ranch's losses, leaving a final tally of $2,066,525. The district court entered an MVRA restitution award for that amount. Williams timely appealed.

The MVRA further says "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." The same provision also says, however, "[t]he burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires." We have interpreted these two statutory sentences to establish a burden-shifting framework for loss-amount calculations. The Government first must carry its burden of demonstrating the actual loss to one or more victims by a preponderance of the evidence. Then the defendant can rebut the Government's evidence.

Here the Government easily met its burden. It led the district court through each and every line item in its restitution request. For each one, the Government offered victim-impact testimony swearing that money was paid and nothing was received. The Government also offered the PSR's findings, which the district court previously accepted. Based on the evidence, the district court found that Jones Ranch did not suffer an actual loss of two expenses: (1) the $105,000 payment in December of 2015, and (2) the mixer received by Jones Ranch. The district court gave Williams credit for both and then ordered restitution for the balance. The district court did not err, much less clearly err or abuse its discretion.

The Government bore its burden of proving an actual loss of $2,066,525. Williams's only response is that he cannot rebut the Government's evidence because he did not keep records of where the legal beef sales ended and the fraudulent ones began. That won't cut it.

AFFIRMED.

***U.S. v. Williams,* No. 20-40157, 5th Cir. Apr. 14, 2021.**

5. WARRANTS –

WARRANTS – AFFIDAVITS – QUALIFIED IMMUNITY in a civil case – PROBABLE CAUSE

This is a consolidated civil rights action, in which plaintiffs-appellees allege that defendant-appellant Sergeant Jonathon Hodgkiss violated their Fourth Amendment rights by using false statements to secure a search warrant. Hodgkiss now appeals the lower court's denial of qualified immunity. For the reasons that follow, we REVERSE and RENDER summary judgment in favor of Hodgkiss.

Many of the relevant facts in this case are in dispute. However, as is explained in greater detail *infra*, the posture of this interlocutory appeal requires that we "accept the truth of the plaintiffs' summary judgment evidence" and deprives us of jurisdiction to "review the genuineness of [the] factual disputes that precluded summary judgment in the district court." Indeed, "[w]here factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the plaintiffs' version of the facts as true."

The case arises out of a criminal investigation into plaintiffs-appellees Elizabeth Saucedo and Tettus Davis by detectives of the Williamson County Sheriff's Office. Defendant-appellant Sergeant Jonathon Hodgkiss claims that he and Detective Jorian Guinn interviewed a source of information ("SOI") in March of 2015 and alleges that the SOI revealed information about illegal activities involving Davis. Hodgkiss contends that, after a recorded interview, the detectives and the SOI drove through Georgetown while the SOI provided additional information. In particular, the SOI allegedly identified the house—Saucedo's residence—from which Davis conducted illegal activities, including dealing narcotics. Plaintiffs dispute that this drive with the SOI ever occurred and emphasize that the recording of the interview does not include the statements implicating Davis as a drug dealer.

Beyond the information allegedly provided by the SOI, Hodgkiss also learned from other Williamson County deputies that the Saucedo residence was a "suspected drug distribution house due to high traffic going to and coming from the location." Surveillance was conducted at the residence, and Davis was observed there "on numerous occasions" and was seen driving a tan Buick sedan. "[B]ehavior consistent with drug sales" was also observed.

A "trash run" was conducted at the residence on June 9, 2015, during which detectives recovered, *inter alia*, plastic baggies containing marijuana residue and cocaine and mail addressed to Saucedo.

Hodgkiss eventually prepared an affidavit for a search warrant of the Saucedo residence, which was signed by Williamson County District Court Judge King in June 2015. The warrant was executed on June 11, 2015, and Davis and Saucedo were subsequently arrested and charged with drug offenses. However, in May of 2016, a district court judge found that there was no probable cause for the search warrant and granted a motion to suppress all evidence obtained as a result of

the search. Specifically, the judge concluded that the recording of Hodgkiss's interview with the SOI did not reflect the information that Hodgkiss claimed to have received from the SOI in his affidavit. Soon thereafter, the State moved to dismiss all charges against Davis and Saucedo. In November of 2017, Davis and Saucedo each individually filed suit against Hodgkiss for wrongful arrest and malicious prosecution under 42 U.S.C. § 1983. These actions were consolidated for all purposes on September 11, 2018. The case was then reassigned, by consent of the parties, to United States Magistrate Judge Mark Lane on August 8, 2019. On October 15, 2020, the Magistrate Judge denied Hodgkiss's motion for summary judgment, which was based, in relevant part, on qualified immunity. The Magistrate found that Davis and Saucedo had only pled facts "giving rise to one legally cognizable claim"—a claim under *Franks v. Delaware*, based on Hodgkiss allegedly making false statements in his affidavit. With regard to that single claim, the Magistrate concluded both that (1) there was an issue of material fact as to whether Hodgkiss recklessly, knowingly, or intentionally made material misstatements and (2) an affidavit without those misstatements would not have shown probable cause to search the Saucedo residence. The Magistrate Judge thus denied Hodgkiss's qualified immunity defense. This interlocutory appeal by Hodgkiss followed.

It is necessary first to define the scope of our jurisdiction in this interlocutory appeal. We may exercise jurisdiction over an interlocutory appeal of a denial of summary judgment based on qualified immunity only, "to the extent that the denial of summary judgment turns on an issue of law." Indeed, "[w]henever the district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly." The first such determination is "that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law." The second is "that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct." We lack jurisdiction to "review conclusions of the *second* type on interlocutory appeal." Put another way, we lack jurisdiction to hear challenges to "the district court's assessments regarding the sufficiency of the evidence." However, we may consider the "purely legal question" of "whether a given course of conduct would be objectively unreasonable in light of clearly established law."

The qualified immunity inquiry includes two prongs: (1) "whether the officer's alleged conduct has violated a federal right" and (2) "whether the right in question was 'clearly established' at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct." The officer will be entitled to qualified immunity if no constitutional violation occurred or if the conduct "did not violate law clearly established at the time." We have the "discretion to decide which prong of the qualified-immunity analysis to address first." Again, in reviewing the district court's determinations on these two prongs, we "lack jurisdiction to resolve the genuineness of any factual disputes" and may only consider "whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment."

We focus our discussion on the first prong of the qualified immunity analysis—whether Hodgkiss's alleged conduct violated a federal right. Plaintiffs have alleged a violation of their Fourth Amendment right, recognized by the Supreme Court in *Franks v. Delaware*, to be free from search pursuant to a warrant that lacks probable cause due to knowing or reckless misstatements.

To prove such a claim under *Franks*, plaintiffs must show that (1) the affidavit supporting a warrant contained false statements or material omissions; (2) the affiant made such false statements or omissions knowingly and intentionally, or with reckless disregard for the truth; and (3) the false

statements or material omissions were necessary to the finding of probable cause. As to the final element, falsehoods will be deemed necessary to the finding of probable cause if the affidavit, "with the . . . false material set to one side," is "insufficient to establish probable cause."

Each of the three elements is at issue in this case. The Magistrate Judge found that issues of material fact precluded summary judgment on the first and second elements, and we may not "resolve the genuineness of [those] factual disputes." However, as detailed above, the remaining question is whether, "if the false statement is excised, . . . the remaining content in the affidavit fail[s] to establish probable cause." And the "ultimate determination of probable cause . . . is a question of law." "In determining whether probable cause exists without the false statements," we must make "a practical, common-sense decision as to whether, given all the circumstances set forth in the affidavit [minus the alleged misstatements], there is a fair probability that contraband or evidence of a crime will be found in a particular place."

The Magistrate Judge concluded that the remaining content in the affidavit was not sufficient to establish probable cause. We disagree. The Magistrate identified that remaining content as follows: patrol deputies believed that the Saucedo residence was suspected drug house and that Davis and Saucedo together transported marijuana and other narcotics to and from the residence; patrol deputies routinely observed plaintiffs leave the residence and return after short periods of time and saw multiple vehicles stop at the residence and briefly meet Davis in the street; Davis was routinely observed driving his car around the city and meeting individuals for short periods of time at various locations; Davis was pulled over in April of 2015, and officers located a "medium sized box that contained marijuana residue" and a large amount of currency "in small denominations"; and Davis was observed meeting with an individual who was then on parole for a felony drug conviction. Finally, the June 2015 trash run uncovered plastic baggies containing a substance that field-tested positive for cocaine, plastic baggies containing marijuana residue, mail addressed to Saucedo, Swisher Sweet cigars, and loose tobacco. The affidavit also recounts Davis's criminal history, which includes multiple narcotics convictions.

We have previously found probable cause based on similar facts. In *United States v. Sibley*, we held that a supporting affidavit based largely on a single trash run sufficiently connected the defendant to the apartment and "the apartment and its occupants to prior drug activity." In that case, the affidavit stated that law enforcement had received information that the apartment's occupants were dealing in drugs, garbage bags were observed being taken to the dumpster by an occupant, and marijuana was found in the bags following a trash run.

Here, even after setting aside the allegedly false statements, there are similar facts set forth in the affidavit that establish probable cause to search the Saucedo residence. Notwithstanding the fact that only a single trash run was conducted, the evidence uncovered connected the trash bags and their contents to the Saucedo residence. Those contents included over twenty plastic baggies, many of which tested positive for narcotics. That is in addition to Davis's criminal history of engaging in drug activity, the information received from deputies about plaintiffs' suspected involvement in drug dealing, the suspicious behavior observed at the residence, and the drugs uncovered in the vehicle which Davis drove to and from the residence. Such evidence is sufficient to support probable cause.1

1 Indeed, though plaintiffs cite a Sixth Circuit opinion holding that a single trash run is not enough, alone, to support probable cause, that same opinion emphasized that the defendant's history of drug charges had been excluded from the supporting affidavit. *See United States v. Abernathy*, 843 F.3d 243, 248 (6th Cir. 2016). Without that "critical missing ingredient," the court held that the remining evidence gathered in the trash run was not enough to support probable cause. *Id.* at 255. We need not decide whether a single trash

run may establish probable cause by itself because there are more supporting facts set forth in the affidavit at issue here.

Accordingly, we find that, with the allegedly "false statement[s] . . . excised," the affidavit's remaining content is enough to establish probable cause.
We thus conclude that Hodgkiss is entitled to summary judgment on plaintiffs' *Franks* claim as there was no constitutional violation.
Based on the foregoing, we REVERSE the Magistrate Judge's order and RENDER summary judgment for defendant-appellant Sergeant Hodgkiss on plaintiffs-appellees' claim of liability under *Franks*.

***DAVID v. HODGKISS*, No. 20-50917, 5th Circuit, Aug. 25th, 2021.**
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WARRANTS – SEARCH WARRANT - Bitcoin data – privacy of electronic data.

[***ed. Note: the trend seems to be to lean toward protecting electronic data. So the old saying "Get a warrant!" often applies.]***

Richard Gratkowski appeals the district court's denial of his motion to suppress evidence obtained through a search warrant. We AFFIRM.
Gratkowski became the subject of a federal investigation when federal agents began investigating a child-pornography website (the "Website"). To download material from the Website, some users, like Gratkowski, paid the Website in Bitcoin.
Bitcoin is a type of virtual currency. Each Bitcoin user has at least one "address," similar to a bank account number, that is a long string of letters and numbers. Bitcoin users send Bitcoin to other users through these addresses using a private key function that authorizes the payments. To conduct Bitcoin transactions, Bitcoin users must either download Bitcoin's specialized software or use a virtual currency exchange, such as the one used here, called Coinbase. When a Bitcoin user transfers Bitcoin to another address, the sender transmits a transaction announcement on Bitcoin's public network, known as a blockchain.2 The Bitcoin blockchain contains only the sender's address, the receiver's address, and the amount of Bitcoin transferred. The owners of the addresses are anonymous on the Bitcoin blockchain, but it is possible to discover the owner of a Bitcoin address by analyzing the blockchain.
For example, when an organization creates multiple Bitcoin addresses, it will often combine its Bitcoin addresses into a separate, central Bitcoin address (i.e., a "cluster"). It is possible to identify a "cluster" of Bitcoin addresses held by one organization by analyzing the Bitcoin blockchain's transaction history. Open source tools and private software products can be used to analyze a transaction.

2 Blockchain is a technological advancement that permits members in a shared network to "record a history of transactions on an immutable ledger." *See* Ashley N. Longman, Note, *The Future of Blockchain: As Technology Spreads, It May Warrant More Privacy Protection for Information Stored with Blockchain*, 23 N.C. BANKING INST. 111, 118–19 (2019) (citing Brittany Manchisi, *What is Blockchain Technology?*, BLOCKCHAIN PULSE: IBM BLOCKCHAIN BLOG (July 31, 2018), https://www.ibm.com/blogs/blockchain/2018/07/what-is-blockchain-technology/).

Federal agents used an outside service to analyze the publicly viewable Bitcoin blockchain and identify a cluster of Bitcoin addresses controlled by the Website. Once they identified the Website's Bitcoin addresses, agents served a grand jury subpoena on Coinbase—rather than seeking and obtaining a warrant—for all information on the Coinbase customers whose accounts had sent Bitcoin to any of the addresses in the Website's cluster. Coinbase identified Gratkowski as one of these customers. With this information, agents obtained a search warrant for Gratkowski's house. At his house, agents found a hard drive containing child pornography, and Gratkowski admitted to being a Website customer. The Government charged Gratkowski with one count of receiving child pornography and one count of accessing websites with intent to view child pornography. Gratkowski moved to suppress the evidence obtained through the warrant, arguing that the subpoena to Coinbase and the blockchain analysis violated the Fourth Amendment. The district court denied the motion. Gratkowski entered a conditional guilty plea to both counts, reserving the right to appeal the denial of his motion to suppress. After the district court issued its final judgment, Gratkowski timely appealed.

"We will uphold a district court's denial of a suppression motion if there is any reasonable view of the evidence to support [the denial]."

Gratkowski presents the novel question of whether an individual has a Fourth Amendment privacy interest in the records of their Bitcoin transactions.3 For the Government to have infringed upon an individual's Fourth Amendment protection against unreasonable searches, the person must have had a "reasonable expectation of privacy" in the items at issue.

3 So far, we have found only two other federal district courts (and no circuit courts) that have addressed the issue of whether an individual has a privacy interest in the records of their Bitcoin transactions on a virtual currency exchange. *See Zietzke v. United States* (*Zietzke II*), No. 19-cv-03761, 2020 WL 264394 (N.D. Cal. Jan. 17, 2020); *Zietzke v. United States* (*Zietzke I*), 426 F. Supp. 3d 758 (W.D. Wash. 2019). In each case, the district court held that the defendant did not have a privacy interest in their Bitcoin transaction records because the transactions were shared with a third party, the virtual currency exchange. *Zietzke II*, 2020 WL 264394, at *13; *Zietzke I*, 426 F. Supp. 3d at 768-69.

Under the third-party doctrine, a person generally "has no legitimate expectation of privacy in information he voluntarily turns over to third parties." But relying on *Carpenter v. United States*, which limited the applicability of the third-party doctrine in the context of cell phones, Gratkowski argues that the Government violated his reasonable expectation of privacy in the records of his Bitcoin transactions on (1) Bitcoin's public blockchain and (2) Coinbase. In that regard, Gratkowski argues that the district court erred in denying his suppression motion. We hold that it did not.

Applying the third-party doctrine, the Supreme Court in *U.S. v. Miller* held that bank records were not subject to Fourth Amendment protections. The Court concluded that the bank records were "not confidential communications but negotiable instruments," which "contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." It recognized that in enacting the Bank Secrecy Act, Congress assumed that

individuals lacked "any legitimate expectation of privacy concerning the information kept in bank records."
The Court has also held that the third-party doctrine applies to telephone call logs. It held that individuals had no privacy interest in the telephone numbers they dialed because people generally do not have any actual expectation of such privacy and "voluntarily convey[]" the dialed numbers to the phone company by placing a call.

However, the Supreme Court recently concluded differently in the context of cell phones. Court held that individuals had a privacy interest in their cell phone location records, known as cell-site location information ("CSLI"), despite the records being held by a third party. In discussing the third-party doctrine, the Court noted that the sole act of sharing did not eliminate an individual's privacy interest. Rather, the Court considered (1) "the nature of the particular documents sought," which includes whether the sought information was limited and meant to be confidential, and (2) the voluntariness of the exposure.
Regarding the nature of the information sought, the Court noted that "telephone call logs reveal little in the way of identifying information" and that checks are "not confidential communications but negotiable instruments . . . used in commercial transactions." Unlike telephone call and bank records, CSLI provides officers with "an all-encompassing record of the holder's whereabouts" and "provides an intimate window into a person's life, revealing not only [an individual's] particular movements, but through them [their] familial, political, professional, religious, and sexual associations." Because individuals "compulsively carry cell phones with them all the time[,]" cell phones have become "almost a feature of human anatomy." Thus, the Court held that CSLI "implicate[d] privacy concerns far beyond those considered in *Smith* and *Miller*."

As for the voluntary exposure component, the Court noted that CSLI was not voluntarily shared information for two reasons. First, "cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society." Second, CSLI does not require "any affirmative act on the part of the user." So long as the user has their cell phone on, a third party receives CSLI.
Gratkowski cites *Carpenter* to support his argument that he had a privacy interest in the information held in the Bitcoin blockchain. But the information on Bitcoin's blockchain is far more analogous to the bank records in *Miller* and the telephone call logs in *Smith* than the CSLI in *Carpenter*.
The nature of the information on the Bitcoin blockchain and the voluntariness of the exposure weigh heavily against finding a privacy interest in an individual's information on the Bitcoin blockchain. The Bitcoin blockchain records (1) the amount of Bitcoin transferred, (2) the Bitcoin address of the sending party, and (3) the Bitcoin address of the receiving party. The information is limited. Moreover, transacting through Bitcoin is not "a pervasive [or] insistent part of daily life," and transferring and receiving Bitcoin requires an "affirmative act" by the Bitcoin address holder. Further, Bitcoin users are unlikely to expect that the information published on the Bitcoin blockchain will be kept private, thus undercutting their claim of a "legitimate expectation of privacy." Granted, they enjoy a greater degree of privacy than those who use other money-transfer means, but it is well known that each Bitcoin transaction is recorded in a publicly available blockchain. Every Bitcoin user has access to the public Bitcoin blockchain and can see every Bitcoin address and its respective transfers. Due to this publicity, it is possible to determine the

identities of Bitcoin address owners by analyzing the blockchain. Gratkowski thus lacked a privacy interest in his information on the Bitcoin blockchain.

7 Because we hold that there is no privacy interest in information stored in the Bitcoin blockchain, Gratkowski's argument—that the federal agents' method of using a "powerful and sophisticated software" to analyze the Bitcoin blockchain intruded into a constitutionally protected area and violated the Fourth Amendment—lacks merit. There is no intrusion into a constitutionally protected area because there is no constitutional privacy interest in the information on the blockchain.

Gratkowski again cites *Carpenter* to support his argument that he had a reasonable expectation of privacy in the Coinbase records that documented his Bitcoin transactions. Like the Blockchain, we hold that the Coinbase records are more akin to the bank records in *Miller* than the CSLI in *Carpenter*.
Coinbase is a financial institution, a virtual currency exchange, that provides Bitcoin users with a method for transferring Bitcoin. The main difference between Coinbase and traditional banks, which were at issue in *Miller*, is that Coinbase deals with virtual currency while traditional banks deal with physical currency. But both are subject to the Bank Secrecy Act as regulated financial institutions. Both keep records of customer identities and currency transactions.
In that regard, the nature of the information and the voluntariness of the exposure weigh heavily against finding a privacy interest in Coinbase records. First, Coinbase records are limited. Having access to Coinbase records does not provide agents with "an intimate window into a person's life"; it provides only information about a person's virtual currency transactions. Second, transacting Bitcoin through Coinbase or other virtual currency exchange institutions requires an "affirmative act on part of the user." Bitcoin users have the option to maintain a high level of privacy by transacting without a third-party intermediary. But that requires technical expertise, so Bitcoin users may elect to sacrifice some privacy by transacting through an intermediary such as Coinbase. Gratkowski thus lacked a privacy interest in the records of his Bitcoin transactions on Coinbase.

For the foregoing reasons, we AFFIRM the district court's denial of
Gratkowski's motion to suppress.

***U.S. v. Gratkowski*, No. 19-50492, 5th Cir. June 30, 2020.**
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Affidavit for cell phone search, sufficiency of affidavit

During a capital murder investigation, investigators obtained a search warrant for Appellee John Wesley Baldwin's phone pursuant to Texas Code of Criminal Procedure article 18.0215(c)(5)(B). In a motion to suppress, Appellee objected to the search warrant's supporting affidavit, which contained generic statements about the use of cell phones. The trial court and the court of appeals both concluded that the affidavit did not contain sufficient facts to establish a fair probability that a search of the cell phone found in Appellee's vehicle would likely produce evidence in the investigation of the murder. We granted review to answer this question: under what circumstances may boilerplate language about cell phones be considered in a probable cause analysis? We hold that boilerplate language may be used in an affidavit for the search of a cell phone, but to support

probable cause, the language must be coupled with other facts and reasonable inferences that establish a nexus between the device and the offense. Because the affidavit in the instant case failed to do so, we discern no abuse of discretion on the part of the trial court and no error on the part of the court of appeals.

Background On September 18, 2016, Adrianus Michael Kusuma was shot and killed during a robbery at his residence. The homeowner's brother, Sebastianus Kusuma, witnessed the murder and said the perpetrators were two black men who fled in a white, four-door sedan. Investigators learned that, shortly after the murder, one of the Kusuma's neighbors saw a white, four-door sedan exit the neighborhood at a very high rate of speed. Investigators obtained security footage from a nearby residence showing a white sedan suspiciously circling the neighborhood, not only on the day of the capital murder, but on the day before as well. On four separate occasions, the sedan entered a cul-de-sac, drove to the front of the residence where the murder occurred, and then turned around. One neighbor came forward and informed investigators that a white sedan had passed by his residence three times shortly before the murder. The neighbor added that the sedan was driven by a large black male. Another neighbor came forward and said that she had seen a white, four-door sedan "casing" the neighborhood on the day before the offense. This neighbor said there were two occupants in the sedan, and both were black men. This neighbor took a picture of the sedan, capturing the license plate. Investigators determined that the sedan in the photo was registered to Appellee's stepfather, who claimed he sold the sedan to Appellee. Appellee's stepfather told investigators that Appellee was living at his girlfriend's apartment. Investigators located the sedan at the apartment and followed Appellee as he left in the sedan. A marked unit eventually pulled Baldwin over for unsafely crossing two lanes of traffic in a single maneuver and for driving over the "gore zone," which is the triangular portion of a highway exit. Baldwin was arrested for those traffic violations, as well as for driving with an expired license and for failing to show identification on demand. Appellee made a lengthy statement to the police. He consented to a search of the sedan, and a cell phone was found inside. Appellee refused to consent to a search of the phone, so investigators obtained a search warrant. The following affidavit was submitted in support of the search warrant:

> On September 18, 2016, at 2120 hours, your Affiant was assigned to investigate the robbery and murder of Adrianus Michael Kusuma, an Asian male, date of birth September 27, 1982, having occurred at his home located at 21522 Canvasback Glen in unincorporated Harris County, Texas. Upon arrival at the scene, Affiant spoke with Sebastianus Kusuma, the brother of the complainant, who was home at the time of the robbery and murder, a person Affiant found credible and reliable. Sebastianus Kusuma advised he was upstairs in his room when he heard a loud banging noise emanating from downstairs. Sebastianus Kusuma went downstairs to investigate and was confronted by a masked black male, armed with a handgun, at the base of the stairs. The masked gunman demanded money and began to assault Sebastianus Kusuma with his fists and the handgun in the dining room of the home. While he was fighting with this male, Sebastianus Kusuma stated he heard a gunshot coming from the kitchen area of the home and turned to see a second black male, also masked, running from the back of the house toward the dining room. The two gunmen grabbed a box of receipts and money from the Kusumas' family run business and fled the residence through the front door. Sebastianus Kusuma followed the two males from the home and witnessed them getting into a white, 4-door sedan and flee [sic] the scene. Sebastianus Kusuma returned to the home to

search for his brother and found him lying on the kitchen floor near the back door. Adrianus Michael Kusuma had sustained a gunshot wound to the chest and was unconscious and unresponsive. The rear door of the residence was open and the door frame shattered from having been kicked in by the suspects.

The neighborhood where this murder occurred consists only of a circling boulevard with multiple small cul-de-sac streets that extend from the main boulevard. Vehicles may only access the neighborhood from one street that leads east off Gosling Road. During the course of conducting the scene investigation, affiant learned that a neighbor, who lives near the entry street to the subdivision, was outdoors at approximately 8:45 PM when he observed a white, 4-door sedan exiting the neighborhood at a very high rate of speed. Within minutes of this vehicle exiting the neighborhood, this citizen observed emergency vehicles entering the neighborhood and thought the white vehicle may be connected to the response of emergency vehicles into the neighborhood. Further, while conducting this investigation, Affiant was advised by Sergeant Mark Reynolds, a certified peace officer reputably employed by the Harris County Sheriffs Office and also assigned to the Homicide Division and assisting in this investigation, that he was approached by a citizen who advised a white, 4-door Lexus vehicle, bearing Texas license plate # GTK6426, was observed driving through the neighborhood, and specifically, past the residence at 21522 Canvasback Glen, on multiple occasions on Saturday, September 17, 2016. The citizen found the repeated circling of the neighborhood and the complainant's home so suspicious that she photographed the vehicle on her smartphone and captured the license plate.
Based on the suspicious circumstances presented by this vehicle one day before the murder, this citizen feared the occupants, two black males, were possibly responsible for the robbery and murder. Affiant and other investigators from the Homicide Division canvassed the neighborhood for residences that may have security cameras. Three (3) residences were located that had recording surveillance systems operating. Video from these surveillance systems were reviewed and one system captured video images of a white, 4-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426, circling the neighborhood on Saturday, September 17, 2016 and Sunday, September 18, 2017 [sic]. Specifically, the video system located at 21622 Redcrested Glen captured images of the vehicle at 2:03 PM on Saturday, September 18, 2016, and the same vehicle on Sunday, September 19, 2016 at 8: 15 PM, 8:16 PM and 8:23 PM.1 On each instance, the vehicle entered the cul-de-sac and drove to the circle in front of 21622 Redcrested Glen and turned around, leaving the view of the camera. On the 8:23 PM event, the vehicle paused momentarily before leaving the view of the camera. The residence at 21622 Redcrested Glen is only 5 residences to the north of the location where Sebastianus Kusuma observed the suspects in the robbery enter the white vehicle and flee the scene. Affiant also interviewed a citizen at 21423 Mandarin Glen who advised that on Sunday, September 18, 2016, at a time estimated by him to be right at duck [sic], observed a white, Lexus GS300 vehicle, driven by a large black male lapped his residence three (3) times. Shortly after this vehicle passed by his residence the last time, the citizen stated he heard the sirens

of emergency vehicles and came outside to see what was happening. The address of 21423 Mandarin Glen is approximately 2.5 blocks from the residence where the robbery and murder occurred. On September 22, 2016, the vehicle bearing Texas license plate GTK-6426 was stopped by patrol deputies for traffic violations and was being operated by John Wesley Baldwin III, a black male, date of birth June 15, 1988. Baldwin gave consent to search the vehicle and a Samsung Galaxy5, within a red and black case was recovered. Baldwin stated that the phone carried the number 832-541-2500. Based on your Affiant's training and experience, Affiant knows that phones and "smartphones" such as the one listed herein, are capable of receiving, sending, or storing electronic data and that evidence of their identity and others may be contained within those cellular "smart" phones. Affiant also knows it is possible to capture video and photos with cellular phones. Further, Affiant knows from training and experience that cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat. The cellular telephone device, by its very nature, is easily transportable and designed to be operable hundreds of miles from its normal area of operations, providing reliable and instant communications. Affiant believes that the incoming and outgoing telephone calls, incoming and outgoing text messaging, emails, video recordings and subsequent voicemail messages could contain evidence related to this aggravated assault investigation. Additionally, based on your Affiant's training and experience, Affiant knows from other cases he [sic] has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime. Affiant further knows based on training and experience, often times, in a moment of panic and in an attempt to cover up an assault or murder that suspects utilize the internet via their cellular telephone to search for information. Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense. Based on Affiant's training and experience, as well as the totality of the circumstances involved in this investigation, Affiant has reason to believe that additional evidence consistent with robbery and/or murder will be located inside the cellular telephone, more particularly described as: a Samsung Galaxy5, within a red and black case, serial #unknown, IMEI #unknown. Affiant believes that call data, contact data, and text message data, may constitute evidence of the offense of robbery or murder. Affiant marked the phone with the unique identifier HC16-0149834 and it is currently located at 601 Lockwood, Houston, Harris County, Texas.

A magistrate issued the search warrant. A Harris County grand jury indicted Appellee for the murder of Adrianus Kusuma in the course of robbing him. Motion to Suppress Appellee filed a motion to suppress the statements he made to the police and the evidence found on his cell phone. The Honorable Judge Denise Collins of the 208th District Court held a hearing on the motion on December 18, 2018. She found that the traffic stop was pretextual but lawful and denied the motion to suppress Appellee's statements. Judge Collins then determined that the affidavit was insufficient to connect either Baldwin or his cell phone to the capital murder.2 Judge Collins orally noted three particular omissions within the affidavit: (1) the affiant reported that one witness had identified the driver of the sedan as a "large black male," but the affiant merely described Baldwin as a "black male," without identifying his size; (2) the affiant did not explain how investigators had tracked down Baldwin to his girlfriend's apartment, even though that information was known to them; and (3) the affiant did not indicate that Baldwin was the actual owner of the sedan where the cell phone was found. Judge Collins granted Appellee's motion as to the cell phone evidence only; however, she did not put her ruling or findings in writing. In a written order dated January 11, 2019, the Honorable Judge Greg Glass, the newly elected judge of the 208th District Court, granted Appellee's motion in its entirety (as to both the cell phone evidence and Appellee's statements) without holding a hearing or making written findings. The State appealed the order, raising two issues in its brief. First, the State argued that Judge Glass should not have suppressed the cell phone evidence because, when viewed in the light most favorable to the magistrate's decision, the affidavit supported a finding of probable cause. Second, the State argued that Judge Glass should not have suppressed Baldwin's statements because Judge Collins had previously found that the traffic stop was lawful, and that finding was supported by evidence developed at the hearing. The Interlocutory Appeal and Abatement Due to the conflicting rulings, the Fourteenth Court of Appeals abated the appeal and remanded the case to Judge Glass with instructions to conduct a hearing and clarify the scope of his order. The court of appeals explained that it could not address the sufficiency of the affidavit without first addressing the lawfulness of the traffic stop. If the traffic stop had been unlawful, then all the evidence would need to be suppressed under the exclusionary rule (unless an exception applied, which the State had not suggested). The lower court refused to infer from Judge Glass's ruling a finding as to the lawfulness of the traffic stop. On remand, Judge Glass held a brief hearing and explained that he had intended to adopt his predecessor's rulings. He then signed an amended order granting Appellee's motion as to the cell phone evidence only. Because the amended order mooted the State's argument that the traffic stop was lawful, the court of appeals only addressed the sufficiency of the search warrant affidavit. In a panel opinion, with Justice Bourliot dissenting, the court of appeals reversed Judge Glass's ruling and remanded the case to the trial court.

Appellee filed a motion for rehearing and a motion for en banc reconsideration. The en banc court of appeals granted his motion for en banc reconsideration, withdrew its prior opinion, and affirmed Judge Glass's ruling granting Appellee's motion to suppress the evidence found on his cell phone.

Court of Appeals Opinions En Banc Majority Opinion

The court below determined that the affidavit did not contain sufficient and particularized facts to establish probable cause that a search of Appellee's cell phone was likely to produce evidence in the investigation of the murder. Instead, the affidavit establishes that the perpetrators left the murder scene in a white four-door sedan, two neighbors saw a white four-door sedan in the

neighborhood the day before and the day of the murder, and security footage recorded a white sedan in the neighborhood the day before and the day of the murder. However, "there are no facts from which to infer that the witnesses all saw the same sedan" or that the security footage recorded the same sedan the witnesses saw. The only fact tying Appellee to the neighborhood is the photo of the license plate taken the day before the murder. At most, according to the lower court, "the magistrate could infer that [Appellee] (or someone driving his car) was in the neighborhood the day before the murder."

The court below relied on *State v. Duarte*, for the proposition that for the magistrate's implied finding to be reasonable, the warrant application must show a correlation between Appellee's car and the car used in the murder. Applying *Duarte*, the court below found there was no evidence that Appellee's car was the same car in the neighborhood on the day of the murder and used in the murder. The court noted, it would strain credulity to conclude that in a county with nearly five million people that evidence of a crime probably would be found in a someone's car just because he was in the neighborhood the day before the offense in a car the same color as the one driven by a suspect who also happened to be Black. Therefore, the warrant application showed no nexus between Appellee's car and the car at the scene of the murder.

The lower court also distinguished between the instant case and *Ford v. State.* In *Ford*, the car was specifically described as a Chevy Tahoe with a roof rack and horizontal stripes, and other facts tied the defendant to the incident. In the instant case, according to the lower court, nothing distinctive tied Appellee's car to the one seen at the murder.

The court below was also critical of the "generic recitations about the abstract use of cell phones" in the affidavit. For example, the affiant stated that cell phones "are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat" and that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." However, this generic language that "a smart phone may reveal information relevant to an offense and that suspects might communicate about their plans on a cell phone is not sufficient to establish probable cause to seize and search a cell phone."

Ultimately, the intermediate court held that, "while magistrates may draw reasonable inferences from . . . the four corners of an affidavit, if too many inferences are drawn, 'the result is a tenuous rather than a substantial basis for the issuance of a warrant.'" In this case, the nexus between the car Appellee was driving and the car seen at the murder scene was "tenuous at best." Extending that nexus to include Appellee's cell phone would be extending the reach of probable cause too far.

Petition for Discretionary Review

On petition for discretionary review, the State argues that the affidavit supported the magistrate's implied finding of probable cause because it contained sufficient facts showing that a search of Appellee's cell phone would probably produce evidence of preparation and the identity of the other participant in the murder. In addition, the State argues that particularized facts are not required. Instead, according to the State, nothing other than the affiant's assumption that "It is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications" is necessary to connect the murder with Baldwin's phone. We granted review of the following two issues:

(1) Did the court of appeals depart from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause? (2) Did the court of appeals employ a heightened standard for probable cause, departing from the flexible standard required by law?

While we agree that the court of appeals' analysis failed to give deference to the magistrate's implied findings with respect to the nexus between the sedan and murder, the court of appeals was correct in concluding that the boilerplate language was insufficient to establish a fair probability that evidence of the murder would be found on the cell phone.

i. The court of appeals misapplied the law with respect to the nexus between Appellee's car and the car in the incident.

Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular location. This is a flexible, non-demanding standard. The duty of reviewing courts is to ensure a magistrate had a substantial basis for concluding that probable cause existed. Reviewing courts must give great deference to a magistrate's probable cause determination, including a magistrate's implicit finding. Even in close cases, reviewing courts give great deference to a magistrate's probable cause determination to encourage police officers to use the warrant process. When in doubt, reviewing courts should defer to all reasonable inferences a magistrate could have made. Reviewing courts should not invalidate a warrant by interpreting an affidavit in a hyper-technical rather than commonsense manner. Reviewing courts should not invalidate a warrant by interpreting an affidavit in a hyper-technical rather than commonsense manner.

In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. We must examine the supporting affidavit to see if it recited facts sufficient to support conclusions (1) that a specific offense was committed, (2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or within the thing to be searched.

Appellee argues that the court of appeals properly applied the standard of review by holding (1) that the statements in the affidavit did not support reasonable inferences that all the vehicles were the same and (2) that there was no nexus between the white sedan observed fleeing the murder and the vehicle Appellee was driving four days later. We disagree with both Appellee's and the majority's conclusion that there was no nexus between Baldwin's vehicle and the offense. The State alleges that it was reasonable for the magistrate to infer that the Lexus that Appellee was driving four days after the offense was linked to the capital murder. We agree. The magistrate considered evidence from the homeowner's brother, neighbors, and security footage and made an implied finding that all three witnesses saw the same vehicle. The magistrate could have reasonably determined that—even in a county as populous as Harris County—the sedan observed by neighbors and captured by security footage was the same sedan witnessed by the complainant's brother. For one thing, while the complainant's brother did not describe the car he saw in detail, his description narrowed the class of cars by color and number of doors, and his description did

not differ from the descriptions of the car observed by neighbors and captured by security footage. Moreover, the brother's description fit the car that drove by the complainant's residence multiple times the day before the murder and that was captured on camera circling the neighborhood. On this point, we agree with the dissent's observation: the separate sightings were too similar and too coincidental to be unrelated. The majority ignores that part of the affidavit describing the neighborhood as having only a single point of ingress and egress and a single circling boulevard with multiple cul-de-sacs branching out from the main boulevard. The dissent continued that, because of this fact, the magistrate could reasonably infer:

1. Because thru traffic is not possible in this neighborhood, there is a reasonable probability that the vehicles seen most frequently there belong to the residents of the neighborhood, which would also tend to explain why two separate neighbors became suspicious of an unfamiliar sedan circling the area.
2. Because the neighbors' suspicions were raised on two consecutive days about sedans that were similar in appearance, there is a reasonable probability that the neighbors witnessed the same sedan, and that its driver was deliberately circling the neighborhood in preparation for the capital murder.
3. Because the sedan was positively linked to Baldwin through the license plate, there is a reasonable probability that Baldwin was the driver witnessed by the homeowner's brother and that Baldwin participated in the capital murder.

We agree that the court of appeals' analysis departed from the law in this instance because it didn't give enough deference to the magistrate's implied findings and applied an overly demanding standard for probable cause.

ii. The search warrant affidavit did not establish a nexus between criminal activity and the cell phone.

Under Texas law, to search a person's cell phone after a lawful arrest, a peace officer must submit an application for a warrant to a magistrate. The application must "state the facts and circumstances that provide the applicant with probable cause to believe that (A) criminal activity has been, is, or will be committed; and (B) searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A)." Tex. Code Crim. Proc. Ann. art. 18.0215(c)(5). While there is no statutory definition of "probable cause," under the Fourth Amendment, an affidavit is sufficient to establish probable cause if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. However, *Gates* noted that the conclusory allegations alone are insufficient to support a finding of probable cause and that "sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."
Gates then highlighted two cases that "illustrate the limits beyond which a magistrate may not venture in issuing a warrant." The *Gates* Court observed, "[a]n affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement." Once again in *Aguilar v. Texas,* the Supreme Court held that an officer's statement that "[a]ffiants have received reliable information from a credible person and do believe" that heroin is stored in a home is insufficient to establish probable cause. The *Gates* Court continued, "[a]s in Nathanson, this is a mere

conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause."

While these two examples did not use boilerplate language, it is clear that the jurisprudence of the Supreme Court has consistently cautioned against "bare bones" affidavits, instead requiring some sort of corroboration to the conclusory statement when a magistrate makes a probable-cause determination. Indeed, in Gates, the Supreme Court held that, under the totality of the circumstances, an anonymous tip was coupled with other facts and reasonable inferences, and therefore the magistrate had a "substantial basis" that a search would uncover evidence of a crime.

While we have not previously weighed in on the use of generic language in the affidavit for a warrant to search a mobile phone, we have previously held that affidavits which contain "mere conclusory allegations" are insufficient to establish probable cause. . Most notably, in State v. Duarte, we reiterated that warrants should not be issued on "bare conclusions alone."

As applied to cell phones and boilerplate language, the holding in Duarte has been interpreted by a few intermediate courts to stand for the proposition that the affidavit must contain particularized facts demonstrating a fair probability that evidence relating to the offense would be located in the mobile phone. In Diaz v. State, investigators recovered the back cover of a cell phone and a cell phone battery in a house following a burglary. Three cell phones found on Diaz were searched pursuant to a warrant. Diaz filed a motion to suppress, arguing that the probable-cause affidavit failed to establish a nexus between the cell phones and the burglary. His motion was denied. Because the probable-cause affidavit stated that police recovered cell phone parts from the crime scene, the Fourteenth Court of Appeals found that that the magistrate could have reasonably inferred the perpetrators possessed or used cell phones before or during the burglary and that the recovered cell phones could have evidence of the burglary. The court of appeals expressly stated that it wasn't relying on statements in the probable-cause affidavit that criminals generally use cell phones in crimes. The lower court's analysis merits quoting at length:

> Here, appellant argues that nothing, "other than the officer's generalized assumptions" that criminals utilize cellular telephones to communicate and share information regarding crimes they commit, connected the specified offense with the phones to be searched. We disagree because, excluding any reliance on Sergeant Angstadt's assertion that generally criminals use cellular telephones and other electronic devices to facilitate criminal activity, other facts in the affidavit establish a sufficient nexus between the cell phones and the alleged offense. The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense. For instance, the magistrate reasonably could infer that the intruders' scheme of pretending to be police officers necessitated planning, which could have been orchestrated by telephonic communication. The affidavit also stated that DNA testing could not exclude appellant as a source of DNA on the sunglasses left at the scene, thus directly tying appellant to the crime scene. From this, the magistrate reasonably could infer that appellant was the owner of both the sunglasses and the cell phone or phones from which pieces detached during the offense and were left at the scene. Further, the affidavit provided that appellant was associated with at least two phone

> numbers and that police recovered a total of five cell phones in appellant's immediate possession or control upon his arrest. The magistrate reasonably could infer that appellant utilized these phones interchangeably and that evidence of criminal activity on one phone could have been transferred to another.

Although only a handful of cases address this specific issue, the courts below seem comfortable with the use of boilerplate language in affidavits for warrants to search mobile phones, so long as the generic language is coupled with "other facts." Certainly, this holding seems consistent with article 18.0215(c)(5) of the Texas Code of Criminal Procedure, which requires an affidavit offered in support of a warrant to search the contents of a cell phone to "state the facts and circumstances that provide the applicant with probable cause to believe . . . searching the telephone or device is likely to produce evidence in the investigation of . . . criminal activity."

Which brings us to the issue we seek to resolve in this case: Is generic, boilerplate language about cell phone use among criminals sufficient to establish probable cause to search a cell phone? We hold it is not. Instead, specific facts connecting the items to be searched to the alleged offense are required for the magistrate to reasonably determine probable cause. To hold otherwise would condone the search of a phone merely because a person is suspected to have committed a crime with another person. Put another way, all parties suspected of participating in an offense would be subject to having their cell phones searched, not because they used their phones to commit the crime, but merely because they owned cell phones.

In the instant case, the parties and the justices of the court of appeals disagree as to whether there were sufficient "other facts" present. The majority found that the only "other fact" in this case is that two black men committed the offense together and that this was insufficient to connect the mobile phone to the offense. For the dissent, that fact was sufficient to establish that the men might have used their cell phones to coordinate. The majority thinks the dissent's conclusion goes too far. We agree with the majority. While we defer to all reasonable inferences that the magistrate could have made, there are simply no facts within the four corners of the affidavit that tie Appellee's cell phone to the offense. The affidavit before us indicates nothing more than that neighbors saw a certain white sedan with a black driver circling their neighborhood the day before the offense occurred, a similar sedan was seen quickly leaving the neighborhood after the offense, and that Appellee, a black man, was driving the very same vehicle four days after the offense, and that this coincidence somehow necessarily connects Appellee's phone to the offense. That witnesses affirm the description and license plate number of the white sedan, as well as its registration to Appellee's father, are facts that support the nexus of the vehicle to the offense, they have no bearing on whether Appellee's phone is connected with the offense. The affidavit contains nothing about the phone being used before or during the offense. Suspicion and conjecture do not constitute probable cause, and "the facts as recited in the affidavit in this cause evidence nothing more than mere suspicion. Therefore, the magistrate erred by substituting the evidentiary nexus for the officer's training and experience and generalized belief that suspects plan crimes using their phones. The boilerplate language in itself is not sufficient to provide probable cause in this case, nor does the remaining affidavit set forth details in sufficient facts to support probable cause. Considering the whole of the affidavit, here is no information included that suggest anything beyond mere speculation that Appellee's cell phone was used before, during, or after the crime. In the present case, there is no evidence that the suspects planned the offense over multiple days

other than the fact that Baldwin's white sedan was seen in the neighborhood the day before the offense. There is no evidence that these particular suspects communicated about the crime by cell phone, as there was in *Walker.* All that is present here is that two black men committed an offense together, which is clearly insufficient to establish a connection between cell phone usage and the offense.

Conclusion

The record, while viewed in the light most favorable to the magistrate's ruling, supports the trial court's conclusion that the affidavit contained insufficient particularized facts to allow the magistrate to determine probable cause for a warrant to search the phone. Insofar as the court of appeals affirmed the trial court's order granting the motion to suppress evidence obtained from the cell phone found in Baldwin's vehicle, we affirm.

***State v. Baldwin*, Tex. Crim. App., No. Pd-0027-21, May 11, 2022**

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6. REASONABLE SUSPICION

REASONABLE SUSPICION (Border exception), MIRANDA

Vernon Nelson pleaded guilty pursuant to a conditional plea agreement to conspiracy to possess with intent to distribute 50 kilograms or more of marijuana, reserving the right to appeal the denial of his suppression motion. He claims that evidence seized from his vehicle and statements he made should have been suppressed because Border Patrol agents stopped him without reasonable suspicion and subjected him to custodial interrogation without first giving him *Miranda* warnings. We affirm.

Around 9:55 P.M. on October 30, 2018, Vernon Nelson approached the U.S. Border Patrol Laredo North checkpoint in a tractor-trailer. The checkpoint is located north of Laredo near the 29-mile marker on Interstate Highway 35. Border Patrol Agent (BPA) Yajaira Flores asked Nelson whether he was a United States citizen and if he would consent to a scan of his tractor-trailer. Nelson answered both questions affirmatively. Nelson went to a second area, where he was met by BPA Marcus Stauffiger. Stauffiger has worked as a Border Patrol agent for over nine years, performing various duties at the Laredo North station. For two of those years, he was detailed to the Drug Enforcement Administration (DEA) where he received specialized training and investigated narcotics crimes.

Agent Stauffiger scanned Nelson's tractor-trailer using the "Vehicle and Cargo Inspection System" (VACIS), which he described in laymen's terms as "an x-ray machine" used on commercial vehicles. From his scan of Nelson's trailer, he observed only several bundle-shaped objects and the outline of a dolly. He initially suspected that these objects were equipment being stored by Nelson. But his assessment changed when he saw a seal on the back door of the trailer. From his experience, Agent Stauffiger knew that these seals are typically used to ensure that nothing goes missing from a cargo load during transport. If the trailer contained only equipment, there would be no need for a seal. Given these anomalies, Agent Stauffiger typically would have directed the

truck to the secondary inspection area. But ongoing construction at the checkpoint prevented him from doing so. Nelson left the checkpoint.

Now suspecting the scan revealed bundles of narcotics in Nelson's trailer, Agent Stauffiger showed the scan to BPA Abraham Cantu. The two agents decided to pursue the tractor-trailer to perform a roving-patrol stop. The agents left in separate marked vehicles and pulled Nelson over six miles north of the checkpoint.

Once stopped, Nelson presented Agent Cantu with a bill of lading, indicating that he was carrying a load of five pallets of Kellogg's cereal. Agent Stauffiger doubted this account, believing that his scan revealed only two pallets at most. He also noticed inconsistencies in the bill of lading, including a misspelling of Kellogg, two seal numbers instead of one, and a misspelling of seal as "SeAl."

After reviewing the bill of lading, Agent Stauffiger asked Nelson if he would step out of the truck. He was neither handcuffed nor formally placed under arrest. Agent Stauffiger told Nelson: "It looks like there's bundles inside the trailer." He asked Nelson for consent to search the trailer and told him that, if he refused, a service canine would be requested. Nelson refused, and Agent Stauffiger called for a service dog, which had to be brought from the checkpoint.2 Agent Stauffiger informed Nelson that if the service canine did not alert, Nelson would be free to go. While waiting approximately five to ten minutes for the service canine to arrive, Agent Stauffiger asked Nelson several questions. The district court summarized the two-minute conversation based on the video recording from Agent Stauffiger's body camera and the agent's recollections at the suppression hearing:

BPA Stauffiger:	"How long you've been driving?"
Defendant:	"Thirty-one years."
BPA Stauffiger:	"How about for this company?"

Defendant: "I just recently purchased this truck."
BPA Stauffiger: "Is it registered to you?"
Defendant: "Yeah."
BPA Stauffiger: "How about the trailer, same thing?"
Defendant: Nods heads in an apparent 'yes.'
BPA Stauffiger: "How long ago did you purchase the trailer?"
Defendant: "About a year."
BPA Stauffiger: "Where did you get it from?"
Defendant: "Atlanta."
BPA Stauffiger: "Is that where you're from originally?"
Defendant: "Nah, I'm from Houston."
BPA Stauffiger: "Just got a better deal in Atlanta?"
Defendant: "I saw it on Facebook. I jumped on it."
BPA Stauffiger: "Well, how much did you get it for?"
Defendant: Inaudible.
BPA Stauffiger: "Did he already get your I.D.?" (pointing at BPA Cantu)
Defendant: Shakes head in apparent 'no.'
BPA Stauffiger: "Is it in the truck? Or do you have it on you?"

Defendant: "It's on the dashboard."
BPA Stauffiger: "I notice a lot of the trailers get registered out of like Oklahoma, Kentucky? Why is that? Is it just cheaper?"
Defendant: "Yeah."

Within a few minutes, BPA Frederick Irizarry arrived with the service canine. It alerted on the trailer, at which point the BPAs searched it and found approximately 72 kilograms of marijuana, packed in tightly wrapped bundles, consistent with BPA Stauffiger's assessment of the VACIS images.

Nelson was charged with conspiracy to possess and possession with intent to distribute 50 kilograms or more of marijuana. He moved to suppress his statements to Agent Stauffiger, contending that Stauffiger interrogated him without first giving him *Miranda* warnings. At the suppression hearing, the Government called Agent Stauffiger as its only witness and submitted the video recording from the agent's body camera as an exhibit. After the suppression hearing, Nelson filed a supplemental motion, arguing for the first time that the stop violated his Fourth Amendment rights and therefore the evidence derived from the stop should be suppressed. The magistrate judge recommended denying Nelson's motion. Nelson filed objections to the magistrate judge's report, but the district court adopted the report in full and denied Nelson's motion to suppress. Nelson subsequently pleaded guilty to conspiracy to possess with intent to distribute 50 kilograms or more of marijuana. As part of his plea agreement, Nelson reserved the right to appeal the denial of his suppression motion and was sentenced to three years in prison with three years of supervised release.

On appeal, Nelson argues that the district court erred by denying his suppression motion for three reasons. First, Nelson argues that the BPAs lacked the reasonable suspicion required to conduct a roving-patrol stop, rendering all evidence obtained from the stop inadmissible. Second, Nelson argues that he was in custodial interrogation when questioned by Agent Stauffiger, making his statements inadmissible, because he was not given *Miranda* warnings. Finally, Nelson argues that Border Patrol agents lack authority to conduct investigative stops solely related to non-immigration offenses—an argument he concedes is foreclosed under this Court's precedent.

When considering the denial of a motion to suppress, this Court reviews factual findings for clear error and legal conclusions, including whether an officer had reasonable suspicion to support a stop and whether *Miranda*'s guarantees have been impermissibly denied, de novo. Evidence is viewed in the light most favorable to the party that prevailed in the district court—in this case, the Government. And where, as here, "a district court's denial of a suppression motion is based on live oral testimony, the clearly erroneous standard is particularly strong because the judge had the opportunity to observe the demeanor of the witnesses." A district court's ruling to deny a suppression motion should be upheld "if there is any reasonable view of the evidence to support it."

Nelson first argues that the district court erred in denying his motion to suppress evidence obtained from the stop of his vehicle, contending the stop was unconstitutional because the BPAs lacked reasonable suspicion to make it. A Border Patrol agent on roving patrol "is justified in stopping a vehicle if he reasonably suspects, based on specific articulable facts together with rational

inferences from the facts, that the vehicle might be engaged in illegal activity." In determining whether reasonable suspicion exists, we often consider the common sense factors set forth in *United States v. Brignoni-Ponce*: (1) proximity to the border; (2) characteristics of the area; (3) usual traffic patterns on a particular road; (4) agent's previous experience in detecting illegal activity; (5) behavior of the driver; (6) particular aspects or characteristics of the vehicle; (7) information about recent illegal trafficking in aliens or narcotics in the area; and (8) the number, appearance,
and behavior of the passengers. "[E]ach case must be examined based on the totality of the circumstances known to the agents at the time of the stop and their experience in evaluating such circumstances." The Government argues, and we agree, that the totality of the circumstances here support a finding that Agent Stauffiger had reasonable suspicion to justify stopping Nelson's vehicle. First, our Court has recognized that proximity to the border is "a paramount factor in determining reasonable suspicion." While there is no bright line test with regard to this factor, we have held that "[t]he proximity element is satisfied . . . if the defendant's car was first observed within 50 miles of the United States/Mexico border."15 It is undisputed that Nelson's vehicle was first spotted at the Laredo-North checkpoint less than 50 miles from the border, here 29 miles, a factor weighing in favor of the reasonableness of Stauffiger's suspicions. Furthermore, "an officer's experience is a contributing factor in determining whether reasonable suspicion exists." "[A]fter proximity to the border, [experience] is likely the most important factor because the facts are to be viewed through the eyes of an objective officer with Agent [Stauffiger's] experience." Agent Stauffiger received five months of training at the Border Patrol Academy, and he received nine months of postacademy training after that. As a Border Patrol Agent, he worked various
operations at Laredo North for nine years and worked at the DEA for two years investigating narcotics crimes. His training and experience at the border, as well as his specialized work investigating narcotics crimes support his suspicions here.
From this extensive experience, Agent Stauffiger noticed irregularities with Nelson's vehicle. He knew the seal on Nelson's trailer was likely incompatible with a scan that seemingly showed a small amount of personal equipment inside. He also knew the VACIS images of Nelson's trailer were consistent with images of bundles of narcotics, facts further supporting Stauffiger's suspicion that Nelson was engaged in illegal activity.
Nelson points out that his consent to the initial scan weighs against a finding of reasonable suspicion, and we agree; that the Government's failure to produce evidence related to other *Brignoni-Ponce* factors suggests that Stauffiger lacked reasonable suspicion to stop Nelson's vehicle. But we have repeatedly counselled that "not every factor must weigh in favor of reasonable suspicion for it to be present."

Here, just 29 miles from the border, a highly experienced Border Patrol agent noticed anomalies with Nelson's vehicle and saw what appeared to be bundles of narcotics inside. Accepting Nelson's compliant behavior, viewing the totality of the circumstances in the light most favorable to the Government, we are satisfied that Stauffiger's stop of Nelson's vehicle was supported by reasonable suspicion.

Next, Nelson challenges the district court's denial of his motion to suppress statements he made to Agent Stauffiger while waiting for the canine unit to arrive, arguing that he was in custody and therefore entitled to *Miranda* warnings prior to being questioned. Generally, a suspect's

incriminating statements during a custodial interrogation are inadmissible if he has not first received *Miranda* warnings. "A suspect is 'in custody' for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." "The requisite restraint on freedom is greater than that required in the Fourth Amendment seizure context." Whether a suspect is in custody is an objective determination, depending on the totality of the circumstances, that looks to the circumstances surrounding the interrogation and whether, given the circumstances, a reasonable person would have felt he was at liberty to terminate the interrogation and leave. "[T]his court has repeatedly considered certain key details when analyzing whether an individual was or was not in custody," including (1) the length of the questioning; (2) the location of the questioning; (3) the accusatory, or non-accusatory, nature of the questioning; (4) the amount of restraint on the individual's physical movement; and (5) statements made by officers regarding the individual's freedom to move or leave. These factors support the finding that Nelson was not in custody at the time Stauffiger questioned him. Nelson was only questioned for two minutes, on the side of the highway, visible to those driving past. Agent Stauffiger's questioning was never hostile or accusatory: his tone was cooperative and he never accused Nelson of lying or committing a crime. Finally, Nelson was not handcuffed or otherwise physically restrained—he answered Stauffiger's questions while leaning against the hood of the agent's vehicle.

While Nelson makes much of the fact that he was not free to leave while waiting for the canine unit, this Court has recognized that temporary detention, by itself, does not automatically rise to the level of custodial interrogation. A reasonable person in Nelson's position would have understood that "so long as . . . everything checked out," he would be able to leave shortly. Such limited restraint is not the type associated with formal arrest.

We conclude that Nelson was not subject to custodial interrogation and therefore was not entitled to *Miranda* warnings. The district court did not err in declining to suppress his statements.

Finally, Nelson argues that Border Patrol agents lack authority to conduct roving stops related to non-immigration offenses. But as Nelson concedes, this argument is foreclosed by this Court's precedent recognizing that Border Patrol agents possess authority under *Brignoni-Ponce* to "make roving stops on the basis of reasonable suspicion of *any* criminal activity."

We affirm the district court's denial of Nelson's motion to suppress.

U.S. v. Nelson, No. 19-41008, 5th Cir. Mar. 12, 2021.

REASONABLE SUSPICION – Suspect description.

During a roundup of gang members with outstanding warrants, Corpus Christi police were given information describing one suspect only as a "Hispanic male" who had "run from officers" on a "bicycle with large handlebars" in the "area of Leopard and Up River" at some unspecified time in the past. The officers had nothing else—not the suspect's photo, his age, his build, his clothing, or any other identifying features. Nor were they told when the suspect had last been seen in the area. Nor were they told anything about the bicycle other than it had "large handlebars."

Armed with this meager description, the police soon found a person who fit it: Andres Alvarez, who was riding a bicycle with large handlebars in the noted area. Alvarez at first ignored the officers, but he was soon stopped and a frisk revealed he had a revolver and ammo. The officers later determined Alvarez was not the Hispanic male on a bicycle they were looking for. The government then charged Alvarez with being a felon in possession, and Alvarez moved to suppress the evidence against him. The district court denied the motion, holding the officers had reasonable suspicion for the stop.

Reasonable suspicion to stop someone suspected of criminal activity is a low threshold, but not this low. Our cases require officers to have information more specific than "a Hispanic male who once rode away from police on a bicycle with large handlebars in a particular area," especially in Corpus Christi, Texas. That open-ended description would effectively authorize random police stops, something the Fourth Amendment abhors.

We reverse the denial of Alvarez's motion to suppress, vacate his conviction and sentence, and remand for further proceeding.

On July 15, 2019, federal and Texas law enforcement conducted a state-wide "roundup" of known gang members with outstanding warrants. Officer Martin Deleon, a thirty-two-year Corpus Christi Police Department veteran with twenty-eight years in the gang unit, led a team of about a dozen officers. Each team received a packet of fifteen to twenty subjects grouped geographically.

One subject in the Deleon team's packet was described as a "Hispanic male" in the "area of Leopard and Up River." The information stated the subject "may be in the area on a bicycle and that he had run from officers in the past [o]n that bicycle." It described the bicycle only as having "large handlebars." But the officers did not know anything about the bicycle's color or condition or whether it had other identifiers like pegs or distinctive tires. Nor did the officers know the subject's age, body type, or build; whether he had identifying marks or features; what he was last seen wearing; or when he was last seen in the area.

The officers searched for the subject in an apartment complex in the Leopard–Up River area but could not find him, so they left for another location. Officer Deleon and his partner drove in a marked patrol car down Old Robstown Road toward Up River Road, an area known for gang activity.

They saw a man who fit the subject's description riding a bicycle with large handlebars on the sidewalk approaching the intersection from the opposite side of Up River Road. The suspect turned left, and the officers turned right, so they were traveling parallel on Up River, with a lane of oncoming traffic between them. The officers pulled alongside the suspect, and Deleon honked the horn and shouted, "stop, pull over[!]" The suspect asked, "Why?" and

kept pedaling. After the suspect traveled about seventy-five yards, the officers pulled ahead of him and blocked the sidewalk. The suspect laid his bicycle down, and the officers grabbed him. They placed him against the car and frisked him, finding a revolver on his waistband and ammunition in his pocket. They cuffed him and put him in their car.

The officers could not immediately identify their detainee. Deleon did not recall the name of the wanted gang member described in the packet. The team apparently had been looking for Jose Morales, "the third or fourth guy on the list." The officers later learned that they had instead detained Alvarez, a convicted felon, who himself had an outstanding warrant.

A grand jury indicted Alvarez on one count of being a felon in possession of a firearm and ammunition. Alvarez moved to suppress the revolver and ammo, arguing the officers unlawfully stopped him. At an evidentiary hearing, Deleon testified for the government, and Alvarez introduced bodycam footage from an officer who arrived on scene after the seizure, as well as photographs and maps of the area.

The district court denied Alvarez's motion, holding the stop was supported by reasonable suspicion. It reasoned: "Alvarez matched the description of the subject who had an outstanding warrant. He was a Hispanic male, he rode a bicycle with particularly large handlebars, and he was spotted in the area where the subject was known to reside." *Ibid.* The court added that "collectively," these factors were "not so general as to negate reasonable suspicion."

Alvarez entered a conditional guilty plea pursuant to an agreement that reserved his right to appeal the suppression ruling. The district court sentenced him to time served. Alvarez timely appealed.

In reviewing the denial of a motion to suppress, we review factual findings for clear error and legal conclusions *de novo*. Whether officers had reasonable suspicion to support an investigative stop is a question of law. We view the evidence in the light most favorable to the prevailing party—here, the government. We will uphold the district court's ruling "if there is any reasonable view of the evidence to support it."

Alvarez challenges only whether the officers had reasonable suspicion for the stop; he does not challenge the frisk. He argues the description of the wanted gang member was too general and the detail about past flight from police on the bicycle was too "sparse" and potentially "stale." The government relies on the description of the subject and the bicycle, the location, and the officers' knowledge of gang activity in the area.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

The exclusionary rule, a judicially created deterrence measure, provides that evidence obtained by an unreasonable search or seizure generally may not be used as evidence of guilt at trial. Warrantless searches and seizures are *per se* unreasonable subject to certain narrow exceptions. The government bears the burden of showing an exception applies.

One exception permits officers to conduct brief investigatory stops based on reasonable suspicion that the person is engaged in criminal activity or wanted in connection with a completed felony. A seizure "must be justified at its inception.'" Reasonable suspicion therefore "must exist *before* the initiation of an investigatory detention."

Reasonable suspicion "is a low threshold, requiring" only a "minimal level of objective justification." But it "must be founded on specific and articulable facts rather than on a mere suspicion or 'hunch.'" Reasonable suspicion "takes into account the totality of the circumstances— the whole picture."

"Whether an officer has reasonable suspicion to stop is answered from the facts known to the officer at the time." Relevant facts and considerations may include a description of a suspect, a suspect's location and proximity to known or reported criminal activity, the timeliness of information or the stop, a suspect's behavior, and the officer's experience. Facts that appear innocent when viewed in isolation can constitute reasonable suspicion when viewed collectively.

A physical description of a suspect known to officers must be sufficiently specific and particularized to justify an investigatory stop. "*Terry* does not authorize broad dragnets . .. Without more, a description that applies to large numbers of people will not justify the seizure of a particular individual."

see also, Reid v. Georgia, 448 U.S. 438, 441 (1980) (rejecting justification that would "describe a very large category of presumably innocent" persons).

A general, imprecise physical description of a suspect, standing alone, is insufficient to support reasonable suspicion.

For example, in *United States v. Jones*, 619 F.2d 494, 496, 498 (5th Cir. 1980), an officer stopped a man matching "the general description that he had heard over the police radio the day before" of "a black male, 5 feet 6 inches to 5 feet 9 inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket." (The information reported by the police radio was in fact five weeks old. *See id.* at 496.) We found no reasonable suspicion because the officer "acted on the basis of an incomplete and stale description of a suspect that could, plainly, have fit many people." *Id.* at 498. Similarly, in *United States v. Rias*, 524 F.2d 118, 119 (5th Cir. 1975), an officer stopped two black males in a black Chevrolet, knowing that "two

black males in a black or blue Chevrolet were suspects in a series of Farm Store robberies" a few weeks prior. We held the facts "clearly did not rise to the required level, and in reality were so tenuous as to provide virtually no grounds whatsoever for suspicion," because "[t]he officer was unsure whether the automobile used in the robberies was black or blue; the only description of the robbers was that they were black males; . . . [and] it was not unusual for blacks to be seen in the area." *Id.* at 121.

A less specific description may support reasonable suspicion where there is temporal and geographic proximity to recent criminal activity. In *Vickers*, officers received a report of a recent burglary by a "black male last seen wearing red shirt, blue or black shorts." 540 F.3d at 361. We held the officers had reasonable suspicion to stop a man "wearing clothing that met the description" found "75 to 100 yards from the burglarized home." *Ibid.* Similarly, in *United States v. Hall*, 557 F.2d 1114, 1115–16 (5th Cir. 1977), a police dispatch reported an armed robbery by three men—two black and one either black with a light complexion or white—who fled in a red 1969 two-door Ford. An officer stopped "a red 1969 Ford driven by a light complexioned black male, proceeding away from the vicinity of a bank robbery within twenty minutes after the robbery." *Id.* at 1116–17. We upheld the stop, emphasizing that "[t]he most important factors" were "the timing of the initial stop and its location." *Id.* at 1117.

Accordingly, our case law distinguishes between stops related to completed crimes and stops related to ongoing crimes or crimes very recently committed.

The officers' stop of Alvarez was not supported by reasonable suspicion. This case involves an outstanding warrant—completed criminal activity—so the information the officers relied on must satisfy a higher level of specificity than if they were responding to a report of ongoing or very recent criminal activity. The government cannot clear this hurdle under our precedent. If a weeks-old description of two black males in a black or blue Chevrolet was insufficient to stop two black males in a black Chevrolet, *Rias*, 524 F.2d at 119–21, and a five-week-old description of a man's race, height, weight, hair style, and clothing was insufficient to stop someone matching it, *Jones*, 619 F.2d at 496, 498, then the description of a Hispanic male who had once ridden a bicycle with large handlebars in a general area at some unknown time in the past cannot justify the stop of Alvarez. To explain why this is so, we consider in detail each factor relied on by the government—the description of the subject and the bicycle, the location, and the officers' knowledge of local gang activity.

The subject's physical description was too general and vague. The officers did not have a photograph and did not otherwise "know what [the

suspect] looked like." Other than race and sex, they knew of no descriptors—age, height, weight, identifying marks, or clothing. "Hispanic" has negligible predictive value here given Corpus Christi is predominantly Hispanic or Latino. Put simply, the physical description "fit too many people[] to constitute particular, articulable facts on which to base reasonable suspicion." The same is true of the bicycle. Other than "large handlebars," the officers knew of no identifiers—color, make, model, condition, features, or style of handlebars. "Large handlebars" pales in comparison to vehicle descriptions that have created or contributed to reasonable suspicion.[9] Furthermore, when asked if certain types of large handlebars were "more prevalent in that area," Officer Deleon answered, "most bikes have regular handlebars. Those there . . . will stand out . . . because they're not normal." "But the success or failure of a suppression motion cannot hinge on an officer saying, in essence, 'I know it when I see it.'" Unable to point to specific identifiers, the government has not shown that Alvarez's handlebars were sufficiently distinctive to create reasonable suspicion.

The location fares no better. The officers knew only that the subject had previously been seen in the Leopard–Up River area and "may be" there. They had no information whatsoever about where in the area he had been seen[11] or when he had been seen there—whether "that day," "the day before," or "the week before." Nor did they have reason to believe he might still have been in the area—for example, if he resided there.

The government also relies on the area being known by the officers for gang activity. It is true that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation," and so "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." Still, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." Something more is needed— some observed fact beyond the person's mere presence that gives an officer "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." That is where the government stumbles. Beyond Alvarez's presence in a high-crime area, it points to no fact suggesting that Alvarez "ha[d] been, [wa]s, or [wa]s about to be engaged in criminal activity."

Finally, our dissenting colleague asserts that the stop was justified because Alvarez "fle[d]," "abscond[ed]," and "deliberately evaded" the officers. Not so. If any of that were true, this case would be governed by *Illinois v. Wardlow*,. There, Wardlow—while standing in an area known for drug dealing and "holding an opaque bag"— saw patrolling officers and "fled," running through a "gangway and an alley" before being stopped. This "[h]eadlong

flight" was, the Court explained, "the consummate act of evasion[,]" justifying the officers "in suspecting that Wardlow was involved in criminal activity."

Wardlow is nothing like this case. Alvarez was not "absconding" or "fleeing" from the police—he was already riding his bicycle when Officer Deleon spotted him, and he ignored the officers and kept riding when asked to stop. He had every right to do so. ("[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)). So, "this is not a case of headlong flight at the mere sight of a police officer." If there were any doubt, the government conceded at oral argument that this case is not *Wardlow*.

The government further defends the stop by arguing the description, location, and gang activity were "identified in the information obtained by the officers during the gang roundup investigation," citing the collective knowledge doctrine. We disagree.

"[R]easonable suspicion can vest through the collective knowledge of the officers involved in the search and seizure operation." This doctrine applies "so long as there is 'some degree of communication' between the acting officer and the officer who has knowledge of the necessary facts." Officers may conduct an investigatory stop in reliance on information issued through police channels, such as a wanted flyer or bulletin or a radio dispatch, if the information is based on "articulable facts supporting a reasonable suspicion that the wanted person has committed an offense." But if the information "has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment."

Officer Deleon's team could rely on the information in the round-up packet only "if the police who *issued* [the packet] possessed a reasonable suspicion justifying a stop." But Deleon did not know who provided the information in the packet, and he only vaguely described the investigation leading up to the round-up. And the government did not introduce into evidence the packet or any details about the origin or timeliness of the information therein to show that it was premised on articulable facts.

We do not blindly accept officers' reliance on information obtained through police channels; the government must substantiate the basis of the information. Because the government here has not established reasonable suspicion that could have been transferred between officers, the collective knowledge doctrine does not apply.

We REVERSE the denial of Alvarez's motion to suppress, VACATE his conviction and sentence, and REMAND for further proceedings consistent with this opinion.

***U.S. v. Alvarez,* No. 21-40091, 5th Cir., July 13, 2022.**

REASONABLE SUSPICION – detention and search.

Clarence Bass was approached by police officers after a tip was received that he was illegally selling CDs outside of a store in a high-crime area. After Bass voluntarily opened the trunk of his vehicle, police arrested Bass for unlawful labeling of CDs and searched him and his vehicle, and discovered a loaded pistol, magazine, cash, drugs, and drug paraphernalia. Because Bass had 13 prior felony convictions, he was subsequently charged federally with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) & 924(e). Following a bench trial, Bass was convicted and sentenced to 180 months imprisonment. Bass appeals the district court's denial of his motion to suppress, the imposition of an Armed Career Criminal Act ("ACCA") enhancement, and the firearm sentencing enhancement. We AFFIRM.

On May 25, 2016, an off-duty police officer observed Clarence Bass standing beside the open trunk of a parked vehicle in a convenience-store parking lot. The off-duty officer, Christopher Langlois, reported the activity to the police unit assigned to that high-crime area, explaining that Bass was standing next to a vehicle and appeared to be selling items from the truck. Based on this tip and a prior complaint that Officer Otoneal Boudet had received about Bass illegally selling CDs in front of local businesses from his purple Dodge Challenger with a red stripe, Officer Boudet was dispatched to respond to the suspicious activity in the area. While driving up to the scene, Officer Boudet activated his body camera to record the interaction. When Officer Boudet approached Bass, Bass closed his car truck and disclosed that he was selling CDs and had more CDs in the trunk. When Officer Boudet asked Bass whether there was anything illegal in the vehicle, Bass answered, "Just the CDs." Bass also asked Officer Boudet about the complaint made against him, and explained he had been charged with illegally selling CDs before. Based on the initial disclosure and suspecting that Bass was illegally selling CDs, Officer Boudet asked Bass for consent to search the vehicle. Another man who was observed talking with Bass, Mr. Floyd, was detained and told another officer at the scene, Officer Williams, that Bass gave him a CD without charge. This statement conflicted with what Bass had told Officer Boudet. In an appeal to Officer Boudet's leniency, Bass explained that he was currently on parole. Officer Boudet again asked to search the vehicle. Bass was hesitant and informed Officer Boudet that the vehicle was registered to his wife. When Bass pulled out a cell phone to allegedly call his wife to seek consent to search the vehicle, Officer Boudet told Bass not to make any calls out of concern for the officers' safety. Officer Boudet continued to question Bass and answered Bass's question as to why someone complained about his activity. After a back-and-forth dialogue that lasted several minutes, Bass offered to and then did open his trunk, where bootlegged CDs and DVDs were displayed.

When asked by Officer Boudet, Bass said he was not carrying any personal identification. Officer Boudet told Bass that he and Officer Williams saw illegally labeled CDs and DVDs in plain view in the trunk. At that point, Officer Boudet asked Bass to sit on the curb and told Bass that he was detained, and that they would search the vehicle. Bass was placed under arrest for unlawfully labeling CDs and DVDs. Officers searched the trunk of the vehicle where they found boxes and bags full of CDs and DVDs. Officer Boudet then started searching the inside of the vehicle around

the driver's seat and found a backpack in the back of the vehicle that contained several small baggies of cocaine that totaled 1.5 grams, 442.9 grams of marijuana also wrapped in small baggies, and 221.5 grams of synthetic cannabinoids.

Before putting him in the police car, Officer Williams patted Bass down and searched him. In his pockets, police found a loaded pistol, a loaded handgun magazine, $477 in cash, several small baggies of marijuana, and 5.6 grams of codeine. Bass was charged by the state of Texas with illegally labeling unauthorized records, possession of marijuana, possession of a controlled substance, possession with intent to deliver a controlled substance, and unlawful possession of a firearm by a felon. Bass had previously been convicted of possession of a controlled substance with intent to deliver, a felony under Arkansas law. Because Bass had 13 prior felony convictions, he was subsequently charged federally in the Northern District of Texas with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) & 924(e).

On July 2, 2017, Bass moved to suppress (1) all the items that were seized from him and his vehicle after he was detained by the two Dallas police officers on May 25, 2016, including the 9mm handgun found in his pocket, which forms the basis of Count One of the Indictment, and (2) all the statements he made during his encounter with the police on May 25, 2016, about previously selling CDs and being on parole, arguing the items were improperly obtained without reasonable suspicion for his detention, without probable cause, and without consent.

The district court held a hearing on November 29, 2017, and heard live testimony from Officers Boudet and Langlois. The Government also offered video from Officer Boudet's body camera. After the hearing, the district court denied the motion to suppress, explaining in a written order that police had reasonable suspicion to stop Bass, that he voluntarily opened the trunk of his car, that police had probable cause to arrest him and search him and his vehicle incident to that arrest, and that the statements he made to police were voluntarily made during the *Terry* stop and not the result of a custodial interrogation requiring a *Miranda* warning.

Bass waived his right to a jury and proceeded to an uncontested bench trial with counsel on December 18, 2017, to preserve his right to appeal the court's denial of his suppression motion. The Government offered a stipulation of evidence in which Bass stipulated to the admission of the testimony and exhibits from the suppression hearing, stipulated to the admission of the handgun that was found in his pocket, and to having previously been convicted of a crime punishable by imprisonment for a term exceeding one year. The Government admitted the gun and testimony from an ATF agent regarding its interstate nexus. The district court found Bass guilty of being a felon in possession of a firearm.

A probation officer prepared a presentence investigation report (PSR), which assigned a base offense level of 14. The initial PSR calculated his advisory guideline range at 188 to 235 based on a total offense level of 31 and a criminal history category of VI. The PSR then applied a four-level enhancement for possessing a firearm in connection with another felony offense under USSG §2K2.1(b)(6)(B), which increased the base offense level to 18. Finding that Bass had at least three

prior convictions for serious drug offenses, the PSR applied an enhancement under the ACCA to give Bass an offense level of 33.

With a two-level reduction for acceptance of responsibility and a criminal history category of VI, the amended final advisory guideline range was 188 to 235 months. At sentencing, the Government moved for an additional one-level reduction for acceptance of responsibility, which resulted in a final guideline range of 180 to 210 months. While Bass objected to the PSR's application of the firearm and ACCA enhancements, the court overruled those objections and sentenced Bass to the mandatory minimum sentence of 180 months. Bass now appeals the district court's denial of his motion to suppress, the imposition of the ACCA enhancement, and the firearm sentencing
enhancement.

Bass first argues the district court erred in denying the motion to suppress after finding the police had reasonable suspicion to detain Bass and probable cause to arrest him and search his vehicle. In evaluating a district court's denial of a defendant's motion to suppress, we review factual findings, including credibility determinations, for clear error, and we review legal conclusions de novo. "Factual findings are clearly erroneous only if a review of the record leaves
this Court with a 'definite and firm conviction that a mistake has been committed.'" "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." "Where a district court's denial of a suppression motion is based on live oral testimony, the clearly erroneous standard is particularly strong because the judge had the opportunity to observe the demeanor of the witnesses." Finally, we review the evidence in the light most favorable to the Government as the prevailing party. The district court's ruling should be upheld if there is any reasonable view of the evidence to support it.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. Const. amend. IV. That text says nothing about suppression. It is well-established that warrantless searches violate the Fourth Amendment unless they fall within a specific exception to the warrant requirement.

The Fourth Amendment contemplates searches and seizures based "upon probable cause." U.S. CONST. amend. IV. Probable cause requires "a fair probability" that a suspect has committed a crime. This court has recognized that, under *Terry*, officers may briefly detain an individual on the street for questioning, without probable cause, when they possess reasonable, articulable suspicion of criminal activity. Reasonable suspicion is considerably easier for the government to establish than probable cause.

Bass argues that he was detained without reasonable suspicion and that "[t]here are no specific articulable facts from Officer Langlois that support his alleged suspicion that something illegal was going on nor that something was being sold as he saw no transaction."

When analyzing the legality of an investigative stop, this court makesa two-part inquiry. First, we consider whether the officer's decision to make the stop was justified at its inception. Second,

we determine whether or not the officer's subsequent actions were reasonably related in scope to the circumstances that caused him to stop the vehicle in the first place.

Our assessment of reasonable suspicion is based on the totality of the circumstances. Reasonable suspicion can vest through the collective knowledge of the officers involved in the search-and-seizure operation. The collective knowledge theory for reasonable suspicion applies so long as there is "some degree of communication" between the acting officer and the officer who has knowledge of the necessary facts. The record supports that is what happened in this case.

The facts leading up to Bass's arrest are straightforward. An off-duty officer called in a tip about suspicious activity to the unit assigned to a high crime area known for drug dealing, and the officer explained that a man was standing next to his vehicle and appeared to be selling items from the trunk. Reasonable suspicion can be formed by a tip so long as the information is marked by "indicia of reliability." Further, tips specific to an area well-known for illegal activity can give law enforcement the reasonable suspicion they need to detain a defendant.

Officer Boudet approached Bass who, by Bass's own admission, was selling CDs in an area known to law enforcement as a high-crime zone. As noted above, when Officer Boudet asked Bass whether there was anything illegal in the vehicle, Bass answered, "Just the CDs." Bass was driving without a license and disclosed he was on parole. Officer Boudet had previously received another complaint from a business in the area that a man matching Bass's description was selling CDs and DVDs out of a vehicle that matched the specific description of Bass's car. Bass's behavior and response to Boudet's questions supported the officer's suspicion consistent with previous arrests he had made for illegal transactions. In determining whether reasonable suspicion exists, an officer's inferences based on knowledge gained through specialized training and experience routinely play a significant role in law enforcement investigations. *Kansas v. Glover*, 140 S. Ct. 1183, 1189-1190 (2020). The district court did not err finding reasonable suspicion justified the initial stop by Officer Boudet.

Prolonged Detention

Bass next argues that, even assuming there was a valid investigatory detention, it was unreasonably prolonged in violation of the Fourth Amendment. An investigatory detention should not last longer than necessary to either verify or dispel the officer's original suspicion "unless further reasonable suspicion, supported by articulable facts, emerges." There is no "constitutional stopwatch" on investigatory stops. Rather, the court assesses whether police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."

Officer Boudet questioned Bass about his activity for the first five minutes of their interaction. Within roughly the first minute of questioning, Bass told Officer Boudet that he had illegal CDs in his car. Bass acknowledged he was selling CDs and DVDs, that he didn't have any identification, he didn't own the vehicle he was driving, and he had previously been charged with illegally selling CDs. The combined totality of this information justified Officer Boudet's continued investigation and the questioning was not unreasonable. Officer Boudet did not unreasonably prolong Bass's investigatory stop.

Consent

Bass next argues that the district court erred by concluding that he freely and voluntarily consented to the search of his vehicle. A search conducted pursuant to consent is excepted from the Fourth Amendment's warrant and probable cause requirements. Whether consent was given voluntarily is a question of fact reviewed under a clearly erroneous standard. Bass argues he was coerced to open his trunk, and at most, he *only* consented to a search of his trunk. Once general consent is given, police may search all containers found within the vehicle unless the consent is expressly limited by the suspect. Absent any limitation placed by the

> [2] *Despite Bass's argument that he never consented to a search of the vehicle, consent is not dispositive. This court need not determine whether the search exceeded the scope of Bass's consent because police had probable cause to arrest Bass and search him and his vehicle incident to arrest. And even if probable cause for Bass's arrest did not exist, the search of his car was reasonable under the automobile exception to the Fourth Amendment's warrant requirement. A search incident to a lawful arrest is a well-recognized exception to the warrant requirement. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. The scope of a search incident to an arrest is broad enough to include the interior of a vehicle if the arrestee was a recent occupant of the vehicle and it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."*

suspect, consent to search a car will support an officer's search of unlocked containers within it. *(ed. Note: watch for this. When relying on consent, it's probably best to document [or video] the fact that no limitation of the consent occurred.)* The record does not support that Bass expressly limited his consent to the trunk.

Officer Boudet testified that, when Bass opened his trunk, a spindle of CDs labeled with permanent marker were in plain view. When paired with his knowledge about the prior complaints against Bass for illegally selling CDs and Bass's admission that he was previously convicted for similar conduct, Officer Boudet had probable cause to believe that Bass was committing a crime and make an arrest.

The Government must prove Bass voluntarily consented to the search by a preponderance of the evidence. We use a multi-factor test to determine whether consent was voluntary, in which we consider:
(1) the voluntariness of the defendant's custodial status;
(2) the presence of coercive police procedures;
(3) the extent and level of the defendant's cooperation with the police;
(4) the defendant's awareness of his right to refuse consent;
(5) the defendant's education and intelligence; and,
(6) the defendant's belief that no incriminating evidence will be found.

Several factors support a finding of voluntariness. Bass was calm and cooperative when speaking with Officer Boudet. The interaction was cordial, and the record does not indicate that Officer Boudet used verbal threats orintimidation to obtain Bass's consent to search the vehicle. The record demonstrates that Bass was aware he had the right to refuse consent. Because no single factor is dispositive and because several factors supported a finding of voluntariness, we conclude that, viewing these facts in the light most favorable to the Government and under the highly deferential standard which we are compelled to apply on review of a denial of a suppression motion after a hearing with live testimony, there is no clear error in the district court's finding that Bass voluntarily consented to the search of his car. Therefore, under the totality of the circumstances specific to this case, the consensual car search did not violate Bass's Fourth Amendment rights. Because there is no clear error, we affirm the district court's finding that Bass's consent was voluntary.

Miranda

At the suppression hearing, Bass clarified he was seeking to suppress statements he made early in his encounter with Officer Boudet about selling CDs and being on parole. *Miranda*'s procedural safeguards attach "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" To ascertain whether an individual was in custody, we examine all of the circumstances surrounding the interrogation, but ultimately ask "whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

The district court found that the statements made by Bass were made at a time when the encounter was still characterized as a *Terry* stop, and Bass volunteered this information when he was not in custody. Bass freely shared the information with Officer Boudet. It is clear from the record that Bass was not in custody within the meaning of *Miranda*. Because "[a]pproaching someone who is in a public place … and asking questions does not constitute a seizure," Bass was not seized under the Fourth Amendment, and thus not in custody under the Fifth Amendment, when he made these statements.

Reviewing the totality of the circumstances, we find the officers had probable cause to arrest Bass and search his vehicle subsequent to arrest. Although the totality of the circumstances suggest that Bass was not free to leave, his restraint had not yet reached the level necessary to necessitate *Miranda* warnings. We affirm the district court's denial of Bass's motion to suppress his voluntarily given statements made prior to being in custody.

(Discussion of whether the sentencing guidelines were properly applied is omitted. Ed.)

For the foregoing reasons, we AFFIRM the district court's denial of the motion to suppress and find the district court did not err in the application of the ACCA and firearm enhancements at sentencing.

U.S. v Bass, 5th Cir. No. 20-10588, May 11th, 2021.

REASONABLE SUSPICION - Terry Stop .

Otha Ray Flowers, convicted of a federal gun violation, appeals the denial of his motion to suppress evidence as a violation of his Fourth Amendment rights. The questions on appeal are whether Flowers and Jeremy Mayo were "seized" when five or six patrol cars parked behind and around Mayo's Cadillac with their patrol lights flashing, and if they were seized, whether Officer Stanton had reasonable suspicion to conduct a "Terry stop." Under the circumstances of this case and viewing the facts in the light most favorable to the Government, assuming arguendo that these individuals were seized, there was reasonable suspicion to do so. We AFFIRM.

On Saturday, February 18, 2017, around 8:30 p.m., Officer Eric Stanton of the Jackson Police Department was patrolling an area of Jackson, Mississippi. Officer Stanton was a member of the Direct Action Response Team (DART), a proactive unit tasked to "look[] for suspicious behavior, suspicious activities, traffic stops, [and] things of that nature . . . ." On that night, Officer Stanton's supervisor had directed the DART to an area of Jackson, around Capitol Street and Road of Remembrance, where "recent violent crime and burglaries" had occurred.

As Officer Stanton was turning from Capitol Street onto Road of Remembrance, he saw a silver Cadillac parked in the south end of a small parking lot connected to an open convenience store. It was dark outside, but Officer Stanton observed that the vehicle was occupied by two men, one in the driver's seat and one in the passenger's seat. Officer Stanton observed the vehicle "for approximately 10 to 15 seconds" and noticed the occupants "didn't appear to be exiting the vehicle, [and] didn't appear to be patronizing the establishment." Therefore, he decided to conduct what he characterized as a "field interview."

Officer Stanton testified that at this point, he and five to six other officers, all in separate patrol cars, converged upon the silver vehicle with their blue lights activated. The parking lot in front of the store was narrow, with very little space or room to maneuver. Officer Stanton later acknowledged that it would have been impossible for the silver vehicle to leave the parking lot because of the way the officers parked their cars around it.

Officer Stanton got out of his patrol car and approached the silver vehicle, as did other officers. He testified that the men in the vehicle were still free to leave at this point in the encounter, but he did not communicate that to them. Flowers, sitting in the driver's seat, did not attempt to flee. As Officer Stanton approached, Flowers lowered the driver's side window.
With the window down, Officer Stanton reported smelling "what appeared to be the strong odor of marijuana coming from the vehicle." Officer Stanton asked Flowers for identification and Flowers provided his Mississippi driver's license. According to Officer Stanton, the passenger in the vehicle— Jeremy Mayo—then threw an object into his mouth. In response, Officer Stanton ordered both men to exit the Cadillac.

When Flowers stepped out of the vehicle, Officer Stanton saw in plain view a silver, .32-caliber revolver on the driver's seat where Flowers had been sitting. A criminal history check revealed that Flowers had an outstanding arrest warrant, and Officer Stanton placed him under arrest. During a search incident to his arrest, Flowers stated that he had marijuana on him, and Officer

Stanton recovered a small, clear plastic bag of marijuana from his front left pocket. Officer Stanton identified this marijuana as the source of the odor he smelled upon approaching Flowers's driver-side window.

Flowers was charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before trial, Flowers moved to suppress evidence of the gun on the basis that the encounter with Flowers was a seizure that violated the Fourth Amendment. The district court explained orally on the record his reasons for rejecting the motion. The district court determined that there was "no evidence" that the "investigatory aspect of the initial approach of the officers ever evolved into a seizure." Flowers proceeded to trial, and a jury convicted him.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Evidence seized in violation of the amendment may be excluded from introduction at trial. A temporary, warrantless detention of an individual constitutes a seizure for Fourth Amendment purposes and may only be undertaken if the law enforcement officer has reasonable suspicion to believe that a crime has occurred or is in the offing. Importantly, however, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen…."

This court reviews the constitutionality of the *Terry* stop *de novo*. We review the findings of fact by the trial court for clear error, *id.*, and are bound by the court's credibility determinations. Moreover, we construe the evidence presented at the suppression hearing "in the light most favorable to the prevailing party"—here, the Government.

Because a seizure under the Fourth Amendment must be "justified at its inception," our first task is ordinarily to determine when the seizure occurred. Flowers contends that he was seized at the outset of the police encounter, when the patrol cars surrounded the vehicle in which he was sitting. The government contends that the police encounter with Flowers was consensual, and a seizure did not occur until after Officer Stanton smelled marijuana from Flowers's open window, giving rise to probable cause for arrest.

A seizure occurs when, under the totality of the circumstances, a law enforcement officer, by means of physical force or show of authority, terminates or restrains a person's freedom of movement. The test that applies in the absence of an unambiguous intent to restrain or upon a suspect's passive acquiescence is whether "in view of all of the circumstances…, a reasonable person would have believed that he was not free to leave." And the Court added to this test that when a person "'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.

The parties debate the existence of a "seizure" under the circumstances present here, and there appears to be no Fifth Circuit case where a law enforcement seizure occurred by the mere surrounding presence of police cars and Officer Stanton's non-threatening approach to Mayo's auto. We need not resolve that debate and will assume arguendo that the police cars' surrounding of the Cadillac, under the totality of circumstances, "seized" Flowers and Mayo. The district court

principally viewed this incident as analogous to a stop-and-frisk situation, for which the court found reasonable suspicion under *Terry*. This conclusion, based on credibility determinations to which we are bound to defer, was sufficient to vindicate the officers' actions.

The following facts are determinative. The police were patrolling on Capitol and Remembrance, the exact streets where this arrest occurred, because of the prevalence of "violent crime and burglaries." The Supreme Court has noted, "the fact that [a] stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." In addition, Officer Stanton was no novice. He possessed an undergraduate degree in justice administration and a masters degree in criminology and had ten years of law enforcement experience. In determining reasonable suspicion, courts must consider the facts in light of the officer's experience.

The officer saw a car parked in the convenience store lot as far as possible from the storefront, facing its brick wall rather than the glass door, so its occupants could not easily be viewed from within the store. Two males were in the car, and Officer Stanton observed that neither of them stepped out of the Cadillac heading toward the store for 10–15 seconds. The district court found the officer's testimony credible. Every case that turns on reasonable suspicion is intensely fact specific. The reasonable, articulable facts taken in context here supported an investigation at least to the point of the officer's dispelling the ambiguity in the situation.

In 1992, this court decided *en banc* that a police officer did *not* violate the Fourth Amendment when he "reached out and touched the pants pocket" of an individual who, appearing to be intoxicated, was standing in the road, at night, in a high crime area. As happened here, the individual was later convicted of illegally possessing a gun discovered during the frisk. We reiterated *en banc* the reasonableness of an officer's conduct during a stop-and-frisk two years later in *United States v. Michelletti*, (officer lightly frisked pants pocket in which a man held his right hand while barging out of the back door of a bar at closing time, holding an open beer in his left hand, as he approached a group of police and individuals they were about to question). *Michelletti* noted that in the seminal *Terry* case, when detained by the police, the suspects had actually turned and began walking away from the store they had possibly been casing for later burglary. Moreover, in support of its conclusion, the Supreme Court relied heavily on the police officer's seasoned judgment of what the occasion demanded. Here, of course, we are not confronted with the additional physical invasion of a frisk, only the officer's attempt to question Flowers and Mayo, which was cut short by the marijuana odor wafting from their car. Time has not overborne these considered holdings in our circuit.

[*discussion of opposition argument omitted. Ed.*]

In this case, in a notoriously crime-ridden neighborhood, at night, two men were seen to be dawdling in a Cadillac parked out of view from inside the convenience store but also stationed where they could watch its entrance. Convenience stores are a type of establishment known to be frequent targets for theft, robbery, and burglary. Taken together, these facts present a similarly suspicious scenario to that which alerted the officer in *Terry*, and it captured the attention of the officer here. Finally, the non-threatening nature of Officer Stanton's approach to the car's occupants is supported here by the lack of hostility on the part of Flowers and Mayo, and indeed a reaction that indicated Flowers was attempting to cooperate with the "field interview."

It bears repeating that apart from the presence of a number of police cars, the tenor of Officer Stanton's encounter with Flowers was entirely benign until Stanton smelled marijuana. He conducted no physical frisk of Flowers's person but simply approached the Cadillac to ask some questions.

If this course of conduct is constitutionally impermissible, then it is difficult to see how any active policing can take place in communities endangered and impoverished by high crime rates. Officers in such areas may well require safety in numbers, while the law-abiding citizens desperately need protection that will be denied if law enforcement officials believe that incriminating evidence will be suppressed or they will be sued for alleged violations of rights. *Terry* prescribes a careful balance that protects individual rights, but not at the expense of reasonable law enforcement activity and officer safety.

More recently commenting on these types of cases, the Supreme Court noted in *Illinois v. Wardlow*, "[e]ven in *Terry,* the conduct justifying the stop was ambiguous and susceptible of an innocent explanation." The Court rejected the proposition that because the suspect's flight from officers might have been innocent and "not necessarily indicative of ongoing criminal activity," the detention was constitutionally unreasonable. The Court reaffirmed that "officers c[an] detain [] individuals to resolve the ambiguity" in their conduct. Indeed, the Court emphasized that, in allowing such detentions, the Fourth Amendment "accepts the risk that officers may stop innocent people."

In the case before us, there is no indication that the officers were either abusive or threatening. Once Flowers opened his window, Officer Stanton smelled a distinct odor of marijuana, and immediately afterward he saw Mayo apparently attempting to swallow something that could be evidence. At that point, it is undisputed that he had probable cause to seize Flowers by asking him to step out of the car, leading to the immediate discovery of his pistol.

* * *

Based on the foregoing discussion, we AFFIRM the conviction.

***U.S. v. Flowers*, No. 20-60056, 5th Cir. July 30th, 2021.**

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7. MIRANDA

Confessions

Appellant was charged with the capital murder of Javier Vega, Jr. ("Harvey"), by intentionally causing his death in the course of committing or attempting to commit the offense of robbery. A jury found Appellant guilty of capital murder and answered the special issues in such a manner that appellant was sentenced to death. Appeal to this court is automatic. Appellant raises twenty-seven points of error. Finding no reversible error, we affirm the trial court's judgment and sentence.

On Sunday, August 3, 2014, Harvey Vega, a border patrol agent, and his family and one of his son's friends went to Harvey's parents' house for a barbeque. Afterwards, Harvey and some of the others left to go target shooting. Later, they all decided to meet up again to go fishing. Harvey's parents drove their own truck. Harvey's father, Javier, always carried his gun for protection when he went somewhere, so along with their fishing gear, he brought his .40 caliber Sig Sauer, a .22 pistol, and a .22 rifle.

As the two vehicles traveled to the fishing spot, they passed a red SUV parked on the side of the road with two men inside. Harvey's mother noticed that the SUV was parked on an upslope. That was unusual to her because, "No one ever parks on the upslope." Harvey's father got a good look at the two men, and his mother made eye contact with them. Both parents waved at the two men as they passed. The SUV started following them. After the Vega family arrived at and set up the fishing site, the SUV drove to within 30 yards but then reversed and drove away. Ten or fifteen minutes later, the SUV returned. Two men jumped out and began firing their guns at the Vega family. The driver shot Harvey point blank and the passenger shot at the parents. According to the parents, the driver shouted "Al suelo, cabron," meaning "Down to the ground, motherfucker." After Appellant shot Harvey, the passenger shot Javier. Javier fell to the ground, went for his gun, and shot at the passenger. When that happened, the two men got back into the SUV and drove away, with the passenger hanging on to the door. Harvey's parents identified Appellant as the driver and testified that Appellant shot Harvey. The friend, Aric Garcia, testified that the driver shot Harvey. Harvey's wife testified that Appellant was one of the men in the SUV. Harvey died, never regaining consciousness.

Around 2:00 the next morning, the SUV broke down and Appellant and his passenger were forced to walk. They went to a house and asked for help. The woman who lived there let them in, but she alerted border patrol agents after seeing a helicopter search light. Appellant and his passenger were arrested. Swabs from testing Appellant's hands tested positive for gunshot residue. A .45 caliber Taurus pistol was later found near the scene of Appellant's arrest. Four .45 caliber cartridge casings found at the crime scene and the bullet that killed Harvey were consistent with having been fired from the Taurus. Bloodstains on the driver's side seatbelt and the passenger seat backrest of the red SUV matched Appellant's DNA.6 At the punishment stage of trial, the State introduced evidence that Appellant participated in three other robberies against people fishing in the area. During these robberies, the victims were ordered at gunpoint to get on the ground. One victim was struck twice in the head with the butt of a gun. Appellant also had convictions for misdemeanor assault, unlawful carrying of a weapon, and driving while intoxicated, as well as two convictions for possession of marijuana. And Appellant had a federal conviction for illegal reentry after deportation.

Appellant presented the following mitigating evidence at punishment: The woman who lived in the house where Appellant was arrested testified that Appellant did not mistreat, harm, or act disrespectfully to her or her four children while he was there and that she did not feel threatened by him. The evidence also showed that Appellant surrendered peacefully to border patrol agents when they found him. And a director from the Texas Department of Criminal Justice testified that she saw nothing in Appellant's records that indicated he was part of a security threat group, though she testified on cross-examination that he had previously been placed in administrative segregation.

II. GUILT
A. Venue
…
B. Jury Selection
…
D. Recorded Statements

In points of error three through seven, Appellant contends that the trial court erred in failing to suppress his recorded custodial statements to the Texas Rangers. He claims that parts of the statements were inadmissible because they were obtained in violation of *Miranda v. Arizona* and Article 38.22 after he invoked his right to silence. He also claims that the statements were coerced or involuntary in violation of constitutional and statutory protections and that constitutional and statutory requirements were violated because he did not knowingly, intelligently, and voluntarily waive his rights prior to the statements. In point of error eight, Appellant contends that the trial court should have instructed the jury on voluntariness under Section 7 of Article 38.22.

1. General Law on Confessions, Standard of Review, and Standard of Harm

Ordinarily, for an electronically recorded statement made by a defendant in custody to be admissible under Article 38.22, the officers taking the statement must, prior to the statement and on the recording, convey certain warnings outlined in the statute or their fully effective equivalent.53
And the statute requires that the suspect knowingly, intelligently, and voluntarily waive the rights set out in the warnings.54 The statute outlines the following warnings to be conveyed to the suspect:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
(2) any statement he makes may be used as evidence against him in court;
(3) he has the right to have a lawyer present to advise him prior to and during any questioning;
(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
(5) he has the right to terminate the interview at any time.

53 *See* Art. 38.22, § 3(a)(2), (e)(2). *But see id.* § 3(c).
54 *Id.* § 3(a)(2).

Miranda has a warnings and waiver requirement that is consistent with the Article 38.22 requirements. Giving the Article 38.22 warnings and waiving rights in accord with the statute is sufficient to comply with the *Miranda* requirements regarding the giving of warnings and the initial waiver of rights. Other confession issues, such as whether *Miranda* rights are scrupulously honored and whether a confession is voluntary under due process or other aspects of state law, will be addressed later in this opinion when those issues are discussed.

Constitutional and statutory confession claims are evaluated under the bifurcated standard set out in *Guzman v. State*,58 with questions of historical fact and questions that turn on credibility and demeanor being reviewed with deference to the trial court's ruling and application-of-law-to-fact questions that do not turn on credibility and demeanor being reviewed *de novo*.

58 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

If a statement has been found to be admitted in violation of *Miranda* or due process, we apply the constitutional-error harm analysis, which requires the error to be found harmful unless the appellate court "determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." If a statement has been found to be admitted only in violation of a statute, then the harm analysis for non-constitutional errors applies, requiring the error to be found harmless if it did not affect the defendant's substantial rights. A substantial right is affected only if the error had "a substantial and injurious effect or influence" on the jury's verdict. Stated another way, a substantial right is not affected if the appellate court has "fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect." A different harm analysis applies to jury-charge errors, which we shall address in our discussion of Appellant's jury-charge claim.

2. The Interviews

Appellant was arrested at about 2:00 a.m. While still at the scene, Appellant's hands were tested for gunshot residue. Before taking custody of Appellant for purposes of transporting him to jail and before frisking him, State Trooper Jason Vela asked him if he had any weapons or guns or anything that could poke the officer. Appellant responded that he had "thrown the gun away already." He was then taken to the Willacy County Jail. At about 5:40 a.m., a DNA sample was obtained from Appellant.

Two Texas Rangers—Donato Vela and Patrick O'Connor—sat in an interview room with Appellant. Ranger Vela interviewed Appellant in Spanish. A transcript with an English translation was before the trial court as an exhibit at the suppression hearing, and a redacted version of the transcript was admitted at trial. The first interview began on August 4, 2014, at 6:37 a.m. The second interview occurred about two hours after the first interview ended.

a. First Interview

After asking and receiving from Appellant his name and date of birth, Ranger Vela read Article 38.22 warnings. When asked if he understood the rights that were read, Appellant nodded in agreement. Ranger Vela then read from a document with a signature line that

> said that Appellant knowingly, intelligently, and voluntarily waived his rights. Ranger Vela asked Appellant again if he understood his rights, and Appellant responded, "Yes, yes. That what I speak here, can be used against me?" Ranger Vela explained that these were official documents and that he needed "to know if you understood your rights, to begin with, and if you voluntarily want to speak with us." After a moment, Appellant responded, "Let's talk," and nodded affirmatively. Ranger Vela then directed Appellant to the signature line of the waiver document, and Appellant signed it. Ranger Vela asked, "Are you sure you don't want water or anything?" and the interview began.

Appellant admitted to driving the red SUV. He claimed that he and the passenger were going to fish when he was shot at. He characterized the shots as being like marbles on the front glass window and said that he was hit in the eye and saw only black. He said they drove away after that to get away from being shot at. He said that they wandered aimlessly for awhile, not knowing the area, and then arrived at a woman's house and asked for water. Appellant said that they were arrested, that the officers hit him on the head and back with a gun and kicked him, and that Appellant was ultimately brought to where the Rangers were interviewing him.

At this point in the interview, Appellant stated, "I want to go to sleep already." Ranger Vela responded that they needed to talk further, and the interview continued. Ranger Vela began going back through Appellant's story and confirming what he had previously said. He also confirmed that Appellant had an injury to his head and eye that appeared to be from a bullet graze. Appellant also mentioned his eye and said that the bullets "were coming in through the front window glass." Then Ranger Vela asked, "What else do you remember?" Appellant said he did not remember anything else and that "I am going to try to remember so that I can tell you everything."

Regarding Appellant's story, Ranger Vela then stated, "But we know that, that is not how things happened." Ranger Vela then launched into a long statement saying that some of what Appellant said was true but that he was not being honest about all of it, that they had already talked to others, including Appellant's passenger, and that the Rangers already knew how things had happened. Appellant asked, "Then how did it happen?" Ranger Vela responded that something else happened and that Appellant and his friend "didn't just arrive there and people began to shoot you (both) just because."

Ranger Vela asked Appellant if he needed water. Appellant responded, "I want to remember everything." Ranger Vela asked if Appellant wanted to be given time, and Appellant said that he did. Ranger Vela asked, "Why?" Appellant responded, "I can't," and that his head did not feel well. Ranger Vela continued to press Appellant for what really happened, and Appellant made various responses, including, "I don't remember," "I was drugged up, I think," and "Something is happening to me." At some point, Ranger Vela said, "We know for a fact that you were in the truck. We know for a fact that you (both) were involved in this shooting. Okay? We know for a fact that you shot somebody and we know the motive. Again, I am not saying that it was you, that, that was your intention. But, if things turned out bad, we need to know that. We need to know what exactly happened."

Shortly after that, Ranger Vela told Appellant that he was facing a capital felony charge, and the following colloquy occurred:

RANGER VELA: Do you know who the person whom you (both) shot is?
APPELLANT: No.
RANGER VELA: The person whom you and Ismael tried to rob?
APPELLANT: I don't know.
RANGER VELA: Do you know what the punishment for a capital felony is?
APPELLANT: I will be killed.
RANGER VELA: .—and jail for life. It doesn't matter that you are Mexican. It doesn't matter that you are an illegal (alien) here. The punishment is going to—the punishment is going to take place here (overlap)—in the United States. APPELLANT: It has to be punished. But then Appellant reiterated his original story: "That we arrived and they started shooting." Ranger Vela urged Appellant to tell the truth. At one point he said, "[W]e are going to reach a point in court when we are going to talk to them before trial and they are going to say: 'When you spoke to Gustavo and with other guys—the other guy, Ismael; were they honest with you; did they tell you?' Our answer will be: 'Yes or no.' I am not saying that this is going to affect you or not; it may or may not affect you in court." In response to this and further admonitions to tell the truth, Appellant said that he "took a pill" and he did not remember.

Ranger Vela asked about "the pistol" and whether he was carrying it on his waist. Appellant replied, "No, I didn't have it with me." When asked if the passenger had it, Appellant responded, "I think so, yes. I am not sure; I don't want to lie to you. Isn't it in the truck?" After further questioning, Ranger Vela said, "Going back to the pistol. You stated that you remember that Ismael had it. When you got off the truck, at the time the truck stalled—And I thank you, Gustavo, that you are remembering, I thank you for that." Appellant responded, "Yes, but I don't want to continue talking (unintelligible) anymore right now, please." Ranger Vela then responded, "Let me ask you a question; only answer me this: Do you think that you all threw it in the brush?" Appellant replied, "I don't know. I would imagine that maybe it is in the brush. I don't know." Ranger Vela then asked if Appellant was positively sure he did not have it, and Appellant responded that he did not know but then admitted that he had the pistol for a while. When asked if he remembered having the pistol in his vehicle, Appellant responded, "Yes, I—like I told you; I don't want to continue talking right now." Ranger Vela then asked, "Why?" and Appellant responded that he did not know and could not remember. After that Ranger Vela suggested taking a break, and Appellant responded that he wanted to sleep. The rangers terminated the interview.

b. Second Interview

At the beginning of the second interview, Ranger Vela asked Appellant if he understood his rights, and Appellant said, "Yes." Ranger Vela asked if Appellant wanted the rights read to him again, and he responded, "No. I already understood them." But Ranger O'Connor interjected, "Read them one more time," and Ranger Vela read the Article 38.22 warnings. He also read a statement that Appellant had waived the rights "in this document" of his "full knowledge, intelligence, and free will," and Appellant acknowledged his signature to a waiver-of-rights form. When asked what he remembered, Appellant responded, "I did fire" but that "they fired first." When asked to clarify "they," Appellant responded, "There were two there. They fired and I fired back; and, well, I am guilty." When asked what he and his passenger were in agreement to do, Appellant responded, "To go there with them. Not to kill anybody or anything." When asked if Appellant and his passenger went only to rob a person, Appellant responded, "Because they

threatened me." When asked who threatened him, Appellant said that they were people in Weslaco to whom he owed money who told him that, if he did not give them the truck, they would kill his parents. He also suggested that his wife was afraid and that the people threatening him threatened to kill his family in Mexico. After being questioned a while about this particular story, Appellant said, "It was a mistake, I have to pay the price." While Ranger Vela continued pressing for Appellant to tell the truth, Appellant said, "I don't want to talk about this anymore, sir," and, "I want to talk to my family." Ranger Vela responded, "Okay. Tell me only one thing. What happened to the gun?" Appellant replied, "It got lost in the parcel (track of land). I don't know where we dropped it; we dropped it." In response to subsequent questions, Appellant said that the gun was "dropped in the brush," and when asked what caliber the gun was, Appellant said it was a ".45."
A suppression hearing was held before trial and another one was held during trial. Appellant testified that he was initially detained in a small office by a police sergeant and kept on the floor and that he was not given food or water. He said that he told the sergeant that he did not want to talk to anyone but that the sergeant said, "Talk to me. I will help you." Appellant testified that he was later moved to another room and told by officers that they had received calls from individuals threatening to kill Appellant. He affirmed that he had not slept for 24 hours at the time of the interviews.

Appellant also testified that while he was handcuffed, an officer punched him in the stomach so hard that he vomited. Appellant acknowledged that he was given Article 38.22 warnings, but he claimed that he did not understand that he had a right to remain silent and a right to an attorney at the time of questioning. Appellant claimed that his tiredness affected his rational thinking. Appellant also said that he was not informed of his right to contact the Mexican consulate. When asked about Ranger Vela's statement in the first interview that certain information may or may not affect Appellant in court, Ranger O'Connor replied that such a statement did not comport with the *Miranda* warnings. Both rangers testified that Appellant was taken back to his cell and slept between the interviews. Appellant, however, testified that he was taken to another room to speak with officers and did not sleep. When asked why Appellant was not taken for treatment for his injuries, Ranger O'Connor testified that he thought that Appellant's injury did not seem serious.
…

Appellant contends that parts of his recorded statements were inadmissible because they were made after he invoked his right to remain silent and to terminate the interview and that their admission violated *Miranda*.

Under *Miranda*, law enforcement officers are required to respect a defendant's invocation of his right to remain silent by cutting off questioning. A suspect's right to cut off questioning must be "scrupulously honored." But a suspect's invocation of this right must be unambiguous, and there is no requirement that law enforcement clarify ambiguous remarks. A statement that a person "needs to rest" is not an unambiguous invocation of the right to cut off questioning.

Once a person has unambiguously invoked his right to cut off questioning, a resumption of questioning is permissible only if it is consistent with scrupulously honoring the defendant's invocation. That inquiry depends on the balancing of five factors: (1) whether the suspect was informed of his right to remain silent prior to the initial questioning; (2) whether the suspect was informed of his right to remain silent prior to the subsequent questioning; (3) the length of time

between initial questioning and subsequent questioning; (4) whether the subsequent questioning focused on a different crime; and (5) whether police honored the suspect's initial invocation of the right to remain silent.

We have held that resumption of questioning after two hours was permissible when the defendant requested "a little more time" before talking and was given a new set of *Miranda* warnings before the second interrogation.

Appellant's statement in the first interview that he wanted to sleep was not an unambiguous invocation of his right to cut off questioning. We will assume that his later statement, "I don't want to continue talking anymore right now," was an unambiguous invocation and that the subsequent statement, "Like I told you; I don't want to continue talking right now" was a reiteration of that invocation. This would make some parts of the first interview inadmissible: his admission that he possessed the pistol for a while, that he imagined the pistol was in the brush, and that he remembered the pistol being in the SUV. We will also assume that his later statement in the second interview, "I don't want to talk about this anymore, sir," was an unambiguous invocation of his right to cut off questioning. That would render inadmissible the later statements about what happened to the gun and the caliber of the gun.

But this did not render all of the statements in the second interview inadmissible. Appellant was informed of his rights before both the first and second interviews. Although the passage of two hours might not seem to be a long time, Appellant's statements in the first interview that he did not want to continue talking "right now" and that he wanted sleep suggested that a brief pause to get some sleep was what he wanted. Although Ranger Vela did not immediately honor this request, Appellant was given a two-hour break during which he could sleep. Appellant testified that he was not permitted to sleep, but the trial court was free to believe the rangers' testimony to the contrary and in fact found that Appellant was given the opportunity to sleep for two hours. And the warnings were read again before the second interview even though Appellant indicated that they were not necessary. And Appellant gave new information in the second interview, not traceable to his earlier admissions, when he talked about firing a gun, being "guilty," and trying to rob the Vega family because he had been threatened.

The question then is whether the errors in admitting the latter portion of the first interview and the latter portion of the second interview were harmless. Before Appellant invoked his right to cut off questioning the first time, he had already admitted to the following incriminating facts: (1) he was the driver of the red SUV, (2) he encountered the Vega family, (3) shots were fired (by the Vega family), (4) Appellant had thrown away a gun or that a gun had been possessed by the passenger, and (5) there was a crime that "ha[d] to be punished." Appellant also said that he had taken drugs and did not remember things. Facts (1) through (3) established unequivocally that Appellant was present during the crime and was the driver. This eliminated any possible defense based on mistaken identity. And if the jury believed the eyewitness testimony that the driver shot Harvey, it meant that Appellant was the one who killed Harvey. Facts (4) and (5) further tended to incriminate Appellant by suggesting that he did more than just run away from being shot. At worst, the allegedly inadmissible admissions made in the latter part of the first interview and the latter part of the second interview were minor points: admitting to personally possessing a firearm, knowing the firearm's location, and knowing that the firearm was a .45. This is especially

true when one considers that Appellant tested positive for gunshot residue. And he had already at least impliedly admitted to possessing a gun and knowing its location when he told a state trooper that he had already thrown the gun away. And then there were the more incriminating facts admitted in the early part of the second interview: that Appellant fired the gun, was "guilty," and tried to rob the Vega family because he was threatened. This further attenuates any significance attaching to the allegedly inadmissible statements. We conclude beyond a reasonable doubt that any error in admitting the latter portion of the first interview and the latter portion of the second interview did not contribute to the jury's determination of his guilt or punishment and, therefore, was harmless.

But what if the incriminating facts in the earlier part of the second interview were added to Appellant's side of the ledger instead of to the State's? That is, what if we were to hold that the entire second interview was inadmissible due to Ranger Vega's delay in honoring Appellant's request to pause the first interview? The errors would still be harmless beyond a reasonable doubt. Although the facts elicited in the second interview were far more incriminating than the facts elicited in the latter part of the first interview, the facts elicited in the earlier part of the first interview were of primary importance. The jury had undisputed evidence that Harvey was shot and killed, and it had the testimony of three eyewitnesses that the driver of the red SUV was the shooter. Plus, it had the evidence of gunshot residue on Appellant's hands. With the second interview, Appellant at least had his self-serving claim that he did not shoot first but shot back. Without that interview in evidence, Appellant's position would appear to have been that only the Vega family did the shooting. That was a totally implausible position, given the undisputed fact of Harvey's death, the injury suffered by Harvey's father, and the gunshot residue on Appellant's hands. And while Appellant admitted to being "guilty" in the second interview, he was claiming what might have amounted to self-defense.85 Regardless, Appellant admitted during the first interview that there was a crime that ha[d] to be punished," also an arguable admission of guilt. Appellant argues that the second interview was crucial because it supplied the only evidence that the shooting occurred during a robbery or attempted robbery. We disagree. Although it would seem helpful to the State to have evidence that accosting the Vega family was part of a robbery or attempted robbery, what else could it have been? We have said that it is an "unlikely supposition" that there exists "a motive-less killer." Appellant's statements in the earlier part of the first interview did not supply any possible motive other than greed. Appellant did not know the victim or any of the other people with him. It is apparent from the interview that he did not even know that Harvey was a border patrol agent. The red SUV initially following the Vega family vehicles, backing away, and then returning later is consistent with casing the Vega family and the fishing site for a robbery. Commanding the Vega family to get on the ground is consistent with attempting to facilitate the theft of property (and thus a robbery). Appellant was not able to do more to effectuate a robbery because the intended victims did something he did not expect—they shot back. We do not harbor any reasonable doubt about what the jury would conclude this was—an attempt to rob the Vega family that was thwarted by the Vega family fighting back.

Appellant contends that his recorded statements were inadmissible in their entirety because they were coerced, in violation of due process. He contends that his statement bears the hallmarks of coercion because he was physically attacked by border patrol officers, did not receive medical care, was told that people had threatened to kill him, was in fear of his life, had not been given food, and had not been allowed to sleep. He also complains that he was not informed of his right

to contact the Mexican consulate in violation of Article 36 of the Vienna Convention on Consular Relations. And he claims that the Rangers' failure to honor his right to cut off questioning created a coercive environment.

A confession is coerced in violation of due process if the suspect's "will has been overborne and his capacity for self-determination critically impaired." Factors taken into account in addressing this question are "the youth of the accused, his lack of education or his low intelligence, the lack of any advice about constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep."89 But even with these factors, an essential element of any due-process involuntariness claim is law-enforcement overreaching. A suspect's lack of sleep, alone, does not make a statement coercive in violation of due process.

Most of the factors do not favor a conclusion that Appellant's will was overborne. Appellant was not young—he was 30 years old at the time he gave the statement—and he does not point to anything suggesting that he lacked education or intelligence. It does appear that his primary, and perhaps sole, language was Spanish, but the interviews were conducted in Spanish. The elapsed time for all interviews combined was approximately 2 hours and 25 minutes, which does not seem particularly long, especially for a capital murder case. Appellant was given complete Article 38.22 warnings at the beginning of each of the two recorded interviews, and while Ranger Vela continued the first interview after Appellant first said he did not want to continue talking, this continued questioning was brief, and questioning did cease after Appellant reiterated his request. Appellant's claims of mistreatment are based solely on his own testimony, which the trial court was free to disbelieve. And in fact, the findings indicate that the trial court did not believe Appellant's testimony in this regard.

As for lack of sleep, some lack of sleep was inevitable given that Appellant appears to have fled until law enforcement caught up with him at 2:00 in the morning. But the claim that he was not allowed sleep between the two interviews is based solely on his own testimony, which the trial court was free to disbelieve and did disbelieve. Also, tiredness by Appellant does not by itself show that his will was overborne so that his capacity for self-determination was impaired.
As for lack of medical care, Appellant acknowledges that Ranger O'Connor did not believe the injury to be serious. Appellant has not shown that Ranger O'Connor's assessment was incorrect, nor has he shown that this purported injury pressured him to make incriminating statements. We conclude that Appellant has not shown that his will was overborne by official misconduct.

As for Appellant's claim that he was not informed of his rights under Article 36 of the Vienna Convention on Consular Relations, the Supreme Court has held that exclusion of evidence is not an appropriate remedy in that situation. And the Supreme Court has said that a failure to inform an accused of his right under Article 36 "is unlikely, with any frequency, to produce unreliable confessions" and that "there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police." Given the other voluntariness factors we have discussed above, the failure to inform Appellant of his right to contact the consulate did not cause otherwise voluntary statements to become coerced.

It is true that the Rangers continued to interview Appellant after his statement in the second interview that he did "not want to talk about this anymore." That fact is not sufficient, under the circumstances of this case, to cause what was said afterwards to have been coerced in violation of due process. Regardless, little was admitted into evidence after this statement. The only information not found earlier in the recordings was Appellant's admission that he knew the gun was a .45. Even assuming that this part of his statement was inadmissible, any error was harmless for reasons we have stated earlier.

Appellant contends that his waiver of his rights was not voluntary because he was subject to food and sleep deprivation, physical violence by Border Patrol agents who arrested him, lack of care for his physical injury, and threats against him. These arguments are the same arguments he made for finding the recorded statements to be coerced, and the same reasons for rejecting them in connection with that claim apply here. He also claims that officers told him that they could not go to the District Attorney without information from him, that he signed the *Miranda* waiver because he thought he had to, and that threats had been made against his family. These additional arguments depend on statements made by Appellant—during the suppression hearing or in the recorded interviews—which the trial court was free to disbelieve. Given the findings, it is clear that the trial court did not in fact believe these statements from Appellant.

Appellant also contends that he did not understand that, by signing the waiver, he was waiving his right to remain silent and his right to a lawyer, and he claims that he did not understand specific terms in Spanish read out to him from the *Miranda* waiver. These arguments also depend on Appellant's testimony, which the trial court was free to disbelieve and did disbelieve, given the findings. Moreover, Appellant indicated on the first recording that he understood his rights, and on the second recording, he said that the warnings need not be re-read because he understood them. Appellant claims that Ranger Vela undermined the validity of his waiver of rights with respect to the second recorded interview when he disregarded Appellant's invocation of his right to cut off questioning. This argument is really just another way of stating his contention that the failure to scrupulously honor his right to cut off questioning during the first statement extended to the second statement. We addressed and rejected that contention under the "Honoring the Right to Silence" subsection of this opinion. Moreover, the sequence of events shows that Appellant was able to successfully terminate the first interview by asserting his right to cut off questioning a second time. At worst, that sequence would have conveyed that Appellant could have his right to cut off questioning honored if he persistently asserted it. Consequently, we have no reason to think that he did not understand that he did not have to agree to the second interview.

Appellant also claims that Ranger Vela undermined the waiver with respect to the second recorded interview by saying, contrary to the *Miranda* and Article 38.22 warnings, "I am not saying this is going to affect you or not; it may or may not affect you in court." Saying that a confession can be used "for or against you" is an improper warning that does not comply with Article 38.22. Appellant does not dispute that all of the warnings given at the beginning of each recorded interview complied with Article 38.22. Rather, he claims that Ranger Vela's statement here was an additional statement in the middle of the first interview that was contrary to the Article 38.22 warning that a statement may be used against the defendant.97 Ranger Vela's "may or may not affect you in court" statement, however, was talking about the *Rangers* telling the prosecutor

whether or not the defendant was honest during the interview. Ranger Vela was saying that such a statement by the Rangers to the prosecutor "may or may not affect" Appellant in court. This in no way undermined the Article 38.22 warning that whatever *Appellant* said might be used against him.

But even if the waiver as to the second interrogation were rendered invalid for the reasons Appellant suggests, any error in admitting the second recorded statement was harmless for reasons stated earlier in the "Honoring the Right to Silence" subsection. And even if we went back to the first interview and held that Ranger Vela's "may or may not affect" statement rendered inadmissible what was said afterwards, facts (1), (2), (3), and (5) from the first interview would still have been admitted, along with the first half of fact (4) from Appellant's arrest-scene statement, and our conclusion that any error is harmless would still be valid.

Appellant further claims that his recorded statements were involuntary under state law due to his state of mind. He claims that he was "sleep-deprived, injured, ill, and intoxicated from drugs." He also claims that he feared for his life and his family's life prior to and during his statements. A state-law claim of involuntariness under Article 38.22 may, but need not, be predicated on law enforcement overreaching. A confession can be involuntary under state law if it is given "under the duress of hallucinations, illness, medications, or even a private threat." A confession can be involuntary under state law if the suspect lacked the mental capacity to understand his rights or if, due to a temporary mental condition, he did not understand what he was confessing to. But "youth, intoxication, mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible."

Appellant claimed both lack of sleep and that he was on drugs. As we indicated earlier, some lack of sleep was inevitable given the lateness of the arrest, though how much that affected Appellant was something the factfinder could decide. The finder of fact was free to disbelieve the drug claim. And even if the finder of fact believed that Appellant was tired and under the influence of drugs, that would not alone require a conclusion that Appellant lacked the mental state needed to make a voluntary confession. Appellant said that he understood his rights and agreed to waive them. He specifically noted his understanding that what he said could be used against him. At the beginning of the second interview, he insisted that the warnings did not need to be read again because he understood them. Appellant's statements during the interviews suggested that he could think rationally. Without being told, Appellant understood that a capital offense carried the death penalty.

And he was able to articulate a coherent and exculpatory version of events in both interviews—claiming in the first interview that he was the victim of an unprovoked attack by the Vega family and claiming in the second interview that he shot at the Vega family but only in response to them shooting first. The trial court was well within its discretion to conclude that Appellant was not suffering from a mental condition that would have caused his statement, or his waiver of rights, to be involuntary.

As for Appellant's claim that private threats rendered his statement involuntary, that claim depended on Appellant's suppression-hearing testimony and recorded-interview statements, all of which the trial court was free to disbelieve.

But even if all of Appellant's recorded statements were admitted in violation of statute, we are convinced that any possible error did not influence the jury or had but slight effect and thus was harmless under the standard for non-constitutional errors. Even without his statements, Appellant was connected to the abandoned red SUV by bloodstains in the vehicle matching his DNA. Three witnesses identified Appellant as one of the two men who attacked the Vega family, two of those witnesses identified Appellant as both the driver and the person who shot Harvey, and an additional witness testified that Harvey was shot by the driver. Two witnesses testified that Appellant instructed the Vega family to get down on the ground. A gun that was consistent with the bullet that killed Harvey and with shells at the crime scene was found near the scene of Appellant's arrest.

Appellant had gunshot residue on his hands. And without Appellant's recorded statements, there would be no evidence that the Vega family shot first or that Appellant was defending himself. The testimony that Appellant and his accomplice fired shots without provocation would have been uncontroverted.

Having rejected all of Appellant's claims regarding the admission of his recorded statements, we overrule points of error three through seven.

7. Jury Instruction

…

E. Other Evidentiary Complaints

1. Extraneous Offense

…

2. Co-Defendant's Statement

In point of error twenty, Appellant contends that the trial court erred in admitting a reference by Ranger Vela, in Appellant's first recorded interview, to a statement made by Appellant's passenger, who was a co-defendant. He claims that, because the passenger did not testify and therefore could not be cross-examined, the admission of this reference violated his Sixth Amendment right to confrontation.

The trial court had ordered redactions of the English translation of the first recorded interview to take out statements allegedly made by the passenger. Defense counsel objected that the redactions were incomplete and pointed to a particular passage. He did not request a limiting instruction. The passage at issue reads as follows:

This guy also talked. He already told me his version of how things happened. We are not trying to play games with you, or trying to play tricks on you, or trying to put things on your head, nor anything like that. Okay? Simply, Gustavo—it is simply that we already know how the events happened. Look, if you (both) went there, you were going to try to—Let's say how things are. Okay?—to attack those people or you needed money, or I don't know; I don't know what your motives were and—Hey, things turned out wrong because sometimes things turn out wrong and shit hit the fan there; the shooting began and all that shit and then, obviously that you have to run away.

This passage was part of the long explanation that Ranger Vela had given Appellant for saying, after hearing Appellant's initial story, that the rangers "know . . . that is not how things happened." The passage was relevant to show the context in which Appellant made various statements in the recorded interview. It was also relevant to the issue of the voluntariness of Appellant's recorded interview as a whole, an issue that was submitted to the jury. These were non-hearsay purposes, as they do not involve proving the truth of any matters asserted by the passenger, and even a non-testifying co-defendant's statement can be admitted for a non-hearsay purpose without violating the Confrontation Clause. Because the passenger's statements were part of Ranger Vela's questioning, it is manifest that the State was not attempting to introduce the statements to show that the passenger was giving a true account of what occurred. The record does not reflect whether the rangers even talked to the co-defendant, let alone what he told them if they did. It is not an unheard-of tactic for law enforcement to dissemble about what a suspected accomplice has told them as a ruse to elicit incriminating statements from the accused. And the passage at issue here does not even recite what the passenger allegedly said happened. At worst, Ranger Vela conveyed, in a vague way, that the passenger gave a different story than Appellant.

The judgment of the trial court is affirmed.

***Sandoval v. State*, Tex. Crim., No. AP 77,0981, Dec. 7, 2022.**

MIRANDA – CUSTODY FACTORS;
EVIDENCE – POSSESSION OF CHILD PORNOGRAPHY

A jury convicted Jeffrey Michalik of possessing child pornography. Michalik contends that the district court erred in denying his motion to suppress evidence and by admitting various pieces of evidence and testimony at trial, and he also asserts that the evidence was insufficient to sustain his conviction. Finding no reversible error, we affirm.

Agents from the Department of Homeland Security, Homeland Security Investigations ("HSI"), executed a warrant at Michalik's house. They did so because someone using an IP address associated with the house had accessed and downloaded child pornography from a website called "Amateur Lovers."

The HSI agents testified that they arrived early in the morning as Michalik was leaving for work. They approached Michalik as he was getting into his car, informed him that he was not under arrest, and asked for his assistance entering the house pursuant to their warrant. The agents say that they swept the house and informed Michalik and his family that they were free to leave.

The agents then interviewed Michalik in one of their cars on the street near his house. During the interview, the agents asked Michalik whether he had viewed child pornography, and they assert that he admitted to having done so on his work laptop and that he said he used the same laptop to view pornography at home. The agents showed him images of child pornography, and he conceded that he recognized some of them. The agents testified that Michalik then drove to his office in his own car with agents in tow, stopping along the way at a McDonalds so an agent could use the

restroom. At the office, Michalik led the agents to his laptop and signed a form consenting to its search. On the laptop, agents found child pornography.
Michalik's version of the events differs. He asserts that the agents gave him the ultimatum that either he lead them to the office and retrieve the laptop, or they would take him to jail. Michalik also contends the agents told him that they already had a warrant to search his laptop. Michalik doesn't contest that he signed the consent form but avers that the agents failed to tell him what he was signing or give him a choice whether to do so.

Michalik moved to suppress the evidence from his interview with the agents and the evidence from his laptop; the district court denied the motion. The jury convicted Michalik of possessing child pornography under 18 U.S.C. § 2252A(a)(5)(B). He appeals the denial of his motion to suppress, several admissions of evidence at trial, and the sufficiency of the evidence in support of his conviction.

Michalik appeals the denial of his motion to suppress the evidence of his statements to HSI agents and the evidence from his laptop. He contends that the government's failure to recite his *Miranda* rights necessitates the exclusion of his statements to the agents, and he avers that his consent to search his office laptop was not voluntary.

In reviewing the denial of a motion to suppress, we review findings of fact for clear error and legal conclusions *de novo*. We view "the evidence in the light most favorable to the party that prevailed in the district court," and we will uphold the district court's ruling on the motion "if there is any reasonable view of the evidence to support it." "Our review is particularly deferential where denial of the suppression motion is based on live oral testimony because the judge had the opportunity to observe the demeanor of the witnesses."

In general, "a suspect's incriminating statements during a custodial interrogation are inadmissible if he has not first received *Miranda* warnings." A suspect is in custody "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." A suspect's custodial status "is an objective inquiry . . . that depends on the totality of the circumstances." Five factors are relevant: "(1) the length of the questioning; (2) the location of the questioning; (3) the accusatory, or non-accusatory, nature of the questioning; (4) the amount of restraint on the individual's physical movement; and (5) statements made by officers regarding the individual's freedom to move or leave."

Regarding the first factor, the length of questioning, the HSI agents testified that Michalik's interview lasted from forty-five minutes to just over an hour. That's roughly consistent with Michalik's contention that the interview lasted "at least an hour." Although an interview length of one hour "weighs in favor of finding that it was custodial," an hour-long interview, alone, doesn't render the questioning custodial. Indeed, "[w]e have previously rejected the broad proposition that an hour-long interview constitutes a *per se* custodial interrogation."

The second factor—the location of the questioning—suggests that the interview was not custodial. Michalik sat in the passenger-side front seat of a police car on the street near his house. As in *Wright*, the interview "took place close to the [suspect's] home, in a car subject to public scrutiny."

The third factor—whether the questioning was accusatory—indicates that the interview was not custodial. The district court found HSI agents DePaola and Juarez credible when they testified that the conversation was "cordial" and Michalik was "cooperative." As the district court noted, Michalik contested those characterizations, asserting that the agents called him a liar and made "disparaging and accusatory statements" about his family. The district court did not clearly err in its credibility determination in favor of the agents, and the third factor thus indicates that the interview was not custodial.

The fourth factor—the amount of restraint on the suspect's physical movement—also suggests that the interview was not custodial. Michalik contends that the presence of six to eight armed agents indicates that he was physically restrained. He also notes that agents escorted him outside to the car. The presence of armed agents, however, does not necessarily render an interview custodial. The agents never handcuffed or otherwise physically restrained Michalik's movement. Indeed, the district court found that the interview ended when Michalik "became frustrated with the agents' questioning." Moreover, the fact that Michalik's mother-in-law left to take his stepdaughter to school while agents were searching the house suggests that a reasonable person would have felt free to leave.

The fifth factor—whether officers informed the suspect of his freedom to leave—also supports a finding that Michalik was not in custody. Michalik contends now, as at his suppression hearing, that the agents failed to tell him he was free to leave. He also asserts that the other occupants of his house confirmed that the agents didn't inform Michalik that he could leave. On that contention, there is a dispute of fact. Agents DePaola and Juarez testified that they told Michalik "repeatedly" that he was not under arrest and was free to leave before the interview. The agents testified that both Michalik and his family appeared to understand what they were saying.

Considering the divergent accounts, the district court made an explicit credibility determination that the agents' testimony was credible and reliable. The district court did not clearly err in its determination; thus, the fifth factor indicates that the interview was not custodial. Weighing the totality of the circumstances, the district court did not err in concluding that Michalik was not in custody.

Michalik also appeals the admission of evidence from his office laptop, averring that he did not voluntarily consent to its search. "A search conducted pursuant to consent . . . remains one of the well-settled exceptions to the Fourth Amendment's warrant and probable-cause requirements." The government must show by a preponderance of the evidence that the suspect voluntarily consented to the search, and whether the consent was voluntary is a factual finding, reviewed for clear error.

To determine the voluntariness of consent, the court assesses six factors: "(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found."

The first factor for determining whether consent to a search was voluntary—the voluntariness of the suspect's custodial status—favors the government. As previously discussed, the district court did not err in determining Michalik was not in custody and was informed that he was free to leave. The second factor—the presence of coercive police procedures— favors the government. Michalik avers that the agents used "coercive and misleading statements . . . to obtain the written consent" to access his laptop. Specifically, he asserts that he asked the agents whether they needed a warrant before searching his laptop and that they told him they already had a warrant. Agent DePaola, on the other hand, testified that that claim was "totally false." Michalik also contends that the agents threatened to take him to jail if he did not consent to the search of his laptop. Agent DePaola flatly disputed that claim too. The district court determined that the government agents were credible, and it did not clearly err in that finding.

The third factor—the extent and level of the defendant's cooperation with police—also supports the government. The district court determined that the "record in the case demonstrates that [Michalik] was cooperative with the agents during the drive to his work as well as in his office," and Michalik does not contest that characterization.

The fourth factor—the defendant's awareness of his right to refuse consent—favors the government, as well. Agent DePaola testified that Michalik's leading the agents to his office to retrieve the laptop was "completely up to him," and that on "multiple occasions [DePaola] said it was voluntary and [she] thanked him for his cooperation." She also testified that the agents told Michalik that "he could say no" to cooperating. Michalik challenges the veracity of Agent DePaola's testimony, contending that there are discrepancies in her account, but a review of the record shows no material discrepancies; instead, it reveals only that DePaola had trouble recalling some details of her interaction with Michalik. The district court determined that Agent DePaola's testimony was credible and also noted that the consent form Michalik signed included clear language informing him that he could withhold his permission.

The fifth factor—the defendant's education and intelligence—is undisputed and also favors the government. Michalik was forty years old, had a high school education, and operated a small business, demonstrating that he had sufficient education and intelligence to consent voluntarily to the search.

The sixth and final factor—the defendant's belief that no incriminating evidence will be found—favors the government. Indeed, Michalik told agents that, although he had viewed pornography on his laptop, he did not believe there was any such material stored on it. With all six factors favoring the government, the district court did not err in determining that Michalik's consent to the search of his laptop was voluntary.

[*discussion of procedural evidentiary rulings omitted. Ed.*]

Michalik asserts that the evidence was insufficient to convict him of knowing possession of child pornography. "We review sufficiency of the evidence *de novo*." We "examine all evidence in the light most favorable to the verdict, and consider whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt."

Moreover, the "assessment of the weight of the evidence and the determination of the credibility of the witnesses is solely within the province of the jury."
The jury convicted Michalik of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The evidence is sufficient to sustain a conviction under § 2252A(a)(5)(B) where "a rational juror could find beyond a reasonable doubt that [the defendant] (1) knowingly (2) possessed (3) material containing an image of child pornography (4) that was transported in interstate or foreign commerce by any means." Michalik contests only the first element—knowledge. "The knowledge requirement extends both to the age of the performers and to the pornographic nature of the material."

Michalik makes a number of contentions in his argument that the evidence was insufficient to prove that he knowingly possessed child pornography. His central assertion is that, because others had access to his laptop at his place of work—coworkers, customers, and other business associates— the evidence was insufficient to prove that he knew there was child pornography on his computer. A reasonable jury could easily conclude that Michalik had knowing possession because the origins of the investigation undercut his explanation: Agents initially searched his house because someone had accessed a child pornography website from an IP address associated with Michalik's house, not his office.

Michalik points out that there were other people living there who could have used his laptop. A reasonable jury could still conclude that it was Michalik who accessed the contraband because the HSI agents testified that he confessed to viewing and searching for child pornography and also admitted that he recognized some of the child pornography images that the agents showed him from the website in question. The jury was entitled to credit the agents' testimony over Michalik's denials. Indeed, the "jury retains the sole authority to . . . evaluate the credibility of the witnesses." Given that evidence, a reasonable jury could easily find that Michalik knowingly possessed the child pornography on his laptop.
AFFIRMED.

***U.S. v. Michalik*, No. 20-50244, 5th Cir. July 15, 2021.**

8. PRISONERS

Commit or release.

Our prior opinion, *Harris v. Clay Cnty.*, 40 F.4th 266, is WITHDRAWN and the following opinion is SUBSTITUTED therefor:

When a defendant is found incompetent to stand trial with no reasonable expectation of restored competency, the state must either civilly commit the defendant or release him. That simple commit-or-release rule was not followed in this case. Steven Harris was found incompetent to stand trial, and his civil commitment proceeding was dismissed. Yet Harris stayed in jail for six more years. This suit challenges his years-long detention when there was no basis to hold him. We consider whether his jailers are entitled to qualified immunity.

Harris was charged with murdering his father, shooting three law enforcement officers, shooting into occupied vehicles, carjacking, and kidnapping. He pleaded not guilty in a Clay County circuit court, and the court ordered that he be held in custody without bail.

While Harris was in custody, his counsel requested a mental evaluation to determine Harris's competency to face trial. Harris had a long history of suffering from schizophrenia. The circuit court agreed to the evaluation and transferred him to a hospital. There, there was "no substantial probability that Mr. Harris [could] be restored to competence to proceed legally in the foreseeable future."

Harris returned to jail and awaited competency proceedings. The court held a hearing on October 12, 2010 and agreed with the doctors that Harris was not competent. It therefore ordered Mississippi to pursue civil commitment proceedings in the chancery court. Importantly, the court also ruled on Harris's detention status: He should be held "until the determination of said civil proceedings." But the civil commitment case did not last long. On the same day the circuit court removed Harris's criminal case from its active docket (October 20, 2010), the chancery court dismissed the just-filed commitment proceeding for lack of jurisdiction. It based that dismissal on the pending criminal charges—yes, the charges that had just become inactive—in the circuit court. The circuit court apparently never caught wind of the chancery court's dismissal, sending Harris into legal limbo. No one disputes that Harris remained in Clay County jail from that point forward. It is hard to explain, then, what happened next. On October 25, 2010, Sheriff Laddie Huffman and Deputy Eddie Scott, the ones in charge of the jail, signed a "Diligence Declaration." The declaration purportedly related to a separate indictment against Harris for assaulting a jailer while in custody.3 In that declaration, they said the following: "After diligent search and inquiry, [we] have been unable to find the within named Steven J. Harris in [our] county." It appears that they submitted the declaration to the circuit court—further misleading the circuit court that the civil commitment proceedings went according to plan. Fast forward to 2012. The district attorney prosecuting Harris's case, Forrest Allgood, found out about the state court snafu. After putting the pieces together, he went to Sheriff Huffman to inquire about Harris's confinement. This time Huffman acknowledged that Harris was still in jail but indicated that his mental health seemed to be improving. So Allgood submitted a Motion for Reevaluation to the circuit court, asking the court to again determine whether Harris was

9. STATUTE

Stalking Statute is Constitutional.

Appellant was charged with stalking by engaging in conduct that is an offense under section 42.07 and/or engaging in conduct he knew or reasonably should have known the complainant would regard as threatening bodily injury or death and did cause the complainant to fear bodily injury or death. See TEX. PENAL CODE § 42.072(a).
Appellant was convicted and appealed. The Court of Appeals held that section 42.072(a) is facially unconstitutional for vagueness and overbreadth to the extent it incorporates section 42.07(a)(7).
The State filed a petition for discretionary review arguing that the Court of Appeals erred in finding the stalking statute unconstitutional and in reversing the conviction. We handed down opinions in *Ex parte Barton*, No. PD-1123-19, 2022 WL 1021061 (Tex. Crim. App. Apr. 6, 2022), and *Ex parte Sanders*, No. PD-0469-19, 2022 WL 1021055 (Tex. Crim. App. Apr. 6, 2022), in which we upheld the facial constitutionality of a previous version of section 42.07(a)(7). The Court of Appeals in the instant case did not have the benefit of our decisions in *Ex parte Barton* and *Ex parte Sanders*. Accordingly, we grant the State's petition for discretionary review, vacate the judgment of the Court of Appeals, and remand this case to the Court of Appeals for further consideration in light of *Ex parte Barton* and *Ex parte Sanders*, and to address Appellant's remaining issues if necessary.

***Griswold III v. State*, Tex. Crim. App., No. PD-0154-22, Nov. 02, 2022.**

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***Griswold III v. State*, Tex. Crim. App., No. PD-0154-22, Nov. 02, 2022.**

10. WEAPON – definition of gangbanger

We granted the State Prosecuting Attorney's petition for discretionary review to decide whether the unlawful carrying of a weapon by a gang member, Tex. Penal Code § 46.02(a-1)(2)(C),[1] requires proof the defendant was continuously or regularly committing gang crimes. The court of appeals found that the language of the statute plainly did, relying on the holding from the Fourteenth Court of Appeals in *Ex parte Flores*. We agree and adopt and apply the holding from *Ex parte Flores* in that, to be a gang member for purposes of prosecution under § 46.02(a-1)(2)(C), an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and must also continuously or regularly associate in the commission of criminal activities.

[1] Since the granting of this petition, the 87th Legislature has repealed subsection (a-1)(2)(C), effective September 1, 2021, and moved the subsection to its own statute, creating a standalone offense. Because this statute was enacted after the granting of this petition, we will not address it at this time.

On April 17, 2018, Terry Martin ("Appellant") was stopped for multiple traffic violations while riding a motorcycle on U.S. Highway 87 in Lubbock County. During the stop, Corporal Michael Macias observed that Appellant was wearing a motorcycle vest, or "cut," that read "Cossacks MC." After patting him down, Officer Macias asked if Appellant had any firearms on him, to which Appellant responded that he had a pistol inside his vest. Officer Macias placed Martin in handcuffs while stating "I take it by your cut you're a Cossack?" Appellant answered, "Yes, sir." Appellant's motorcycle "cut" contained Sergeant's stripes and a portion that said "Cossacks MC, Lubbock County, Mid-Cities, Texas." Corporal Macias believed, based on his training and experience, that the Cossacks were a criminal street gang. Appellant was ultimately charged with unlawfully carrying a weapon (UCW) as a member of a criminal street gang, a Class A misdemeanor.
At trial, the State presented testimony from Deputy Joshua Cisneros of the Lubbock County Sheriff's Office in the street crimes unit. As part of the Texas Antigang Center, Deputy Cisneros worked to disrupt the activity of criminal street gangs.
Deputy Cisneros testified that law enforcement uses a statewide database known as TxGANG to identify and keep track of gang members. He explained that certain factors, which are set forth in the Texas Code of Criminal Procedure, are used to determine whether someone is a gang member. Two of these factors, namely a judicial finding and self-identification during a judicial proceeding, are standalone criteria, meaning an individual can be entered into the TxGANG system upon a showing of either one.

Deputy Cisneros then testified specifically about the Cossack Motorcycle Club. Cisneros testified that he was familiar with the Cossacks and that they were a nationwide outlaw motorcycle gang. The Cossacks had gang colors (yellow and gold), a gang symbol (the "ugly man"), and an organizational structure. Groups would obtain permission from the Cossack national leadership to organize a local chapter. Members paid dues to the national organization, earned patches to wear on their vests upon obtaining full membership, and had to return Cossack insignia upon resignation or "excommunication." Deputy Cisneros further testified that members of the Cossacks continuously and regularly engaged in assaults, threats of violence, intimidation, and illegal firearms possession.

Deputy Cisneros testified that he was familiar with local criminal activity involving the Cossacks. In one incident, on April 15th, 2018, several members of a motorcycle club were assaulted. One victim said that the suspects were wearing Cossack Motorcycle Club cuts and Kinfolk Motorcycle Club cuts. A second incident occurred in a parking lot and involved members of the Villistas, Bandidos, and Cossacks motorcycle clubs. In this incident, a ranking member of the Bandidos Motorcycle Club was reportedly knocked out, carried into a van, and taken from the scene. Deputy Cisneros acknowledged that there had been no arrests from either incident. He also testified that he knew of no criminal charges filed against Cossacks in the area.

Deputy Cisneros expressed the opinion that Appellant was a member of the Cossacks Motorcycle Club because he gave a nonjudicial self-admission to Corporal Macias, he had already been entered into TxGANG as a Cossacks member by two different agencies at the time of the traffic stop, and he was wearing the cuts and various colors for the Cossacks. Deputy Cisneros also testified that Appellant was formerly a Sergeant-at-Arms for the Dallas chapter of the Cossacks. In that role, he reported directly to the president of the chapter and was a bodyguard to the president of the chapter. He was also the "enforcer" for the chapter, "meaning they can deal out the punishment for a member breaking the rules." The "punishment" could range from a "physical punishment" to a fine. Appellant was also involved in the "Twin Peaks Waco incident" where a fight broke out in the parking lot between members of the Bandidos and members of the Cossacks, which turned into a shootout where several people were killed.

Appellant testified on his own behalf. He stated that he had been a member of the Cossacks for four years but that he did not believe that Cossacks were a criminal street gang. He testified that he had never been convicted of a felony or a misdemeanor,[3] other than traffic violations. Appellant admitted to being at the Twin Peaks Waco shootout involving Cossacks, Bandidos, and law enforcement that resulted in nine deaths. At the shootout, Appellant did not have a weapon on his person, although he had one in his vehicle. He was arrested and detained, along with

some 170 others who were present, and charged with criminal organization. These charges were later dismissed. Appellant testified that his best friend was one of seven Cossacks who died in the shooting, and he knew the others. He added tattoos to his body in their memory. To his knowledge, no Cossacks had been convicted for the Twin Peaks incident.
Appellant testified that there were six Cossacks in Lubbock, and they were mechanics and city employees, not criminals, although he acknowledged that law enforcement officers could not join. He and the other Cossacks paid dues to a national organization, and they had common colors, a logo, and a motto. Appellant testified that he and the other five Cossacks in Lubbock did not plot crimes together, and he denied personally assaulting anyone with other members. He testified he did not participate in any bar fights or agree with other Cossacks to beat up Bandidos. The jury found Appellant guilty of the offense of UCW and set his punishment at a fine of $400.00 with no term of confinement.

On appeal, Appellant claimed that the evidence was insufficient to show that he was a member of a criminal street gang. Appellant admitted that he was factually a Cossacks member but denied that he was legally a Cossacks member because the State failed to prove that he personally was a criminal. For this, he relied on the Fourteenth Court of Appeals' interpretation in *Ex parte Flores* that a "member" is one of the three or more persons who continuously or regularly associate in crime.
The Seventh Court of Appeals agreed, accepted the interpretation of the statute from *Ex parte Flores*, and held: "To be a gang member for purposes of prosecution under the statute, 'an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and *must also* continuously or regularly associate in the commission of criminal activities.'"
The court of appeals held that, under *Flores*, both gang membership and a connection to criminal conduct are required and the record is "devoid of evidence" showing that Appellant associated in the commission of criminal activities. The court noted that Appellant's arrest at Twin Peaks on charges that were later dismissed does not establish that he continuously or regularly associated in the commission of criminal activities. Therefore, the court of appeals held that the evidence was insufficient to show that Martin himself regularly or continuously engaged in criminal activity pursuant to his membership in a gang.

The State Prosecuting Attorney's Office filed a petition for discretionary review with this Court, arguing that the court of appeals erred because *Ex parte Flores*'s interpretation is contrary to the plain language of the statute. Specifically, in holding that a "gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities," *Ex*

parte Flores and the court of appeals collapse the two requirements into one, contrary to the plain language. Instead, according to the State Prosecuting Attorney (SPA), in determining gang membership for UCW, two requirements are clear from sections 46.02(a-1)(2)(C) and 71.01(d): (1) the defendant must be a member of the group, and (2) the group, among other things, must continuously or regularly associate in the commission of crime.

The SPA also argues that the court of appeals went beyond *Ex parte Flores,* requiring direct participation in crime. Specifically, the State complains that the court did not address the significance of Appellant's four-year membership, monetary contributions from dues, or past leadership role, although all of these things facilitated the Cossacks' primary activities (committing assaults, according to the State's expert). Instead, the State complains that the court looked only to evidence that Appellant was physically and personally involved in crime. Accordingly, the SPA argues that the court erred by finding the evidence to be insufficient for conviction.

Texas Penal Code section 46.02(a-1)(2)(C) provides that

> A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:
> . . . .
> (2) the person is:
> . . . .
> (C) a member of a criminal street gang, as defined by section 71.01.

"Member" is not defined, but section 71.01 defines a criminal street gang as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Tex. Penal Code § 71.01(d).

In *Ex parte Flores*, the appellant argued that "the term 'criminal street gang,' which section 46.02(a-1)(2)(C) borrows from section 71.01(d) of the Penal Code, is overbroad and criminalizes constitutionally protected conduct." Flores also argued that section 46.02(a-1)(2)(C) uses the overbroad term "member" in defining who may not carry a handgun in a vehicle.

First, the *Flores* court analyzed the construction of the term "criminal street gang." According to Flores, the term "criminal street gang" means "three or more persons having either (1) a common identifying sign, (2) a common identifying symbol, or (3) an identifiable leadership who continuously or regularly associate in the commission of criminal activities." Therefore, three or more persons qualify as a criminal street gang if they have a common identifying sign or symbol. n the appellant's view, under this interpretation, the three or more persons need not continuously or regularly associate in the commission of criminal activities. As a result, the statute prohibits "a wide array of constitutionally protected conduct by prohibiting groups of people from meeting, congregating, or assembling, and having an identifying sign or symbol." This would lead to absurd results, such as the application of the term "criminal street gang" to members of the Boy Scouts of America.

The *Flores* court disagreed and held that three or more persons meet the definition of a criminal street gang "only when they—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities. The statute does not apply to three or more persons solely because they have a common identifying sign or symbol." Flores argued that the court's interpretation added language to the statute, but the court disagreed and instead insisted that its construction "gives the statute its proper grammatical interpretation" and "gives effect to its plain language."

Second, the court analyzed the construction of the term "member." The court determined that the term "member," when read together with the definition of "criminal street gang," indicates that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." Therefore, a person is a "member" of a criminal street gang only when the gang member is "one of the three or more persons who continuously or regularly associate in the commission of criminal activities" based on reading both terms ("member" and "criminal street gang") *together as opposed to separately*.

All statutory construction questions are questions of law, so we review them de novo. When interpreting a statute, we look to the literal text of the statute for its meaning. We ordinarily give effect to that plain meaning unless application of the statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended or the plain language is ambiguous.

The *Flores* court did just that: it interpreted the statute in accordance with the plain meaning of its language and did so by following the rules of statutory construction in analyzing the term "member" and in applying a reasonable

construction of the statute to the issues on appeal. By reading the terms "member" and "criminal street gang" *together as opposed to separately,* the court held that a person is a "member" of a criminal street gang only when he is "one of the three or more persons who continuously or regularly associate in the commission of criminal activities."

The SPA asks this Court to read sections 46.02(a-1)(2)(C) and 71.01(d) differently from the *Flores* court. Under the SPA's interpretation of the statute, sections 46.02(a-1)(2)(C) and 71.01(d) only require that (1) the defendant must be a member of the group, and (2) the group, among other things, must continuously or regularly associate in the commission of crime. The SPA argues that the court of appeals collapsed these two requirements into one, requiring direct participation in the crime, contrary to the plain language of the statute.

The SPA's reading of the statute would allow for the conviction of a person who is unaware of the gang's criminal activities and who has not personally committed a crime or associated in the commission of a crime. In other words, a broad interpretation of the term "member," as the SPA posits, would trigger the culpability of an otherwise innocent person merely by joining or participating in an organization deemed to be a criminal street gang with or without knowledge of that organization's criminal activity.

This absurd result is precisely what happened in this case: Though not a criminal for purposes of carrying a firearm, Appellant became one simply by riding his motorcycle while wearing his cut. This very fact scenario is what the court of appeals in *Flores* was trying to avoid in its interpretation. The *Flores* court was clear that law enforcement may not arrest a person under this section merely because they recognize gang signs or symbols. Instead, law enforcement must also determine whether the person is carrying a handgun in a vehicle and whether he or she continuously or regularly associates in the commission of criminal activity.

Although the constitutionality of the statute is not challenged in this proceeding, we cannot ignore the unconstitutional implications of the SPA's interpretation.

The *Flores* court recognized that without requiring direct participation in the organization's criminal activity, the statute cannot withstand constitutional scrutiny. This is because an interpretation without direct participation requires neither criminal *mens rea* nor *actus reus* by the accused unlawful weapon carrier. Instead, it would only require the accused to join an association in which criminal activity occurs regularly among three or more individuals—even if the accused is unaware of such conduct. We have previously held that where otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances.

Applicable to the present case, a person commits unlawful carry if he "intentionally, knowingly, or recklessly carries on or about his person a handgun" while being a member of a criminal street gang. TEX. PENAL CODE §§ 46.02(a-1), 71.01. According to the SPA, to prove the second portion of the offense—that the same individual is a member of a criminal street gang—the State need only show that the accused is listed in the statewide gang database, and it is not necessary prove that he has any knowledge of the commission of criminal activities of the organization. We disagree. The Legislature must surely have intended that, to be a member of a criminal street gang, the actor "must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership *and must also* continuously or regularly associate in the commission of criminal activities." Otherwise, the statute would attach a *mens rea* to nothing more than membership in an organization. Membership alone does not make conduct criminal, and in fact, the First Amendment to the United States Constitution specifically protects the freedom of association.

The *Flores* court properly clarified what conduct makes an individual a member of a criminal street gang: individual participation in crime. This interpretation of section 46.02(a–1)(2)(C) does not prevent gang members from gathering to engage in any activities protected by the First Amendment. It does not deem a person to be a "member" of a criminal street gang simply by associating with a group that has three or more members who continuously or regularly associate in the commission of criminal activities. Therefore, it does not implicate the constitutional right to freedom of association or authorize state action based on the doctrine of guilt by association.

With this in mind, we now turn to the second part of the SPA's argument that the court of appeals erred in holding that the evidence is legally insufficient to show that Appellant was one of the "members" who regularly or continuously engaged in criminal activity.

The evidence is insufficient to prove that Martin associated in the commission of criminal activities by the Cossacks. In assessing the legal sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. A reviewing court must "defer to the jury's credibility and weight determinations because the jury is the 'sole judge' of witnesses' credibility and the weight to be given testimony."

In some cases, sufficiency of the evidence also turns on the meaning of the statute under which the defendant has been prosecuted. In other words, a reviewing court must perform a statutory analysis to determine the elements of the offense

before reviewing the evidence presented. *Id*. In this case, that statutory analysis is provided above.

The State presented evidence at trial that Appellant had been involved with the Cossacks Motorcycle Club. Appellant said he was a member for four years. Appellant admitted to the arresting officer that he was a Cossack and was wearing "gang attire" at the time of his arrest. Appellant had previously been arrested with gang members for a gang-related offense. Appellant was formerly a Sergeant-atArms and enforcer for the Dallas chapter of the Cossacks. He reported directly to the president of the chapter and served as the chapter president's bodyguard.

Deputy Cisneros testified that the Cossacks were a nationwide criminal street gang known to engage in criminal activities, but he knew of no criminal charges filed against Cossacks in the area. Appellant denied that the Cossacks were a criminal street gang and denied that he was aware of any criminal activity occurring within the gang. He also testified that he had never been convicted of a felony or misdemeanor, except traffic violations. At the Twin Peaks restaurant shoot-out in Waco, he was arrested and charged with criminal organization, but the charges were later dismissed. Further, a later report from the Waco Police Department revealed that police ran a background check and did not find anything that would prohibit Appellant from legally possessing a handgun, and the Waco Police Department returned Appellant's gun to him.

According to the statutory analysis in *Flores*, to be a "member," an individual "must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and must also continuously or regularly associate in the commission of criminal activities." Here, the court of appeals held that while the evidence presented at trial satisfied the first half of the inquiry, i.e., that Appellant was part of the Cossack Motorcycle Club, the record lacked evidence of the second half, i.e., a showing that he associated in the commission of criminal activities.

We agree with the court of appeals in holding that the evidence was insufficient to support Appellant's conviction for unlawful carry by a gang member beyond a reasonable doubt. There is no evidence in the record from which one may fairly infer that Appellant was aware of any criminal activities by the Cossacks. Appellant's mere presence at the Twin Peaks shooting does not establish that appellant continuously or regularly associated in the commission of criminal activities. Nor can one reasonably conclude that Appellant was involved in any criminal activity pursuant to his membership in the Cossacks. That being so, Appellant did not come within the purview of Texas Penal Code sections 46.02(a-1)(2)(C) or 71.01(d).

For the foregoing reasons, we adopt the Fourteenth Court of Appeals' analysis of Texas Penal Code sections 46.02(a–1)(2)(C) and 71.01(d) in *Ex parte Flores* in interpreting Appellant's issues on appeal. We agree with the Seventh Court of Appeals that the evidence was insufficient to uphold Appellant's conviction for unlawful carry under section 46.02(a-1)(2)(C) of the Texas Penal Code. Accordingly, we affirm the judgment of the Seventh Court of Appeals and render a judgment of acquittal.

***Martin v. State*, Tex. Court of Crim. Appeals, No. PD-1034-20, December 15, 2021**

11. INFORMANTS

CONFIDENTIAL INFORMANT – disclosure

In this case, the trial court granted a motion to dismiss pursuant to Texas Rule of Evidence 508. On appeal, the court of appeals decided that the trial court abused its discretion. But a defendant's burden under Rule 508 is not a high one, and, based upon our review of the record, we determine that Appellee made the necessaryplausible showing required by the rule. The trial court's dismissal was not an abuse of discretion, and we reverse the judgment of the court of appeals.

Using a confidential informant, the Hays County Narcotics Task Force (Task Force) conducted a controlled drug buy from Joel Espino, who was a narcotics dealer along with his roommate, Andrew Alejandro. Three months later, Appellee and several co-defendants allegedly attempted to rob Espino and Alejandro. During the attempted robbery, Alejandro shot and killed his roommate Espino and wounded two of the alleged robbers. Alejandro was the only person to fire a weapon during the incident. Appellee was charged with the capital murder of Espino. During initial discovery, Appellee's defense counsel learned about the earlier controlled buy involving Espino and the informant. The defense also found out that Espino was not charged in connection with the controlled buy and that the drugs had been destroyed. The defense suspected that Espino himself may have been an informant and that Alejandro could have had a motive to intentionally kill Espino. The defense then sought information related to the controlled buy, including the confidential informant's identity. The defense theorized that Alejandro could have learned about Espino's involvement with the controlled buy from the informant and that Alejandro used the attempted robbery as an opportunity to shoot and kill Espino.

The State and the Task Force officers claimed that the informant's identity was privileged under Rule 508, but the trial court, agreeing with the defense that the informant could possess exculpatory information, ordered the State to allow the defense to review the informant's file under a gag order to ascertain whether or not the file contained potentially exculpatory information. The trial court determined that this was the best way to ensure that, if potentially exculpatory information existed regarding the informant, it would be discovered by the defense. The State filed a petition for mandamus in the court of appeals, claiming that the trial court was required to conduct an *in camera* hearing under Rule 508 before ordering that the defense be allowed to review the informant's file. The court of appeals denied relief. The State then sought mandamus relief from this Court, but the parties and the trial court agreed to a Rule 508 *in camera* hearing.

At the *in camera* hearing, the prosecutor for the State informed the trial court that, although he was originally under the impression that the Task Force officers would identify the informant, he was subsequently told that the Task Force officers did not know who the informant was because they failed to document the informant's identity. The trial court was skeptical but nevertheless heard testimony from the Task Force officers. All of the officers claimed that they failed to make a record of the informant's identity, even though the Task Force's policies and procedures required an informant's information to be thoroughly documented. The Task Force officers admitted, after the trial court posed the defense theory to them, that it was possible that the informant could have

potentially exculpatory information. Combined with the fact that the State utilized every means available to resist disclosure of the informant's identity, the trial court found that the Task Force officers' claim that they simply did not know the informant's identity lacked credibility.

Appellee filed a motion to dismiss pursuant to Rule 508 which provides that, if the trial court finds that there is a reasonable probability that the informant possesses information necessary to a fair determination of guilt or innocence, once the "public entity elects not to disclose the informer's identity: (i) on the defendant's motion, the court must dismiss the charges to which the testimony would relate[.]" TEX. R. EVID. 508(c)(2)(A)(i). After the defense Rule 508 motion to dismiss was filed, the State disclosed an e-mail to the defense and the trial court showing that, prior to the *in camera* hearing, the Task Force commander—who testified at the hearing that he did not know the identity of the informant—did in fact know the identity of the informant but would not disclose the identity to the defense. The trial court—considering the e-mail, the fact that the State exhausted every legal remedy possible, and the fact that the testimony of the Task Force officers lacked credibility—granted Appellee's motion to dismiss.
The State appealed the dismissal, and the court of appeals reversed after finding that the trial court abused its discretion because it relied upon speculation that the informant had exculpatory information instead of evidence in the record. We granted Appellee's petition for discretionary review, which asked:

(1) Can an appellate court disregard the issue of error preservation so that the State has a remedy when a capital murder case is dismissed because of the State's own actions in disappearing a confidential informant?
(2) Can an appellate court reverse a trial court's dismissal under TRE 508 without ever addressing the untrustworthiness of the State's position that the State does not know the identity of the confidential informant?

(*preservation of error discussion omitted*)

We overrule Appellee's first ground for review.

Appellee's second ground for review complains that the court of appeals erred in reversing the trial court's dismissal pursuant to Texas Rule of Evidence 508 which provides, in pertinent part:
(a) General Rule. The United States, a state, or a subdivision of either has a privilege to refuse to disclose a person's identity if:
(1) the person has furnished information to a law enforcement officer or a member of a legislative committee or its staff conducting an investigation of a possible violation of law; and (2) the information relates to or assists in the investigation.
TEX. R. EVID. 508(a).

In criminal cases:

this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. If the court so finds and the public entity elects not to disclose the informer's identity:

(i) on the defendant's motion, the court must dismiss the charges to which the testimony would relate.

In this case, the public entity—the State through the Task Force officers—did not disclose the informer's identity. Therefore, the trial court was required to dismiss the case on Appellee's motion if it found that "a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence."

A trial court's ruling on a motion to disclose the identity of a confidential informant under Rule 508 is reviewed for an abuse of discretion. The abuse of discretion standard "'is a deferential standard of review that requires appellate courts to view the evidence in the light most favorable to the trial court's ruling.'" The trial court's determination of historical facts is afforded almost complete deference, especially when those determinations are based on assessments of credibility and demeanor. In determining whether the trial court abused its discretion, an appellate court must not substitute its own judgment for that of the trial court, and it must uphold the trial court's ruling if it is within the zone of reasonable disagreement. A trial court abuses its discretion only when no reasonable view of the record could support its ruling.

In *Bodin v. State*, we explained that Rule 508 only requires that the undisclosed informant's testimony may be necessary to a fair determination of guilt or innocence. On the issue of "the amount of proof necessary for the defendant to show that testimony *may be* necessary to a fair determination of guilt or innocence[,]" we concluded that, "[s]ince the defendant may not actually know the nature of the informer's testimony . . . he or she should only be required to make a plausible showing of how the informer's information *may be* important." Evidence from any source, but not mere conjecture or speculation, is required.

The dissent argues that resort to Rule 508 is unnecessary because the State already has an obligation to disclose information related to an informant, if that informant has exculpatory information under *Brady v. Maryland* and Article 39.14(h). It is undoubtedly true that the State has a duty to disclose exculpatory information, but Rule 508 is not limited to exculpatory information.

Inculpatory information is equally" necessary to a fair determination of *guilt* or innocence." For instance, in *Anderson v. State*, we held that the requirements of Rule 508 were met where the defendant made a drug sale to an undercover officer who was accompanied by an unnamed informant. We found the informant's testimony was "necessary to a fair determination of the issue of guilt, innocence" because he was an eyewitness to the sale. Our determination did not turn upon whether the informant's information was exculpatory; indeed, the unknown "informant could provide evidence corroborating or disputing the officer's testimony regarding [Anderson's] actions." The possibility that the unknown informant could have been an exculpatory witness for the defense related, not to the question of whether the informant had information necessary to a fair determination of guilt or innocence, but to the question of harm as a result of the error.

The trial court determined that the Task Force officers were not credible, and, because of their previous resistance to disclosing the informant's identity, it could be inferred that the informant had information necessary to Appellee's guilt or innocence.

The court of appeals disagreed and concluded that the *Bodin* standard was not met. But it appears that the court of appeals did not employ the proper standard of review and did not afford the appropriate amount of deference to the trial court's credibility determination. Although the court of appeals may disagree with the trial court, so long as any reasonable view of the record supports the trial court's ruling,10 it must be accepted that the Task Force officers' testimony was not credible, and consequently, that they knew who the informant was but were nevertheless untruthful to the trial court in the *in camera* hearing. The evidence before the trial court in this case was enough to meet the "plausible showing" required in *Bodin*, and the trial court was not unreasonable in finding that Appellee's burden was met in this case.

The Rule 508 burden is not a high one, and Appellee met his burden to make a plausible showing of how the informant's information *may be* important. When the trial court dismissed the case under Rule 508, the court had before it, not merely speculation, but evidence. The evidence included: 1) there was an informant who was involved in a controlled buy with Espino; 2) Espino was not charged as a result of the controlled buy; 3) Espino was shot and killed by Alejandro, his fellow drug dealer; 4) the State, through the Task Force, vehemently and vigorously fought to prevent disclosure of any information relating to the informant; 5) after the parties agreed to the *in camera* hearing, the Task Force suddenly forgot who the informant was and failed to document any information relating to the informant; 6) the Task Force's own policies and procedures require documentation; 7) nevertheless, during the *in camera* hearing, the Task Force officers all testified that the defense theory was possible that the informant had told Alejandro of the controlled buy and Alejandro used the robbery as an opportunity to kill Espino; and 8) after the hearing, an e-mail was disclosed showing that the Task Force's commander did, in fact, know who the informant was and that he would fight to prevent disclosure.

The trial court reasonably found that the Task Force officers' testimony—that they did not know who the informant was—was not credible. From the evidence that the Task Force officers were untruthful to the court about the informant, and the evidence that the Task Force officers had strongly resisted disclosure of information relating to the informant, the trial court's conclusion that the informant had information affecting the capital murder case against Appellee was not unreasonable.

Such a conclusion is not arbitrary or completely without reference to guiding rules and principles. In civil cases, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. A similar presumption arises when a party controlling missing evidence cannot explain its failure to produce it.
Thus, there was a plausible showing that the informant *may* have had information necessary to a fair determination of Appellee's guilt or innocence. The burden was met, and the trial court did not abuse its discretion in dismissing the case under Rule 508.

In its consideration of the evidence that was before the trial court, the court of appeals failed to give deference to the trial court's credibility determination of the Task Force officers and failed to consider the consequent determination that their untruthfulness, in combination with their previous resistance to disclosure, made for a plausible showing that the informant may have had necessary information. We cannot say that the trial court's finding—that a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence—

fell outside the zone of reasonable disagreement. The trial court did not abuse its discretion. Because the trial court so found, and the State through the Task Force officers elected not to disclose the informer's identity, on Appellee's motion, "the court must dismiss the charges to which the testimony would relate[.]" Tex. R. Evid. 508(c)(2)(A)(i). The trial court's dismissal was not erroneous, and we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

***State v. Lerma,* Tex. Crim. App., NO. PD-0075-19 , November 24, 2021**
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13. Jail

JAIL CASE. ADMINISTRATIVE REMEDIES REQUIRED?

Tacorey Gilliam, Texas prisoner # 02095241, filed a 42 U.S.C. § 1983 civil rights complaint alleging numerous claims, including deliberate indifference to his health and safety, negligence, cruel and unusual punishment, retaliation, failure to investigate, and excessive use of force. The district court granted the defendants' motion for summary judgment and dismissed the suit because Gilliam had failed to exhaust his available administrative remedies, and Gilliam appeals. Although Gilliam requests appointment of counsel, he has not made the required showing.
We review the district court's grant of summary judgment in this case de novo.

"[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The defendants submitted Gilliam's administrative remedy records and the jail's grievance plan, among other records, which support a determination that Gilliam did not proceed beyond the first step of the three-step administrative remedy procedure. Gilliam has neither produced competent summary judgment evidence showing that he proceeded to the second and third step of the grievance process nor challenged the veracity or reliability of these records.

Gilliam has therefore failed to show that there is a genuine issue of material fact as to whether he proceeded to step two and three of the grievance process. Gilliam's conclusory assertions that he "attempted to exhaust" his administrative remedies, that he was unaware prefiling exhaustion was mandatory, and that there was a lack of grievance forms do not entitle him to relief.
The district court did not err by granting summary judgment.

***Gilliam v. Anderson Co. Sheriff Dept.*, No. 19-40834, 5th Cir., Oct. 18th, 2020.**

14. Legislative.

Statutes modified are partially identified. Readers are directed to the text of the Statute for the full extent of modifications.

Police officers removed from the temporary age limit waiver of Sect 143.083 of the Loc. Gov't Code.

Penal Code 49.09, Boating while intoxicated with child (under 15 yoa) present.

Pen. Code 46.03. Definition of school premises broadened for purposes of offense of carrying a weapon.

CCP 12.01 child endangerment limitations.

Transp Code 681.011 regarding disabled vet parking and handicapped parking.

Pen. Code 42.07 harassment by electronic means.

Pen. Code 21.08 indecent exposure, enhancement of subsequent offenses.

Pen. Code 28.03 penalty for interfering with public power supply.

Occ. Code 1702.333 volunteer security service (churches) taken out of regulation as security officers.

Pen Code 22.01 penalties for some family violence offenses.

CCP 12.01 tampering with evidence limitations.

Transp. Code 552.006 walking on roadway defense added.

CCP 59..01 is amended regarding reckless driving offenses.

Transp. Code 552.006, a defense is added to a walking on roadway offense.