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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
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JESSE ADRIAN MARTINEZ **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF ON APPELLANT'S
PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-17-00253-CR,
TRIAL COURT CAUSE NUMBER 20160D03012,
210th DISTRICT COURT OF EL PASO, TEXAS

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<u>The State does not request oral argument.</u>

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STATEMENT OF THE CASE

After the denial of his pretrial motion to suppress, (CR:119); (RR3:6, 77), Jesse Adrian Martinez, appellant, pursuant to a plea agreement with the State, pled guilty to murder, as a lesser-included offense of capital murder. (CR:127-37, 258-59).[1] The trial court accepted Martinez's plea of guilty and assessed punishment at 30 years' confinement. (CR:258-59).[2] Martinez timely appealed. (CR:262-63).

On October 31, 2019, in a published opinion, the Eighth Court of Appeals affirmed Martinez's conviction, holding, among other things, that the State had met its burden of proving that the nexus between any unlawful arrest and Martinez' second video-recorded statement was sufficiently attenuated so as to purge the taint of any prior illegality. *See Martinez v. State*, 589 S.W.3d 869, 889 (Tex.App.–El Paso 2019, pet. granted). This Court subsequently granted Martinez's petition for discretionary review (PDR) on one ground (ground four): "In affirming Petitioner's conviction, the Eighth Court erred when it misapplied the four-factor test in *Brown v. Illinois*, conceding that the arrest was unlawful

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[1] Throughout this brief, references to the record will be made as follows: references to the clerk's record will be made as "CR" and page number; references to the four-volume reporter's record will be made as "RR" and volume and page number; and references to exhibits will be made as either "SX" or "DX" and exhibit number.

[2] As part of the plea agreement, the second count of the indictment, charging Martinez with tampering with physical evidence, was dismissed pursuant to TEX. PENAL CODE § 12.45. (CR:9, 127-37, 260).

under Texas law but not unconstitutional under the Fourth Amendment and, therefore, was not flagrant. The Eighth Court's probable cause analysis was based on opinions, not facts, which is impermissible under *Torres v. State*."

STATEMENT OF FACTS

In his boilerplate "Motion to Suppress," Martinez globally asserted that "Defendant was detained, questions [sic], and later arrested without lawful warrant, probable cause or other lawful authority in violation of the rights of Defendant pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 19 of the [Texas] Constitution...." (CR:115). Martinez further asserted that "[a]ny statements from Defendant were obtained in violation of Article 38.22 of the Texas Code of Criminal Procedure and in violation of Defendant's rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 19 of the [Texas] Constitution...." (CR:115).

Before the start of evidence at the first hearing on Martinez' suppression motion, when the trial court asked defense counsel about the "...nature of the motion..." and the evidence sought to be suppressed, defense counsel narrowed the issue to the legality of Martinez' statement in light of his alleged invocation of the right to counsel. (RR2:4-6). Defense counsel did not, at that time, contend that Martinez was unlawfully arrested or that Martinez' statement had been obtained as

fruit of an unlawful arrest. *See generally* (RR2:4-6).[3]

At this first hearing on Martinez' suppression motion, held on December 15, 2016, Detective Michael Lara testified that he and Det. Rex Parsons of the El Paso Police Department first met with Martinez in a Crimes Against Persons (CAP) video-recording-equipped interview room at approximately 1:16 a.m. on April 15, 2016, for questioning in the disappearance and murder of Tristan Mina. (RR2:9-12, 18, 20, 28-30).[4] Det. Lara related that Martinez, who had been accompanied by his mother, had been waiting in a family waiting room since approximately 12:30 a.m. (RR2:10, 29-30). Once in the interview room, Det. Lara informed Martinez that they were investigating a missing person and administered *Miranda*[5] warnings to him. (RR2:12, 32); (SX1).[6] When Martinez indicated his

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[3] The prosecutor advised the trial court that it had secured the attendance of 12 witnesses for the suppression hearing but that, based on defense counsel's representation that he was "...only bringing up the statement," the prosecutor would be releasing 10 of those 12 witnesses. (RR2:6-7).

[4] Det. Lara testified that he had been an officer for 14 years and had been assigned to the CAP unit for 5 years. (RR2:9). Det. Parsons testified that he had been an officer for approximately 10 years and had been assigned to the CAP unit for about 10 months. (RR2:53).

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[6] Near the beginning of this first video-recorded interview, Det. Lara informed Martinez that they were investigating a missing-person case and that patrol had been dispatched to a location on the west side of town on April 9, 2016, where they found property and blood, which discovery was deemed suspicious. (SX1 at 1:14:25). Det. Lara then informed Martinez that Mina had been entered into the system as a missing person. *See id*.

understanding of his rights by then invoking his right to counsel, the detectives immediately terminated that first, approximately three-minute, video-recorded interview. (RR2:12-13, 19, 32-33); (SX1). Det. Lara indicated that after that first interview was terminated, the detectives advised Martinez that he was under arrest for murder, handcuffed him, and placed him in a holding cell. (RR2:13-15, 33-35).

Det. Lara related that no officer spoke to, or questioned, Martinez until Martinez, approximately 15 minutes later, "flagged" Det. Lara down, telling him through an opening in the holding-cell door that he wanted to talk to the detectives and give a statement. (RR2:14-16, 19, 35-38); *see also* (RR3:16-18, 23-24); (SX2 transcript at 2-3).[7] In response to Martinez's request to talk to detectives, Det. Lara replied that he would have to "reread [to Martinez] his Miranda warnings." (RR2:16); *see also* (RR2:38); (RR3:17-18, 26-27). Det. Lara testified that after preparing the video-recording equipment for a second recording and escorting Martinez back into the interview room, he re-*Mirandized* Martinez, who indicated

[7] At the second hearing on Martinez' suppression motion, Det. Lara estimated that approximately 10 to 15 minutes had passed from the time Martinez was placed in a holding cell until the time he flagged Det. Lara down. (RR3:16, 22, 32, 43). The second video-recorded statement reflects that the first interview had ended at 1:19 a.m. and that Martinez had flagged Det. Lara down at approximately 1:33 a.m., which would have been 14 minutes. (SX1, 2 transcript at 2).

that he understood his rights, and that Martinez then agreed to provide a statement to the detectives. (RR2:16-17); (RR3:18-19).[8]

Det. Lara testified that at no point during the second, approximately hour-long, video-recorded interview did Martinez request an attorney or ask to terminate the interview; that no officers, including the detectives, coerced or threatened Martinez or promised him anything in exchange for his waiver of rights and his second video-recorded statement; and that Martinez did not appear intoxicated and was not denied any basic necessities, such as food or restroom breaks. (RR2:18-20); *see also* (RR3:21-23). The video recordings of Martinez's first and second interviews, and a transcription of the second interview, were admitted into evidence at the first suppression hearing. (RR2:20-22); (SX1, 2).[9]

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[8] In this second video-recorded statement, which commenced at 1:46 a.m., Det. Lara confirmed with Martinez that: (1) he (Martinez) had previously received his *Miranda* warnings when his first video-recorded interview began at 1:16 a.m.; (2) the detectives had terminated the interview at 1:19 a.m., after Martinez had invoked one of his rights; and (3) he (Martinez) had "flagged" Det. Lara down, telling him that he wished to give a statement. (SX2 transcript at 2-3). Det. Lara then re-*Mirandized* Martinez, who indicated that he understood his rights and wished to continue providing the detectives with a statement. (SX2 transcript at 3-4).

[9] In his second video-recorded statement, Martinez told detectives that he had arranged a meeting with Mina to buy cocaine because neither co-defendants Samuel Rico nor Jose Andrade knew him. (SX2 transcript at 6, 9-12). Abner Robles, who had been with them before they left for the meeting with Mina, did not accompany them. (SX2 transcript at 6, 8). At Mina's house, Mina sat in Rico's car, drinking with them, until Mina's "neighbor" arrived with cocaine. (SX2 transcript at 6, 11-16). After using all that cocaine, they had Mina's supplier return. (SX2 transcript at 6, 18). While Mina was in his supplier's car buying more cocaine, Martinez and his co-defendants conspired to assault Mina and rob him of drugs and money. (SX2 transcript at 22-24, 53-57). After they drove down the block, Martinez asked Mina for a loan to see if Mina had

On cross-examination at the suppression hearing, Det. Lara testified that although they had not yet located Mina's body at the time of Martinez' second interview, the detectives had already obtained a statement from Rico indicating that Mina was deceased. (RR2:28-29). Det. Lara also testified that there had been no outstanding arrest warrants, including for the instant offense, for Martinez at the time he (Martinez) arrived at the police station. (RR2:30-31, 36). When asked about the detectives' authority to hold Martinez after terminating the first interview, Det. Lara replied, "Chapter 14, arrest without warrant" and, "We had probable cause based off [Rico's] statement that a felony had occurred." (RR2:33-34). Det. Lara answered affirmatively to defense counsel's question that "...all

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money, but Mina stated that he had left his wallet at home. (SX2 transcript at 19, 22-23, 25-27). Martinez initially claimed that when Andrade and Mina got out of the car, he told Rico to forget about the robbery because Mina did not have money, but that when he got out after hearing a thud and the sound of breaking glass, he saw Andrade beating a seriously injured Mina, got back into the passenger seat without touching Mina, and listened to what sounded like Mina, whose voice he could hear, being dumped in the trunk. (SX2 transcript at 6, 19-22, 26-28, 31, 33, 53).

Martinez later changed his story by telling detectives that he told Andrade to just punch Mina when Andrade said he was going to hit Mina with something or stab him and that he (Martinez) returned to the car after checking Mina's pulse and feeling a "beat." (SX2 transcript at 28-30, 52-56). Martinez volunteered that Andrade must have used a baseball bat in the car floorboard, but denied seeing that. (SX2 transcript at 29-30). Martinez stated that when Rico and Andrade got back into the car, he asked to be taken home, but that he first changed his clothes at Robles's house. (SX transcript at 20, 22, 31-32, 47). A day or so later, Martinez and Robles, avoiding the trunk of Rico's car, helped Rico remove plastic from his wheels; he, Robles, and Andrade burned something that looked like clothes; and "they" told Martinez about how "they" kept beating Mina in the trunk to kill him after they had dropped Martinez off. (SX2 transcript at 36-45). Martinez related that Andrade told Robles that "[t]hey f***ed up." (SX2 transcript at 45). Martinez told detectives that his co-defendants might have burned Mina's body and had told him (Martinez) that they had buried Mina in the desert. (SX2 transcript at 57-58).

you had was a statement of Mr. Rico, which we don't have in front of us?" (RR2:34). Det. Lara testified that they had planned on securing an arrest warrant and agreed with defense counsel's assertion that they had had time to obtain one because Martinez was "...in the holding cell not going anywhere." (RR2:40-41).

On re-direct, Det. Lara agreed that his conclusion that Martinez was one of the parties responsible for Mina's death was based on the investigation that he and other officers had conducted. (RR2:38-39). Det. Lara explained that he had been concerned about releasing Martinez because the investigation was still ongoing and because Martinez might flee or destroy evidence, since Det. Lara's investigation had revealed that Martinez had already participated in the destruction of evidence. (RR2:39, 41, 49-50). And while Det. Lara, on re-cross, agreed with defense counsel's assertion that Martinez was "...not held or charged..." for his participation in that destruction, he agreed with defense counsel that his investigation had nevertheless revealed that "...all of the individuals in this matter had participated in the destruction of evidence, including the person you described as Abner [(Robles)], who was not involved in the murder itself, but involved in stuff afterwards...." (RR2:50-51).

When the trial court, in its own examination, asked Det. Lara whether the detectives, at the time of Martinez' second interview, had already obtained

statements from participants other than Rico, Det. Lara testified that Robles had provided the detectives with a statement, including details about "...subsequent events after the murder took place that he [(Robles)] joined." (RR2:41-42). Det. Lara further explained that Robles had told detectives that he had witnessed all three co-defendants leave together and that on the day after the murder, one of Martinez's co-defendants (Andrade) admitted to him that he had been involved in Mina's disappearance and murder:

> We had met with [Robles] prior to meeting with the defendant. And he advised that he met with the party–all codefendants [(Rico, Andrade, and Martinez)] prior to them leaving–all of them leaving. He stayed behind. [Robles] stayed behind and then he did admit that maybe the day after the incident took place, that one of the co-defendants had admitted to him how he was involved in this disappearance and homicide.

(RR2:41-43). Det. Lara testified that he did not know the precise admission co-defendant Andrade had made to Robles because Det. Parsons had taken Robles' statement, but that Det. Parsons had provided him with "...bits and pieces of information...." (RR2:43-44).

When the trial court questioned Det. Lara about Martinez's initial request for an attorney, Det. Lara testified that he had fully intended to honor Martinez's wishes regarding counsel, but there had not been enough time to afford Martinez

the opportunity to obtain counsel before Martinez reinitiated contact with the detectives and asked to waive his rights and provide a statement. (RR2:44-46).

When the trial court then asked Det. Lara for the details of what Martinez told the detectives regarding his role in Mina's murder, Det. Lara explained that Martinez had essentially told them that: (1) he had arranged the meeting with Mina so that he and his co-defendants, who had all gathered and been using cocaine, could "...score some more cocaine;" (2) he and his co-defendants had conspired to assault Mina to rob him of the drugs and money he carried on his person; (3) he stepped out of their vehicle when he heard two "thuds," one of which was when his co-defendants struck Mina and the other of which was when his co-defendants dumped Mina into the trunk; (4) he allegedly "freaked out" when he saw that Mina was unconscious, getting back into their car and sitting in shock; and (5) he allegedly told his co-defendants he wanted "...no part of it" as they drove off. (RR2:46-48). Det. Lara also recalled that Martinez had mentioned that Robles had been with them before they left to meet Mina, but that he stayed behind when they left. (RR2:47).

The following exchange then occurred:

> [Court]: Okay. And the statement that was provided by [Rico], one of the other codefendants that you said you were in possession of or the investigating agents were in possession of and had

> already given that formed the basis for this defendant's arrest or the probable cause to arrest this defendant, did that statement provided by that codefendant implicate this defendant?
>
> [Det. Lara]: It did in almost the same fashion that he told us in his statement.
>
> [Court]: Did it corroborate this defendant's statement?
>
> [Det. Lara]: Yes, sir.
>
> [Court]: And based upon that, the codefendant's statement, you went ahead and placed him under arrest even–I mean, without a warrant?
>
> [Det. Lara]: Yes, Your Honor.

(RR2:48-49). Det. Lara later agreed with the trial court that Martinez had been arrested based on the statements the detectives had already obtained from others. (RR2:51).

At this first suppression hearing, Det. Parsons testified in much the same fashion as Det. Lara about the circumstances in which they met with, and then interviewed, Martinez, including that Martinez reinitiated contact with Det. Lara in order to give a statement. *See generally* (RR2:53-65, 68, 73, 76-77). Det. Parsons also testified that Martinez had accompanied plain-clothes officers in an unmarked patrol car to the police station for questioning. (RR2:60-62). Det. Parsons further testified that after Martinez was initially placed in a holding cell, he (Det. Parsons) returned to his desk and, believing they had probable cause, began preparing a complaint affidavit against Martinez. (RR2:57, 67). Det. Parsons estimated that approximately 14 to 15 minutes had passed from the time

Martinez was placed in the holding cell until the time he flagged Det. Lara down. (RR2:57).

On cross-examination, Det. Parsons testified that although they had not yet located Mina's body at the time of Martinez' second interview, the detectives knew, from interviewing another witness, that Mina was dead and the general location of where his body might be found. (RR2:62-63). When asked about the detectives' authority to arrest Martinez without a warrant after the first interview, Det. Parsons explained that they had already interviewed a couple of witnesses and believed that they had developed sufficient probable cause to believe that Martinez had been involved in Mina's murder. (RR2:65-67). Det. Parsons agreed with defense counsel's assertions that he had the authority to conduct a warrantless arrest when an offense occurred in his presence, but that because no offense had occurred in his presence, he had to have probable cause to arrest a suspect. (RR2:66-67).

When the trial court, on its own examination, asked Det. Parsons about whether the detectives had obtained statements from witnesses to whom Martinez's co-defendants had made admissions, Det. Parsons testified that "...certain admissions...were made by a codefendant and a witness" and agreed with the trial court that those admissions indicated that "...this defendant

[(Martinez)] was present." (RR2:73-74). The trial court asked Det. Parsons what admissions Martinez made to that same witness, who was identified as Robles, about the crime, and Det. Parsons stated that Martinez had admitted to Robles that he had "...set up the deal." (RR2:74-75). When the trial court made clear that it was only asking about what Det. Parsons had known from Robles' statement regarding Martinez's admissions regarding the crime, and not what Det. Parsons later learned from Martinez's own statement, Det. Parsons, after reviewing Robles' statement, testified that Robles "...knew that they were going to go somewhere to get more cocaine." (RR2:74-75).

The following exchange then occurred:

[Court]:	...Now, let me ask you this question and see if you agree with me. And you understand that based upon your experience, training, your knowledge, as a result of that, that statements or admissions that are made by codefendants or parties to a crime, whether it's one statement that–one codefendant implicating another codefendant as a result of a statement that he makes and they're hearsay, but that's sufficient to establish probable cause to effect an arrest without a warrant; do you agree with that?
[Det. Parsons]:	Yes.
[Court]:	And at the time that the defendant–this defendant was arrested, you had those type of statements before you as a result of the investigation?
[Det. Parsons]:	Yes, Your Honor.
[Court]:	More specifically, I think codefendant, Mr. Rico, had already implicated this defendant.

[Det. Parsons]:	Yes, Your Honor.
[Court]:	Prior to questioning of this defendant?
[Det. Parsons]:	Yes.
[Court]:	And that was what basically formed the basis for this defendant's arrest plus [Robles'] statements concerning the statements that were made by the codefendants in his presence?
[Det. Parsons]:	Yes. (RR2:75).

At the conclusion of this first hearing on Martinez' suppression motion, the State cited to the trial court *Edwards v. Arizona*[10] for the proposition that Martinez's waiver of rights had been voluntary because he had reinitiated contact with the detectives after his alleged invocation of the right to counsel. (RR2:77). And for the trial court's consideration, Martinez cited *Minnick v. Mississippi*[11] and *Hughen v. State*,[12] which he believed "...speak directly to the issue at hand...." (RR2:78-79). Martinez did not at that time specifically assert or argue that his arrest was unlawful under either Chapter 14 of the Texas Code of Criminal Procedure or the Fourth Amendment, and he further did not cite to any fruit-of-the-poisonous-tree jurisprudence or article 38.23 of the Code of Criminal

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[10] *Edwards v. Arizona*, 451 U.S. 477 (1981).

[11] *Minnick v. Mississippi*, 498 U.S. 146 (1990).

[12] *Hughen v. State*, 297 S.W.3d 330 (Tex.Crim.App. 2009), *cert. denied*, 560 U.S. 911 (2010).

Procedure to support the argument that his statement should be suppressed as fruit of an unlawful arrest. *See generally* (RR2:78-80).

When the trial court, at the beginning of the second hearing held on Martinez' suppression motion on June 15, 2017, sought clarification from defense counsel as to whether "...there's a motion to suppress that he was detained without a lawful warrant or probable cause" and whether Martinez was challenging the arrest as unlawful, defense counsel simply answered, "yes." (RR3:5-6). The trial court stated that it was denying any such portion of the suppression motion at that time and was proceeding only on "...the invocation of the rights," to which defense counsel indicated his understanding of the trial court's ruling. (RR3:6).

Det. Lara again testified that at no point during the second interview did Martinez request the presence of an attorney or ask to terminate the interview, even when he was specifically advised of his right to do so. (RR3:18-20). On cross-examination, Det. Lara repeatedly denied defense counsel's suggestion that he told Martinez that "...we can't talk to you unless you waive your rights," explaining that he had stated "...something to the effect, I can't talk to you." (RR3:28-29). Det. Lara denied that "...handcuffing and announcing a charge and putting someone in a holding cell..." was an "investigative tool[]" to coerce or pressure a defendant into providing a statement. (RR3:39). And when asked by

the trial court why Martinez had not been taken to a magistrate at the time his first interview was terminated, Det. Lara testified that they were working on the paperwork, such as the complaint affidavit, when Martinez flagged him down. (RR3:33-34, 36, 40); *see also* (RR3:43). Det. Lara testified that he had not been looking to obtain anything from Martinez until he (Martinez) reinitiated contact with him. (RR3:34-36).

Martinez testified at the suppression hearing that he was transported to the station in an unmarked police car, was not handcuffed, and was told that he was being brought to the station for questioning. (RR3:49-50). He further testified that when he initially invoked his right to counsel, he had really wanted an attorney and told the detectives that his mother was going to call an attorney for him. (RR3:51-52). Martinez claimed that, when later handcuffed, he told Det. Lara that he did not kill anyone and that Det. Lara replied, "...[w]ell, I can't talk to you unless you waive your rights." (RR3:53-54). Martinez acknowledged flagging down Det. Lara, but testified that he did so because he was scared about getting charged with murder and "...wanted to get the situation handled." (RR3:53-54). Martinez agreed with defense counsel that he did not want to give up his right to an attorney, but felt he had to because he was scared and that he did

not wait for his attorney because he "...wasn't thinking," was scared, and "...decided to talk in order to get it over with." (RR3:54-55).

On cross-examination, Martinez acknowledged that: (1) he had understood his rights; (2) he waived his rights, including the right to counsel, in the second video-recorded interview; (3) he reinitiated contact with the detectives; (4) unless being charged with murder could be considered a threat, which he did not know if that was a threat, the detectives did not threaten him; (5) the detectives never told him that he was going to be charged with murder if he did not give them a statement; (6) the detectives did not promise him anything in exchange for his statement and did not deny him restroom breaks, food, or water; (7) it was his idea and wish to speak with the detectives when he flagged them down; (8) he never invoked his right to counsel or requested the presence of an attorney during the second video-recorded interview, even though he understood that he had a right to have an attorney; and (9) he freely and voluntarily gave a true statement to police. (RR3:57-62); *see also* (RR3:65-66). Despite this testimony, Martinez agreed with defense counsel on re-direct that he only waived his right to counsel because he was afraid of being charged with murder and wanted everyone to know that he did not kill anyone. (RR3:62-65). On the trial court's examination, Martinez agreed

that he had understood his rights and that he decided to talk to police because he was going to be charged with murder. (RR3:65-66).

During argument, the State again cited *Edwards v. Arizona*, as well as *Cross v. State*,[13] for the proposition that "[o]nce a suspect reinitiates communications with the authorities concerning the investigation, he validly waives his Miranda rights." (RR3:67, 75). Defense counsel, again citing to *Minnick v. Mississippi* and *Hughen v. State*, characterized the issue before the trial court as "...ha[ving] to do with the invocation of the right to counsel." (RR3:68). To the extent defense counsel complained about Martinez's arrest at all or questioned whether the detectives had had probable cause to arrest Martinez at that time, he did so in the context of his argument that Martinez's waiver of rights was not voluntary under the Fifth Amendment, specifically, that "...the State cannot use any coercive methods to try and get my client or get a defendant to waive [his] right [to counsel] or to reinitiate" and that the only reason why Martinez waived his rights was because of the detectives' alleged "coercive methods." (RR3:69-73). Martinez did not specifically assert or argue that his arrest was unlawful under either Chapter 14 or the Fourth Amendment. *See generally* (RR3:68-73). Martinez did not at any time argue that his statement should be suppressed on the

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[13] *Cross v. State*, 144 S.W.3d 521 (Tex.Crim.App. 2004).

grounds that it was the fruit of an unlawful arrest, nor did he cite to any fruit-of-the-poisonous-tree jurisprudence or article 38.23 of the Code of Criminal Procedure as a basis for suppression. *See generally* (RR3:68-73).

The trial court denied Martinez' suppression motion, (CR:119); (RR3:77), determining that: Martinez understood his rights and initially invoked his right to counsel; Martinez reinitiated contact with the detectives; Martinez understood and knowingly and voluntarily waived his rights when giving his statement during the second video-recorded interview; Martinez' statement was freely, intelligently, and voluntarily made; and Martinez never thereafter invoked his right to counsel or to terminate the interview, despite knowing that he had been placed under arrest for murder. (RR3:75-77). The trial court expressly took into consideration Martinez's "...background, his maturity, his knowledge, his education, all that..." in determining that his waiver of rights had been voluntary. (RR3:73). The trial court also noted on the record that it did not believe that handcuffing and charging Martinez with murder like any other person accused of murder constituted coercive conduct or that the detectives had otherwise engaged in any kind of coercive conduct that would render Martinez' statement involuntary. (RR3:69-71, 73-74).

SUMMARY OF THE STATE'S ARGUMENTS

Summary of the State's reply to Martinez' sole (fourth) ground accepted for review: Martinez failed to sufficiently apprise the trial court as to whether he believed his arrest to be unlawful under Chapter 14 of the Code of Criminal Procedure or the Fourth Amendment and further failed to assert, much less argue, that his statement should have been suppressed as fruit of an unlawful arrest under the federal exclusionary rule or article 38.23 of the Code of Criminal Procedure. He thus failed to preserve for appellate review the complaint that his statement should have been suppressed as fruit of an unlawful arrest, and this Court should not reverse his conviction on the basis of an alleged error that was not preserved.

But even if he had preserved any such complaint for review, the Eighth Court correctly held that the fourth factor of the attenuation-of-taint analysis set out in *Brown v. Illinois*–the purpose and flagrancy of official misconduct–weighed in favor of attenuation under the facts of this case. Specifically, the Eighth Court did not, as Martinez contends, hold that a warrantless arrest that failed to meet the statutory requirements of Chapter 14 could never rise to the level of flagrant misconduct simply because it was supported by probable cause. Rather, the Eighth Court recognized that although an arrest that failed to comply with Chapter

14 was comparatively less-serious misconduct than one that failed to comply with the constitutional requirement of probable cause, it was misconduct nonetheless, but that when considered along with all of the other circumstances attendant to Martinez's arrest, any alleged misconduct in this case was not flagrant.

And what the detectives in this case had, at the time of Martinez's arrest, were concrete facts, not mere opinions, and the evidence in the record, and all the reasonable inferences drawn therefrom, reflects that the facts known to the detectives at the time of Martinez's arrest supported a finding that the detectives had probable cause to arrest Martinez for robbery, at the very least, but also for capital murder, such that the Eighth Court correctly determined that Martinez's arrest was supported by probable cause for purposes of its attenuation-of-taint analysis. The Eighth Court, not simply ending its analysis by determining only that Martinez's arrest was supported by probable cause, considered other evidence presented at the suppression hearing and correctly determined that the fourth *Brown* factor weighed in favor of attenuation because the record did not demonstrate that the detectives engaged in any purposeful or flagrant misconduct.

Moreover, to the extent that this Court granted review of the Eighth Court's analysis of the remaining *Brown* factors, which was not specifically challenged or argued in Martinez's petition for discretionary review, the Eighth Court correctly

held that the first and third *Brown* factors, the administration of *Miranda* warnings and the presence of intervening circumstances, respectively, weighed in favor of attenuation. Because the nexus between Martinez's alleged statutorily non-compliant warrantless arrest and his subsequent statement was sufficiently attenuated, so as to dissipate the taint of any prior illegality, the Eighth Court did not err in upholding the trial court's denial of Martinez' suppression motion.

STATE'S REPLIES TO APPELLANT'S GROUNDS PRESENTED

REPLY TO SOLE (FOURTH) GROUND: Because Martinez failed to preserve for appellate review his complaint that his statement should have been suppressed as fruit of an unlawful arrest, this Court should not reverse his conviction on the basis of an alleged error that was not preserved. But even if Martinez had preserved this complaint for review, the Eighth Court did not err in upholding the trial court's denial of his suppression motion because the nexus between his alleged statutorily non-compliant arrest and his subsequent statement was sufficiently attenuated, so as to dissipate the taint of any prior illegality.

UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

ARGUMENT AND AUTHORITIES

In his sole (fourth) ground accepted for review, Martinez asserts that the Eighth Court erred "...when it applied the four-factor test in *Brown v. Illinois*, conceding that the arrest was unlawful under Texas law but not unconstitutional under the Fourth Amendment and, therefore, was not flagrant." *See* (Appellant's PDR brief at 2).[14] Martinez further asserts that the Eighth Court's "...probable cause analysis was based on opinions, not facts, which is impermissible under *Torres v. State*." *See* (Appellant's PDR brief at 2).

[14] *See Brown v. Illinois*, 422 U.S. 590 (1975).

I. Martinez failed to preserve for appellate review his complaint that his statement should have been suppressed as fruit of an unlawful arrest.

Preservation of error is a systemic requirement on appeal. *See Darcy v. State*, 488 S.W.3d 325, 327 (Tex.Crim.App. 2016); *Ford v. State*, 305 S.W.3d 530, 532 (Tex.Crim.App. 2009). Regardless of whether the issue of error preservation is raised by either of the parties, if an issue has not been preserved for appeal, neither the court of appeals nor this Court should address the merits of that issue. *See Darcy*, 488 S.W.3d at 328; *Ford*, 305 S.W.3d at 532. Ordinarily, a court of appeals should review preservation of error on its own motion, but if it does not do so expressly, this Court can and should do so when confronted with a preservation question. *See Darcy*, 488 S.W.3d at 328; *Ford*, 305 S.W.3d at 532-33.[15]

In order to preserve an issue for appeal, a timely objection must be made that states the specific ground of objection, if the specific ground was not apparent

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[15] Additionally, this Court has held that when the State is the prevailing party in the trial court, as was the case here, it need not raise a particular argument in its reply brief on appeal as a predicate to later raising it in a discretionary-review context. *See McClintock v. State*, 444 S.W.3d 15, 20 (Tex.Crim.App. 2014). For this additional reason, the State may now raise the issue of error preservation, even if it did not do so in the appellate court below. *See id.*

Also, the State recognizes that if this Court should ultimately decide to affirm Martinez's conviction, there would be no need for this Court to address error preservation or to remand the case to the court of appeals to do so. *See Meadoux v. State*, 325 S.W.3d 189, 193 n.5 (Tex.Crim. App. 2010) (explaining that an appellate court should not reverse a conviction without addressing error preservation, but because the appellate court had affirmed the trial court's judgment and this Court was also affirming the judgment, it was not necessary for this Court to address error preservation or to remand the case to the court of appeals to do so), *cert. denied*, 563 U.S. 924 (2011).

from the context. *See Douds v. State*, 472 S.W.3d 670, 674 (Tex.Crim.App. 2015), *cert. denied*, 136 S.Ct. 1461 (2016); *see also* TEX. R. APP. P. 33.1(a)(1)(A). As this Court has observed, the purpose for requiring a timely specific objection is twofold: (1) it informs the judge of the basis of the objection and affords him an opportunity to rule on it, and (2) it affords opposing counsel an opportunity to respond to the complaint. *See Douds*, 472 S.W.3d at 674.

To avoid forfeiting a complaint for appellate review, a party must let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him. *See Vasquez v. State*, 483 S.W.3d 550, 554 (Tex.Crim.App. 2016). A general or imprecise objection will not preserve error for appeal unless the legal basis for the objection is obvious to the court and to opposing counsel. *See id.*; *see also Buchanan v. State*, 207 S.W.3d 772, 775 (Tex.Crim.App. 2006). In resolving issues of error preservation, this Court should not consider arguments in isolation, but should instead look to the context in which the complaints were made and the parties' shared understanding at that time. *See Douds*, 472 S.W.3d at 674; *Pena v. State*, 285 S.W.3d 459, 464 (Tex.Crim.App. 2009).

This Court has held that a complaint that could, in isolation, be read to express more than one legal argument will generally not preserve all potentially

relevant arguments for appeal. *See Resendez v. State*, 306 S.W.3d 308, 314 (Tex.Crim.App. 2009). Only when there are clear contextual clues indicating that the party was, in fact, making a particular argument will that argument be preserved. *See id*. And it is the appealing party who bears the burden of bringing forth a record showing that error was preserved. *See Dixon v. State*, 595 S.W.3d 216, 223 (Tex.Crim.App. 2020).

The record in this case reflects that Martinez failed to sufficiently apprise the trial court as to whether he believed his arrest to be unlawful under Chapter 14 of the Code of Criminal Procedure or the Fourth Amendment and further failed to assert, much less argue, that his statement should have been suppressed as fruit of an unlawful arrest under the federal exclusionary rule or article 38.23. Martinez's global assertions and mere citations to constitutional and statutory provisions in his written suppression motion and at the suppression hearings about an unlawful arrest unsupported by probable cause were not sufficiently specific to apprise the trial court or the State that he believed his arrest was statutorily non-compliant under Chapter 14 or that his statement should be suppressed as fruit of an unlawful arrest. *See Swain v. State*, 181 S.W.3d 359, 365 (Tex.Crim.App. 2005) (holding that where the appellant's arguments in his written suppression motion were global in nature and contained little more than citations to constitutional and

statutory provisions, and his only argument at the suppression hearing was that his statements were inadmissible because the police had unlawfully arrested him and failed to comply with the requirements of articles 38.22, 14.03, and 14.06, the appellant failed to preserve his appellate complaint that the police unlawfully questioned him after he asserted his right to counsel), *cert. denied*, 549 U.S. 861 (2006).

At the outset of the initial hearing on Martinez' suppression motion, defense counsel expressly narrowed the issue to the legality of Martinez' statement in light of his alleged invocation of his right to counsel, which representation the State relied upon in releasing 10 of its 12 anticipated witnesses, (RR2:4-7), and it is apparent from the record that that was in fact the focus of defense counsel's questioning and argument throughout the suppression hearings. At the conclusion of the hearings, defense counsel characterized the issue before the trial court as simply "...ha[ving] to do with the invocation of the right to counsel." (RR3:68). It was not until his direct appeal that Martinez argued for the first time that the trial court erred in failing to suppress his statement "...as fruit of an unlawful warrantless arrest." *See* (Appellant's direct-appeal brief at 18-25). And although Martinez briefly mentioned the Fourth Amendment and articles 14.01 through 14.04 in the applicable-law section of his direct-appeal brief, his analysis

addressed only whether the State satisfied the requirements of section 14.04. *See* (Appellant's direct-appeal brief at 20-23).[16]

Additionally, any isolated allusions or statements by Martinez regarding his arrest and lack of probable cause did not clearly raise the issues of whether his arrest was statutorily compliant or whether his statement should be suppressed as the fruit of an unlawful arrest under state or federal law. In this case, although defense counsel asked both Dets. Lara and Parsons about their authority to hold Martinez after terminating the first interview, (RR2:33-34, 65-67), and the trial court questioned both detectives about the facts upon which they relied as probable cause to conduct a warrantless arrest, (RR2:48-49, 51, 73-75), defense counsel, when citing authority to the trial court at the end of that first hearing, did not apprise the trial court as to whether he believed Martinez's arrest to be unlawful under Chapter 14 of the Code of Criminal Procedure or the Fourth Amendment, nor did he cite to any authority to apprise the trial court that he was seeking to suppress Martinez' statement as fruit of an unlawful arrest. *See generally* (RR2:78-80). To the extent defense counsel thereafter complained about Martinez's arrest or questioned whether the detectives had had probable

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[16] In his statement of the case in his direct-appeal brief, Martinez asserted, without citation to the record, that he had allegedly "...challenged the constitutionality of his warrantless arrest..." in the trial court. *See* (Appellant's direct-appeal brief at 1).

cause to arrest him, he did so in the context of arguing that Martinez's waiver of his right to counsel was not voluntary under the Fifth Amendment because the detectives used "coercive methods." (RR3:69-73).

Thus, any of these isolated statements, when considered in the proper context, went only to defense counsel's argument that Martinez's waiver of his right to counsel was not voluntary under the Fifth Amendment because the detectives allegedly used the arrest as a "coercive method" to induce Martinez to waive his Fifth Amendment rights, such that they do not serve as a basis upon which Martinez preserved his appellate complaint that his statement was the fruit of an unlawful arrest. *See Douds*, 472 S.W.3d at 674, 676-77 (holding that the appellant's arguments, which could be fairly characterized as presenting a challenge to the admissibility of blood evidence only on the basis of the officer's application of the mandatory-blood-draw statute to appellant's case, did not preserve for appellate review a complaint that the blood draw also violated the Fourth Amendment, and appellant's isolated statements globally asserting that a blood draw was conducted without a warrant was insufficient to apprise the trial court that it must also consider whether there were exigent circumstances to permit the warrantless search); *Resendez*, 306 S.W.3d at 315-17 (holding that where the words, "they did not *Mirandize* him on the tape," in isolation, could indicate that

the appellant was complaining that the police had failed to comply with the statutory requirement under article 38.22 that they capture the *Miranda* warnings on the electronic recording, but the record, when viewed in context, suggested that the appellant's reference to the videotape was most likely part of his argument that the police had violated his constitutional rights by failing to *Mirandize* him at any point during his custodial interrogation, and where nothing in the record indicated that he was specifically relying on that statutory requirement, the appellant failed to preserve his article 38.22 complaint for review); *Buchanan*, 207 S.W.3d at 777-78 (holding that where trial counsel's allusions to "consent" and "exigent circumstances" did not necessarily or exclusively refer to Chapter 14, so as to make it obvious that the appellant was raising that argument in addition to his constitutional claims, the appellant failed to preserve any complaint that his warrantless arrest did not comply with Chapter 14).

Moreover, while the trial court indicated in a brief discussion that it was denying any complaint by Martinez that his arrest had been unlawful, its request for clarification as to whether Martinez was actually challenging the legality of the arrest, (RR3:5-6), suggests that it had not been apparent to the trial court that Martinez had even raised that as an issue and further suggests that the trial court was not on notice that Martinez sought suppression of his statement as fruit of an

unlawful arrest. And the trial court's oral findings of fact focused solely on the voluntariness of Martinez' statement, which also suggests that the trial court was not aware of any complaint by Martinez that his statement was fruit of an unlawful arrest. *See Vasquez*, 483 S.W.3d at 555-57 (holding that the appellant failed to preserve his two-step-interrogation complaint for review where, among other things, the trial court's response to appellant's argument and its ruling on appellant's motions to suppress indicated that it did not understand the nature of appellant's complaint).

For all the foregoing reasons, Martinez failed to preserve for appellate review the complaint that his statement should have been suppressed as the fruit of an unlawful arrest. Thus, this Court should not reverse Martinez's conviction on the basis of an alleged error that was not preserved.[17] *See*, *e.g.*, *Vasquez*, 483 S.W.3d at 555-57; *Douds*, 472 S.W.3d at 674, 676-77; *Resendez*, 306 S.W.3d at 315-17; *Buchanan*, 207 S.W.3d at 777-78; *Swain*, 181 S.W.3d at 365.[18]

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[17] And while Martinez argued on direct appeal that Rico's statement could not support the detectives' probable-cause determination because, as an accomplice, he was not a credible witness, this argument was never presented to the trial court and was thus also not preserved for review.

[18] Although Martinez asserts in his PDR brief that the State expressly conceded in the Eighth Court that the arrest was unlawful under Chapter 14, *see* (Appellant's PDR brief at 7), the State, in its direct-appeal brief, simply stated that it did not appear that the arrest fell under one of the statutory exceptions for a warrantless arrest. *See* (State's appeal brief at 45-46). Given the current state of the record, because of Martinez's failure to properly challenge the legality of his

II. Because the nexus between Martinez's alleged statutorily non-compliant warrantless arrest and his subsequent statement was sufficiently attenuated, so as to dissipate the taint of any prior illegality, the Eighth Court did not err in upholding the trial court's denial of Martinez' suppression motion.

A. Standard of review

When reviewing a trial judge's ruling on a motion to suppress, the reviewing court views all of the evidence in the light most favorable to the ruling. *See Gonzalez v. State*, 369 S.W.3d 851, 854 (Tex.Crim.App. 2012). When supported by the record, a trial judge's determination of historical facts are afforded almost total deference. *See id*. Further, reviewing courts afford the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *See id*. Almost total deference is afforded to a trial judge's ruling on mixed questions of law and fact that depend upon an evaluation of credibility and demeanor. *See id*. But when mixed questions of law and fact do not depend on evaluation of credibility and demeanor, the reviewing court reviews the trial judge's ruling *de novo*. *See id*. All purely legal questions are reviewed *de novo*. *See id*. The trial court is the sole factfinder at a suppression hearing, and it may believe or disbelieve all or any part of a

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arrest in the trial court, the State, by responding to Martinez's attenuation-of-taint arguments, does not concede that the arrest was, in fact, non-compliant.

witness's testimony. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex.Crim.App. 2009), *citing State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000).

B. Applicable law

The "fruit of the poisonous tree" doctrine generally precludes the use of evidence, both direct and indirect, obtained following an illegal arrest. *See Monge v. State*, 276 S.W.3d 180, 184 (Tex.App.–Houston [14th Dist.] 2009) (hereinafter *Monge I*), *aff'd*, 315 S.W.3d 35 (Tex.Crim.App. 2010) (hereinafter *Monge II*); *see also Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Evidence that is sufficiently attenuated from the unlawful arrest is not considered to have been obtained therefrom. *See Monge I*, 276 S.W.3d at 184.[19] The State bears the burden of proving attenuation. *See id*.

This Court has adopted the attenuation-of-taint analysis set forth in *Brown v. Illinois* to be applied to violations of Chapter 14. *See Self v. State*, 709 S.W.2d 662, 665 (Tex.Crim.App. 1986); *see also Bell v. State*, 724 S.W.2d 780, 787-88 (Tex.Crim.App. 1986). Thus, in deciding whether a defendant's confession, which was given following an illegal arrest, was sufficiently attenuated as to

[19] Because Martinez did not, and has not, cited to article 38.23 as a basis for exclusion, such that he has not argued that article 38.23 affords him any greater protection than the federal exclusionary rule, any such complaints were also waived. *See Emack v. State*, 354 S.W.3d 828, 837 (Tex.App.–Austin 2011, no pet.); *see also* TEX. CRIM. PROC. CODE art. 38.23.

permit the use of the confession at trial, the reviewing court considers the following factors:

> (1) whether *Miranda* warnings were given;
> (2) the temporal proximity of the arrest and the confession;
> (3) the presence of intervening circumstances; and
> (4) the purpose and flagrancy of the official misconduct.

See Monge I, 276 S.W.3d at 184; *see also Brown*, 422 U.S. at 603-04. These four factors do not necessarily carry equal weight. *See Monge I*, 276 S.W.3d at 184.

C. The nexus between Martinez's alleged statutorily non-compliant warrantless arrest and his subsequent statement was sufficiently attenuated, so as to dissipate the taint of any prior illegality.

In the ground upon which this Court granted Martinez's petition for discretionary review, Martinez asserted that "[w]ithout conceding that any of the *Brown* factors weigh in favor of the State sufficient to attenuate the taint of an unlawful arrest, Petitioner submits that this Court should grant review based on the misapplication of the fourth *Brown* factor." *See* (Appellant's PDR at 20). Martinez's fourth ground for review in his petition focused exclusively on the fourth *Brown* factor, as did the entirety of his analysis, and he advanced no specific complaint or argument about the Eighth Court's analysis of the remaining *Brown* factors.

Martinez has nevertheless, in his PDR brief, expanded upon this Court's grant of discretionary review by now raising additional arguments not asserted or argued in his petition and in which he challenges the Eighth Court's analysis of the first and third *Brown* factors. *See* (Appellant's PDR brief at 21-26–where Martinez asserts that "[t]he Eighth Court's analysis of the remaining *Brown* factors is also problematic" and then complains about the Eighth Court's resolution of the first and third *Brown* factors). It does not appear that this Court granted review of these additional grounds, since they were not raised in Martinez's PDR, but the State, without conceding that those issues are properly before this Court, *see Martinez v. State*, 323 S.W.3d 493, 500 (Tex.Crim.App. 2010) (declining to address an issue raised by the appellant in his brief on petition for discretionary review, although the issue had been addressed by the court of appeals, where the appellant did not present that argument as a ground in his petition and this Court thus did not grant review of that issue), will address these additional grounds following its discussion of the ground upon which this Court did grant review.

1. The Eighth Court correctly held that the fourth *Brown* factor–the purpose and flagrancy of official misconduct–weighed in favor of attenuation.

Purpose and flagrancy of official misconduct "is one of the most important factors to be considered" in the attenuation-of-taint analysis. *See Monge II*, 315

S.W.3d at 42, *quoting Bell*, 724 S.W.2d at 789. When the official misconduct is flagrantly abusive, the standard for the State to prove attenuation is elevated to require the "clearest indications of attenuation." *See Monge II*, 315 S.W.3d at 42, *quoting Bell*, 724 S.W.2d at 789. Examples of such abusive conduct may include reliance on factors in making an arrest that were so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable; an arrest effectuated as a pretext for collateral objectives; or an arrest that was unnecessarily intrusive on personal privacy. *See Monge II*, 315 S.W.3d at 42. Similarly, the taint may not be attenuated if the accused was arrested with no apparent justification and with the sole intent to extract a confession by exploitation. *See id*. This Court has contrasted such circumstances with those situations in which probable cause exists and the mere failure to get an arrest warrant is comparatively less-serious misconduct. *See id*.

In his brief, Martinez asserts that by holding that those situations in which an officer possesses probable cause to arrest, but fails to satisfy an exception for a warrantless arrest under state law, is comparatively less-serious misconduct than when an officer conducts a warrantless arrest with no probable cause to do so, the Eighth Court somehow "...creat[ed] a per se rule that statutory non-compliance will never rise to the level of flagrant conduct." *See* (Appellant's PDR brief at 5-

9, 11, 36). Martinez appears to then argue that because the Eighth Court relied in part on this Court's decisions in *Maixner v. State*, 753 S.W.2d 151 (Tex.Crim.App. 1988), and *Self*, in holding that the failure to satisfy one of the statutory exceptions for a warrantless arrest under Chapter 14 was comparatively less-serious misconduct, this Court's holdings in *Maixner* and *Self* were inconsistent with *Brown v. Illinois*. *See* (Appellant's PDR brief at 9, 17-21). Martinez appears to suggest that this Court somehow held in *Maixner* and *Self* that a statutory violation of Chapter 14 can never support a determination of flagrant misconduct when he argues in his PDR brief that the outcomes in *Maixner* and *Self*, along with the Eighth Court's decision in this case, reduces the statutory exceptions for a warrantless arrest under Chapter 14 to "...meaningless chatter." *See* (Appellant's PDR brief at 6, 9, 17, 20). And after condemning the Eighth Court for "...creating a per se rule that statutory non-compliance will never rise to the level of flagrant conduct," *see* (Appellant's PDR brief at 36), which the Eighth Court did not actually do, Martinez appears to advocate his own *per se* rule that flagrancy should be presumed whenever there has been a warrantless arrest that does not comply with Chapter 14 and the circumstances show that the officers had enough time to get an arrest warrant. *See* (Appellant's PDR brief at 8-9, 13, 18).

At the outset, with respect to any argument by Martinez that flagrancy should be presumed whenever there has been a warrantless arrest that does not comply with Chapter 14, regardless of whether the arrest was supported by probable cause, this Court in *Bell* rejected the recognition of such a *per se* rule, explaining that the illegality alone did not decisively weigh against attenuation of the taint and that such illegality "...fell somewhere in between a technical violation and...flagrant conduct...," and this Court further recognized the presence of probable cause as a relevant factor in the attenuation-of-taint analysis. *See Bell*, 724 S.W.2d at 790.

And contrary to Martinez's assertions, the Eighth Court in this case, and this Court in both *Maixner* and *Self*, did not hold that a warrantless arrest that failed to meet the statutory requirements of Chapter 14 could never rise to the level of flagrant misconduct simply because it was supported by probable cause. In both *Maixner* and *Self*, this Court, recognizing that the officers had engaged in official misconduct by failing to comply with Chapter 14, considered the existence of probable cause (and thus the lack of a constitutional violation) as only one factor in all of the circumstances that demonstrated that the officers' misconduct was neither purposeful nor flagrant, including whether there existed credible evidence showing that the arrest had a quality of purposefulness, was violent, or was

designed to cause surprise, fright, and confusion. *See Maixner*, 753 S.W.2d at 156-57 (holding that while the conduct of the officers was not in accordance with state law, and should not be condoned, the conduct, under all of the circumstances, did not rise to purposeful and flagrant conduct where the arrest was warrantless but with probable cause (and was thus not unconstitutional), had no "quality of purposefulness," and was not an "expedition for evidence" admittedly undertaken "in the hope that something might turn up"), *quoting Brown*, 422 U.S. at 605; *Self*, 709 S.W.2d at 667-68 (same). These analyses were later reaffirmed in *Brick v. State*, where this Court explained that "...if the illegality, if any, rests alone upon the violation of the statute, this may well influence the court of appeals' assessment of the purposefulness and flagrancy of the police misconduct, and, all other factors weighing equally, could ultimately tip the balance." *See Brick v. State*, 738 S.W.2d 676, 681 (Tex.Crim.App. 1987).

In this case, the Eighth Court similarly recognized that although the failure to comply with Chapter 14 was comparatively less-serious misconduct than an arrest that failed to comply with the constitutional requirement of probable cause, it was misconduct nonetheless, but that when considered along with all of the other circumstances attendant to Martinez's arrest, which did not show flagrant or bad-faith conduct, the misconduct was not flagrant. *See Martinez*, 589 S.W.3d at

888-89. For the following reasons, the Eighth Court correctly held that the fourth *Brown* factor weighed in favor of attenuation.

a. The Eighth Court correctly determined that Martinez's arrest was supported by probable cause.

In his brief, Martinez has addressed the issue of probable cause as a distinct issue apart from his argument that the detectives engaged in purposeful and flagrant misconduct. *See* (Appellant's PDR brief at 8-21–where Martinez argues that his arrest was flagrant misconduct by the detectives, and at 27-35–where Martinez argues that his arrest was unsupported by probable cause). Although, as previously discussed above, the Eighth Court considered the existence of probable cause along with the other circumstances attendant to Martinez's arrest in determining whether any official misconduct was purposeful and flagrant, *see Martinez*, 589 S.W.3d at 888-89, the State will likewise address it separately for the sake of clarity.[20]

At the outset, Martinez did not raise in the Eighth Court one of the arguments he now raises in this Court, specifically, that Rico's statement could not

[20] In his PDR brief, Martinez complains that his arrest was unsupported by probable cause as required by the Fourth Amendment and that in the presence of such a constitutional violation, flagrancy should be presumed. As stated above, while Martinez briefly mentioned the Fourth Amendment in the applicable-law section of his brief on direct appeal, his analysis there focused only on whether his arrest satisfied the requirements of article 14.04 of the Code of Criminal Procedure and not whether his arrest was illegal under the Fourth Amendment. *See* (Appellant's direct-appeal brief at 20-23).

support a probable-cause determination because no one can figure out from the record what Rico told the detectives about Martinez and the offense they all committed together because his formal statement was not offered into evidence. *See* (Appellant's PDR brief at 4, 27-28, 30). Rather, Martinez's arguments on direct appeal appear to have been predicated on the reasonable inferences made by the parties and the trial court, as will be discussed below, about what Rico told the detectives about Martinez's involvement in Mina's murder. Specifically, Martinez argued that: (1) the detectives' probable-cause determination could not rest on Robles's or Rico's statements because Robles was not an eyewitness and "Rico is not a credible witness because he is both a participant in the alleged crime and has a vested interest in telling the police that someone else, namely [Martinez], contacted Mina and devised a plan to rob Mina;" and (2) "Rico's version of the events establish that [Martinez] did not participate in Mina's assault." *See* (Appellant's direct-appeal brief at 20-21). Martinez did not argue that Rico's statement could not support a probable-cause determination because no one could possibly know what Rico said about Martinez in his statement without the statement actually being offered into evidence.[21]

[21] Again, none of these arguments were raised in the trial court.

Probable cause to arrest exists where the police have reasonably trustworthy information, considered as a whole, sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense. *See Hughes v. State*, 24 S.W.3d 833, 838 (Tex.Crim.App.), *cert. denied*, 531 U.S. 980 (2000). Probable cause is a fluid concept that cannot be readily reduced to a neat set of legal rules. *See State v. Ford*, 537 S.W.3d 19, 23 (Tex.Crim.App. 2017). Although the concept evades precise definition, it involves a reasonable ground for belief of guilt that is particularized with respect to the person to be searched or seized. *See id*. Probable cause requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence. *See Hughes*, 24 S.W.3d at 838.

For probable-cause determinations, courts have held that an accomplice's statement against his penal interest is inherently credible and may be sufficient, in and of itself, to establish probable cause. *See Cornealius v. State*, 870 S.W.2d 169, 172 (Tex.App.–Houston [14th Dist.] 1994, *aff'd*, 900 S.W.2d 731 (Tex.Crim.App. 1995); *Chavez v. State*, No. 01-07-00563-CR, 2008 WL 5263404 at *2 (Tex.App.–Houston [1st Dist.], Dec. 18, 2008, no pet.) (mem. op.) (not designated for publication). "Any statement by a source which includes an

admission of wrongdoing gives some indication that the source is credible." *See Janecka v. State*, 739 S.W.2d 813, 824 (Tex.Crim.App. 1987).

The record reflects that before Martinez was arrested, the detectives, as part of their investigation, had already obtained statements from Rico and Robles. Det. Lara testified that, although they had yet to locate Mina's body, they had learned from Rico that Mina was dead. (RR2:28-29). Det. Parsons similarly testified that they knew, from interviewing another witness, that Mina was dead and the general location of where his body might be found. (RR2:62-63). While Rico's actual statement was not admitted into evidence, Det. Lara's testimony regarding the contents of said statement, when viewed in context, was such that the trial court could infer the facts from Rico's statement that incriminated Martinez. Specifically, when the trial court asked Det. Lara about what Martinez ultimately told the detectives regarding his role in Mina's murder, Det. Lara explained that, among other things, Martinez told them that he had arranged a meeting with Mina so that he and his co-defendants could buy more cocaine; that he and his co-defendants conspired to assault Mina to rob him of his drugs and money, and that Andrade and Rico carried out the planned assault and robbery. (RR2:46-48). Det. Lara almost immediately thereafter testified that Rico's statement had implicated

Martinez "...in almost the same fashion that he [(Martinez)] told us in his statement." (RR2:48-49).

The trial court could have made Det. Lara expressly state Rico's exact words about Martinez's role in Mina's murder, but the trial court could have reasonably inferred from Det. Lara's testimony how Rico's "almost the same" statement incriminated Martinez without making Det. Lara repeat himself. The record reflects that the trial court repeatedly ensured that the facts upon which the detectives relied in their probable-cause determination were based on the witness statements they had already obtained as part of their investigation, and not what they later learned from Martinez. (RR2:41-42, 48-49, 51, 73-75).

There was no dispute that Rico was an accomplice to the robbery and murder and Martinez's co-defendant, and even if Rico's statement had been riddled with attempts to minimize his own role, Rico's presence and participation with Martinez and Andrade during the robbery/murder rendered his statements against his own penal interest, upon which the detectives could rely in formulating probable cause. *See Cornealius*, 870 S.W.2d at 172 (holding that while the police had never dealt with the accomplice before and did not know of his credibility, the accomplice's statement that he was part of the criminal combination was sufficient to establish his credibility and trustworthiness); *White v. State*, 746 S.W.2d 775,

777 (Tex.App.–Dallas 1985, no pet.) (holding that by admitting that he was with the defendant during the robbery, the informant subjected himself to possible prosecution for aggravated robbery as a party, such that his declarations were against his own penal interest).[22]

Any statements by Robles, who by all accounts did not accompany Martinez, Rico, and Andrade and thus did not witness the robbery/murder, were still statements against his penal interest because Det. Lara's testimony that Robles had provided a statement that included details about "...subsequent events after the murder took place that he [(Robles)] joined" and that Det. Lara's investigation revealed that all of the involved individuals, including Robles, had participated in the destruction of evidence after the offense indicated that Robles had admitted to police that he helped Martinez and his accomplices destroy evidence, (RR2:39, 41-42, 49-51), which subjected him to possible prosecution for tampering with evidence. *See White*, 746 S.W.2d at 777; *see also* TEX. PENAL CODE §

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[22] To the extent Martinez urges the application of the accomplice-witness rule's corroboration requirement to probable-cause determinations, *see* (Appellant's PDR brief at 32-33), *citing* TEX. CRIM. PROC. CODE art. 38.14, and *Zamora v. State*, 411 S.W.3d 504, 514 (Tex.Crim.App. 2013), an argument not raised in the trial court, the U.S. Supreme Court has "...made clear that the kinds and degree of proof and the procedural requirements necessary for a valid conviction are not prerequisites to a valid arrest." *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *see also Gerstein v. Pugh*, 420 U.S. 103, 119-23 (1975); *Brinegar v. United States*, 338 U.S. 160, 172-73 (1949). By its very language, the accomplice-witness rule only applies to evidence relied upon in a criminal case to secure a defendant's "conviction." *See* TEX. CRIM. PROC. CODE art. 38.14.

37.09(d)(1).[23] Additionally, Det. Lara testified that he knew from Det. Parsons, who had taken Robles' statement and relayed information to him, that Robles had seen Martinez, Rico, and Andrade all leave together and that Andrade admitted to him (Robles) the following day "...how he was involved in this disappearance and homicide." (RR2:41-44). Det. Parsons similarly testified that Robles had told him that Martinez had admitted to setting up the cocaine deal and that he (Robles) knew that Martinez, Rico, and Andrade had left together that night to buy more cocaine. (RR2:73-75).[24] Any statements by Robles were also inherently credible and provided facts upon which the detectives could reasonably rely in formulating probable cause. *See Janecka*, 739 S.W.2d at 824-25; *Cornealius*, 870 S.W.2d at 172; *White*, 746 S.W.2d at 777-78.

In his brief, Martinez asserts that the Eighth Court's conclusion that his arrest was supported by probable cause runs afoul of this Court's decision in

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[23] Although Martinez asserts in his brief that Det Lara "...later recants and admits the obtained witness statements did not implicate [Martinez]," *see* (Appellant's PDR brief at 31), that assertion appears to be based on a muddled exchange between the trial court and Det. Lara, in which it appears that Det. Lara was attempting to explain that Robles had given a statement that did not implicate him (Robles) in the murder because he had not joined the others when they left. (RR2:41-42).

[24] Det. Parsons also testified that "...certain admissions...were made by a codefendant and a witness" that indicated that Martinez had been present during the offense. (RR2:74); *see also* (Appellant's PDR brief at 31-32-where Martinez acknowledges that the statements possessed by the detectives at the time of his arrest placed him at the scene during the offense).

Torres v. State because it was based on nothing more than opinions, rather than facts. *See* (Appellant's PDR brief at 6, 27, 33-34, 36), *citing Torres v. State*, 182 S.W.3d 899 (Tex.Crim.App. 2005). In *Torres*, this Court held that the investigating deputies' unexplained opinions, without any supporting facts, about whether the defendant was intoxicated did not give the arresting officer personal knowledge of, or reliable information about, facts or circumstances sufficient to justify the defendant's arrest. *See Torres*, 182 S.W.3d at 903.

But what the detectives in this case had were concrete facts, not opinions, and the evidence in this record, and all the reasonable inferences drawn therefrom, reflects that the facts known to the detectives at the time of Martinez's arrest were that: (1) Martinez set up the cocaine deal with Mina; (2) Martinez, Rico, and Andrade all left together to meet Mina, leaving Robles behind; (3) Martinez, Rico, and Andrade conspired to assault Mina to steal his money and drugs; (4) Andrade and Rico carried out the planned assault and robbery; (5) Mina ended up dead, and efforts were being made to find his corpse;[25] (6) Andrade, one of the two other individuals Martinez was with, admitted to Robles the following day that he

[25] As previously noted, Det. Lara informed Martinez that patrol had been dispatched to a location on the west side of town where they had found property and blood, which discovery was deemed suspicious, and that Mina was subsequently identified as a missing person. (SX1 at 1:14:25).

(Andrade) had been involved in Mina's murder; and (7) Martinez, Rico, Andrade, and Robles all participated in destroying evidence of the crime afterwards.[26] The record thus supports a finding that the detectives had probable cause to arrest Martinez for robbery, at the very least, but also for capital murder. *See*, *e.g.*, *Janecka*, 739 S.W.2d at 824-25; *Cornealius*, 870 S.W.2d at 172; *White*, 746 S.W.2d at 777; *Mayle v. State*, No. 14-97-687-CR, 1999 WL 130174 at *1-2, 6 (Tex.App.–Houston [14th Dist.], March 11, 1999, pet. ref'd) (not designated for publication) (holding that the arresting officer had sufficient probable cause to arrest defendant where he knew that the defendant had been implicated by a co-defendant's statement and a statement by a witness who had been present in the apartment when the murder occurred in the bedroom and who one of the co-defendants asked for help in removing blood stains covering the bedroom after the corpse had been removed).

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[26] In his brief, Martinez sets out a number of "facts" he believes shows that the detectives did not believe that they had probable cause to arrest Martinez. *See* (Appellant's PDR brief at 29-35). Martinez's "facts" are based primarily on his own speculation about the detectives' subjective intent, which is not only unsupported by the record, but is irrelevant to whether the objective facts demonstrated that the detectives had probable cause. *See Scott v. State*, 572 S.W.3d 755, 762 (Tex.App.–Houston [14th Dist.] 2019, no pet.) (holding that the test for probable cause is an objective one, unrelated to the subjective beliefs of the arresting officer); *see also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.").

And contrary to Martinez's assertions, his alleged lack of participation in Mina's assault did not diminish the detectives' probable-cause determination, *see* (Appellant's PDR brief at 28, 32), as Martinez could be charged as a party to capital murder under the theory of conspiracy-parties liability if the State could demonstrate at trial that Mina's beating death was in furtherance of the robbery and was one that should have been anticipated. *See Pollard v. State*, 392 S.W.3d 785, 801 (Tex.App.–Waco 2012, pet. ref'd) (holding that if the evidence at trial demonstrates that the defendant conspired with others to commit robbery and, during the robbery, one of the co-conspirators commits capital murder, the defendant can be held criminally responsible for capital murder if it was in furtherance of the conspiracy's unlawful purpose and should have been anticipated); *see also* TEX. PENAL CODE § 7.02(b).

For all the foregoing reasons, the Eighth Court correctly determined that Martinez's arrest was supported by probable cause for purposes of its attenuation-of-taint analysis.

b. The record does not reflect that the detectives engaged in any purposeful and flagrant misconduct.

As discussed above, the Eighth Court did not simply end its analysis with respect to the fourth *Brown* factor by determining that Martinez's arrest was

supported by probable cause. Rather, the Eighth Court turned its attention to the other evidence that was presented at the suppression hearing to determine whether the detectives' conduct had been flagrant. *See Martinez*, 589 S.W.3d at 888-89. And when viewed in the light most favorable to the trial court's ruling, the evidence at the suppression hearing does not reflect that the detectives engaged in any flagrant or abusive conduct. Specifically, the detectives gave Martinez a ride to the station, and he was not held in custody for an extraordinary or coercive length of time. The video recordings of the interviews reflect that the detectives were always civil, and Martinez acknowledged that he was not denied any basic necessities. The record does not reflect that the detectives ignored the warrant requirement, as Det. Parsons testified that he had already started the process of obtaining an arrest warrant before Martinez reinitiated contact with them. The detectives believed that they had the authority to arrest Martinez under Chapter 14 because they had sufficient probable cause at the time of the arrest.

In his brief, Martinez's argument that the detectives' conduct was purposeful and flagrant rests upon a number of assertions that are either wholly unsupported by the record or were based solely on Martinez's testimony, which the trial court was free to disbelieve and impliedly did so by denying Martinez' suppression motion. *See*, *e.g.*, *Amador*, 275 S.W.3d at 878. Specifically, there

was no evidence in the record supporting Martinez's assertions that he was asleep at the time four officers arrived at his home at 12:30 a.m.; that he was not told why the officers were there; that Det. Lara arrested Martinez knowing that he did not physically hurt anyone;[27] that the detectives arrested Martinez in retaliation for invoking the right to counsel; that the detectives arrested Martinez to extract a confession; that the "blatant purpose" of the arrest was investigatory; that Martinez was confused; and that the detectives "...knew that if they scared [Martinez] enough, [Martinez] would confess." *See* (Appellant's PDR brief at 10-11). And the trial court, as the sole factfinder, was free to disbelieve, in whole or in part, any testimony by Martinez about the reasons why he volunteered to provide the detectives with a statement. *See*, *e.g.*, *Amador*, 275 S.W.3d at 878.

Martinez also asserts that Det. Lara's testimony that the investigation was still ongoing at the time of the arrest, that Martinez was not free to leave, and that "...when initial interviews have been terminated, that same individual will often 're-engage' if the police wait it out" demonstrated that the detectives "...knew that

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[27] In support of his assertion that Det. Lara knew that Martinez had not hurt anyone, Martinez informs this Court of certain statements that Rico allegedly made in his statement to police. *See* (Appellant's PDR brief at 13 n.4). Unlike the parts of Rico's statement that Det. Lara specifically referred to as implicating Martinez in much the same fashion as how Martinez later implicated himself, from which the trial court and this Court could infer that what Rico stated was pretty much what Martinez later stated, there is no evidence in the record from which the trial court or this Court could infer the statements to which Martinez refers in his brief.

if they scared [Martinez] enough, [Martinez] would confess" and that the detectives' conduct was a "clear attempt to get incriminating information from [Martinez]." *See* (Appellant's PDR brief at 5-6, 11, 13, 30). Det. Lara's testimony that Martinez was not free to leave and that the investigation was still ongoing meant exactly that, and nothing in that testimony necessarily meant, or even suggested, that Det. Lara had expected any further participation or cooperation from Martinez as the investigation continued. And Det. Lara's observation that suspects have reinitiated communication with him in the past did not demonstrate that it was his intent to "wait it out" in the hopes that Martinez confessed, particularly where Det. Lara expressly stated the opposite: "Your Honor, once he waived [sic] any of those rights, the interview terminated and I wasn't trying to seek anything else further from the defendant at that time. He reinitiated. And I've had experiences where that's happened to me, where an interview has been terminated and I cease the interview and then they reengage." (RR3:34-35).[28]

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[28] Martinez also argues that his "...arrest was unnecessarily intrusive..." based on Det. Lara's alleged testimony that "there's always time" to get a warrant. *See* (Appellant's PDR brief at 4, 15). While Det. Lara might have generally agreed that there is always time to get a warrant, he later explained that, in this case, they were still working on the complaint affidavit when Martinez flagged him down. (RR3:33-34, 36, 40, 43). In any case, holding that a statutorily non-compliant arrest is flagrant whenever there is time to get a warrant would essentially be advocating for the kind of *per se* rule this Court has already rejected in *Bell*. *See Bell*, 724 S.W.2d at 790.

Additionally, as further support for his assertion that the detectives could have immediately obtained an arrest warrant, Martinez relies on facts not in the record regarding the

There is simply nothing in the record to indicate that the detectives would have spoken to Martinez again, but for the fact that he requested to speak with them and provide a statement. And by expressly noting on the record that it did not believe handcuffing and charging Martinez with murder like any other person accused of murder constituted coercive conduct or that the detectives had engaged in any kind of coercive conduct that would render Martinez' statement involuntary, (RR3:69-71, 73-74), it appears that the trial court credited Det. Lara's testimony that the detectives did not arrest Martinez for the purpose of extracting a confession from him, and the Eighth Court correctly deferred to any such record-supported findings. *See*, *e.g.*, *Gonzalez*, 369 S.W.3d at 854.

But in response to the Eighth Court's discussion of the evidence supporting the conclusion that the detectives did not engage in flagrant and abusive conduct, Martinez criticizes the Eighth Court for "...miss[ing] the mark when it misconstrues *coercion* with regard to voluntariness and *purposefulness* with

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process for obtaining an arrest warrant in El Paso County. *See* (Appellant's PDR brief at 8 n.2). A trial court's ruling must be reviewed in light of the arguments, information, and evidence that was available to the trial court at the time it ruled. *See Dragoo v. State*, 96 S.W.3d 308, 313 (Tex.Crim.App. 2003); *see also Whitehead v. State*, 130 S.W.3d 866, 872 (Tex.Crim.App. 2004) ("[A]n appellate court's review of the record itself is generally limited to the evidence before the trial court at the time of the trial court's ruling."). In addition to not reversing the trial court's ruling on the basis of arguments Martinez did not present in the trial court, as discussed above, this Court should also not reverse the trial court's ruling on the basis of this evidence, which was not presented to the trial court at the time of its ruling.

regard to attenuation." *See* (Appellant's PDR brief at 16) (emphasis in original), *citing Martinez*, 589 S.W.3d at 876. The complained-of analysis by the Eighth Court, however, appears to be in response to Martinez's argument in his direct-appeal brief that the detectives' allegedly coercive tactics demonstrated purposefulness and flagrancy. *See* (Appellant's direct-appeal brief at 25–where Martinez argued that the "...police coercion tactics..." allegedly used by Det. Lara were "...oppressive and flagrant").[29] The Eighth Court was not incorrect in addressing these circumstances surrounding the arrest, as this Court had previously done in *Monge II* where the defendant alleged that police misconduct was demonstrated by the fact that he was in the control of law enforcement for over 22 hours and received only one meal during that period. *See Monge II*, 315 S.W.3d at 42-43.

Martinez further seeks to distinguish cases such as *Monge II* and *Self* by arguing that those cases did not address a situation where a suspect had invoked his right to counsel. *See* (Appellant's PDR brief at 11, 15, 19-21). This attempted distinction ignores the fact that Martinez did not simply thereafter acquiesce to police interrogation after his "invocation." The detectives were effectively done

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[29] Martinez again complains about "coercive" tactics in his PDR brief while complaining about the "...circumstances leading up to [his] arrest." *See* (Appellant's PDR brief at 14).

with Martinez and had already returned to their investigation and the process of preparing a complaint affidavit with the information they already had in order to take Martinez before a magistrate when Martinez himself interrupted that process by volunteering to give a statement.

For all the foregoing reasons, the Eighth Court correctly held that the fourth *Brown* factor weighed in favor of attenuation. *See Monge II*, 315 S.W.3d at 42-43 (holding that the fourth factor weighed in favor of the State in the absence of flagrantly abusive police conduct and where the detectives had probable cause to arrest the appellant; the detective in charge failed to obtain an arrest warrant based on a misunderstanding of article 14.03(a)(6); the appellant was not held for an extraordinary or coercive length of time; and the detectives were civil and non-coercive while the appellant was not in custody and gave him a ride to the station, provided him a blanket when he got cold, took smoke breaks with him, and provided him lunch); *Crutsinger v. State*, 206 S.W.3d 607, 611 (Tex.Crim.App. 2006) (holding the official misconduct by the police to be neither purposeful nor flagrant where the police "...arguably had enough information to get a warrant based on probable cause"), *cert. denied*, 546 U.S. 836 (2006); *Self*, 709 S.W.2d at 667-68.

2. The Eighth Court correctly held that the first *Brown* factor–the administration of *Miranda* warnings, weighed in favor of attenuation.

Miranda warnings are an important and necessary factor in determining whether the confession is obtained by exploitation of an illegal arrest. *See Monge II*, 315 S.W.3d at 40, *citing Brown*, 422 U.S. at 603. But the fact that a *Miranda* warning has been given is not alone sufficient to break the causal connection between an illegal arrest and the confession. *See Monge II*, 315 S.W.3d at 40.

In this case, *Miranda* warnings were given twice–at the beginning of both video-recorded interviews. Acknowledging that he was repeatedly warned, Martinez nevertheless argues that this factor weighs in his favor because he did not expressly state that he was waiving his rights. *See* (Appellant's PDR brief at 21-22).

The law is well settled that an express waiver of rights is not required. *See Berghuis v. Thompkins*, 560 U.S. 370, 383-84 (2010) ("The prosecution...does not need to show that a waiver of *Miranda* rights was express."); *Joseph v. State*, 309 S.W.3d 20, 24-25 (Tex.Crim.App. 2010); *Gately v. State*, 321 S.W.3d 72, 77 (Tex.App.–Eastland 2010, no pet.). Where the State shows that *Miranda* warnings were given, that they were understood by the defendant, and that the defendant engaged in a "...course of conduct indicating waiver," such as participating in the

interview, the defendant's uncoerced statement establishes an implied waiver of his rights. *See Berghuis*, 560 U.S. at 384.

The record in this case reflects that after Det. Lara re-*Mirandized* Martinez prior to the second statement and asked Martinez if he understood his rights and wished to continue, Martinez answered affirmatively. (SX2 transcript at 2-3); *see also* (RR2:16-17, 20, 58-60, 73).[30] And Martinez removed any doubt as to whether he waived his rights when he himself testified at the suppression hearing that he had understood and waived his rights, including the right to counsel, and that he freely and voluntarily gave a true statement to police. (RR3:57, 60-63).

Where Martinez was twice *Mirandized*, the Eighth Court correctly held that the first *Brown* factor weighed in favor of attenuation. *See Monge II*, 315 S.W.3d at 40-41; *Crutsinger*, 206 S.W.3d at 611 (holding that because the record clearly showed that appellant received and waived his legal rights, the first *Brown* factor weighed in favor of admitting the appellant's confession); *Self*, 709 S.W.2d at 666; *Monge I*, 276 S.W.3d at 185.[31]

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[30] Although Martinez identifies Det. Parsons as the individual who asked him if he wanted to continue with providing a statement, *see* (Appellant's PDR brief at 22), the record reflects that it was Det. Lara who asked that question. (SX2 transcript at 2-3).

[31] While Martinez also discusses in his brief the second *Brown* factor, specifically, the temporal proximity of the arrest and the confession, *see* (Appellant's PDR brief at 22), the State indicated in its direct-appeal brief that the approximate 27-minute lapse of time between Martinez's arrest at approximately 1:19 a.m. and when he gave his statement at 1:46 a.m. was the

3. The Eighth Court correctly held that the third *Brown* factor–the presence of intervening circumstances–weighed in favor of attenuation.

The presence of an intervening circumstance is an important factor. *See Monge II*, 315 S.W.3d at 42. Generally, a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. *See id.* However, the lack of intervening circumstances is not dispositive if other *Brown* factors weigh strongly in favor of the State. *See id*.

In this case, the record supported the trial court's finding that Martinez requested to speak with the detectives, reinitiating their conversation, and that such request was not coerced or prompted by the detectives' actions. While Martinez testified that he reinitiated the conversation because he was scared, which the trial court was free to disbelieve, *see*, *e.g.*, *Amador*, 275 S.W.3d at 878, he acknowledged that the detectives never threatened him that he would be charged with murder if he did not give them a statement and that he chose to speak

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sole *Brown* factor that weighed in his favor, although not heavily so. *See* (State's direct-appeal brief at 48), *citing Monge II*, 315 S.W.3d at 42; *Monge I*, 276 S.W.3d at 186. The Eighth Court, first observing that temporal proximity was generally not a strong determining factor, held that this factor weighed in Martinez's favor. *See Martinez*, 589 S.W.3d at 884, *citing Monge II*, 315 S.W.3d at 41.

with the detectives because he "...decided to talk in order to get it over with" and "...wanted to get the situation handled." (RR3:53-55). That is, Martinez knew that he was a suspect in Mina's disappearance and wanted to speak to detectives in order to distance himself from what he said his co-defendants did to Mina after he went home.

A defendant's request to speak with the detectives after an unlawful arrest, as a product of his own free will, has been recognized by this Court as being an intervening circumstances that "...weighs heavily in the State's favor" in the attenuation analysis. *See Crutsinger*, 206 S.W.3d at 611 (holding that where appellant became emotional shortly after being (unlawfully) arrested and placed in a holding cell, stated that he had "messed up," and asked to speak to the detective, the appellant's request was a product of his own free will and an intervening circumstance that weighed heavily in the State's favor). Martinez's request to speak with the detectives, despite knowing that he had the rights afforded to him under *Miranda*, to give his side of the story was a product of his own free will and an intervening circumstance that weighs heavily in favor of attenuation. *See*, *e.g.*, *Crutsinger*, 206 S.W.3d at 611.[32]

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[32] It is the presence of this intervening circumstance that serves as one of the reasons why this case is distinguishable from *Beasley v. State*, upon which Martinez relies in his PDR brief as being the most similar to this case. *See* (Appellant's PDR brief at 19-20), *citing Beasley v. State*,

Martinez, relying primarily on his own suppression-hearing testimony, nevertheless argues that his "...arrest triggered the confession" and that his "...panic-stricken agreement to 'tell his side of the story'..." was not an intervening circumstance. *See* (Appellant's PDR brief at 23). Martinez also argues that by recognizing his reinitiation as an intervening circumstance, the Eighth Court commingled what would show voluntariness under the Fifth Amendment and what is an intervening circumstance for Fourth Amendment purposes. *See id*. at 23-24. Martinez further questions how a voluntary continuation of an interrogation with police would not be an intervening circumstance, but a "re-initiation of such a conversation while a suspect is still unlawfully arrested..." would. *See id*. at 26.

The distinction is simple because the former (voluntary continuation) is simply acquiescence in a discussion initiated by police, while the latter (reinitiation) is an interaction with police that never would have occurred, but for the independent actions of the defendant in reinitiating contact with the police and volunteering to provide a statement. Additionally, the facts supporting a determination of voluntariness under the Fifth Amendment and those that

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728 S.W.2d 353 (Tex.Crim.App. 1987), *overruled on other grounds by Brown v. State*, 921 S.W.2d 227 (Tex.Crim.App. 1996). And while Martinez attempts to distinguish *Crutsinger* by quoting a passage from that opinion stating that the appellant in that case was repeatedly *Mirandized* but did not invoke his rights, *see* (Appellant's PDR brief at 25), *citing Crutsinger*, 206 S.W.3d at 610-11, that quoted passage is what the trial court in that case determined, not necessarily what this Court held. *See Crutsinger*, 206 S.W.3d at 610.

demonstrate an intervening circumstance for an attenuation-of-taint analysis are not mutually exclusive, and it is not necessarily a determination that a defendant's waiver of rights is voluntary that serves to break the chain between the arrest and subsequent confession; rather, it is the act of free will in reinitiating (and thus restarting) the interaction with police and volunteering to give a statement. Here, Martinez did not simply acquiesce to continued police questioning, nor was there an "agreement," "panic-stricken" or otherwise, to a request by the detectives to speak with them. As previously noted, the detectives were done with Martinez at that point and would not have again spoken with him, but for his actions in summoning Det. Lara and volunteering to give a statement.

Martinez' statement was thus not the result of an unlawful arrest, but, rather, was the product of his request to begin a discussion with police and his voluntary decision to provide a statement, such that the third *Brown* factor weighed heavily in the State's favor. *See Crutsinger*, 206 S.W.3d at 611; *Monge I*, 276 S.W.3d at 188-89; *cf. Monge II*, 315 S.W.3d at 41-42 (holding that where the appellant's confession flowed at least as much from being confronted with his co-defendant's untainted confession as from his arrest, confronting the defendant with the co-defendant's confession was an intervening circumstance that weighed in favor of the State).

Three of the four *Brown* factors thus weighed in favor of attenuation. When weighed together, the factors support the conclusion that the nexus between Martinez's alleged statutorily non-compliant warrantless arrest and his subsequent statement was sufficiently attenuated, dissipating the taint of any prior illegality, such that the Eighth Court did not err in upholding the trial court's denial of Martinez' suppression motion, and Martinez' sole ground for review should be overruled for this reason as well. *See*, *e.g.*, *Monge II*, 315 S.W.3d at 40-43; *Crutsinger*, 206 S.W.3d at 611.

For all the foregoing reasons, Martinez' sole ground accepted for review should be overruled.

PRAYER

WHEREFORE, the State prays that this Court overrule Martinez's ground presented for review and affirm the judgment of the Eighth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 14,746 words.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on June 24, 2020, copy of the foregoing brief was emailed, through an electronic-filing-service provider, to appellant's attorneys: Alexandria Serra, alex@serralawpllc.com; and Gabriela Marquez, gaby@serralawpllc.com; and to the State Prosecuting Attorney, information@SPA.texas.gov.

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