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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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SUZANNE ELIZABETH WEXLER
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 14-17-00606-CR
in the Court of Appeals, Fourteenth District at Houston

Trial Court Cause No. 1513928
177th Judicial District Court of Harris County, Texas
Hon. Robert Johnson, Judge Presiding

APPELLANT'S BRIEF ON THE MERITS

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Robert Johnson 177th District Court Harris County, Texas 1201 Franklin, 19th Floor Houston, Texas 77002

TABLE OF CONTENTS

Identity of Parties and Counsel ii

Table of Contents iv

Index of Authorities vi

Statement of the Case 1

Statement Regarding Oral Argument 2

Issue Presented 2

Whether the Court of Appeals erred by concluding that Appellant's statement to Detective Hill was not obtained via a custodial interrogation without the benefit of any warnings when the statement was made after Appellant was ordered to involuntarily leave a residence by an overwhelming police presence and placed into the back of a police car?

Statement of Facts 3

Summary of the Argument 6

Argument 8

Whether the Court of Appeals erred by concluding that Appellant's statement to Detective Hill was not obtained via a custodial interrogation without the benefit of any warnings when the statement was made after Appellant was ordered to involuntarily leave a residence by an overwhelming police presence and placed into the back of a police car?

A. Applicable Law 8

B. Standard of Review 12

C. Analysis 13

1. *The Court of Appeals analysis improperly focused on the reasonableness of the officers' actions and failed to consider whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest* 15

2. *The record demonstrates Appellant would have been aware that a large contingent of HROU officers and an armored vehicle were on scene* 20

3. *Appellant was subjected to a custodial interrogation without the benefit of any warnings* 22

D. Harm 32

Prayer 37

Certificates of Service and Compliance 38

INDEX OF AUTHORITIES

Federal Cases:

Arizona v. Fulminante,
499 U.S. 279 (1991) 36

Berkemer v. McCarthy,
468 U.S. 420 (1984) 19, 20

Dickerson v. United States,
384 U.S. 436 (1966) 16

Miranda v. Arizona,
384 U.S. 436 (1966) 8, 10

Oregon v. Mathiason,
429 U.S. 492 (1977) 9

Rhode Island v. Innis,
466 U.S. 291 (1980) 9, 30

Satterwhite v. Texas,
486 U.S. 249 (1998) 33

Stansbury v. California,
511 U.S. 318 (1994) 10

Thompson v. Keohane,
516 U.S. 99 (1995) 11

United States v. Martinez,
462 F.3d 903 (8th Cir. 2006) 19

United States v. Newton,
369 F.3d 659 (2nd Cir. 2004) 17, 18, 19

United States v. Perdue,
8 F.3d 1455 (10th Cir. 1993) 19

United States v. Revels,
510 F.3d 1269 (10th Cir. 2007) 17, 19

United States v. Smith,
3 F.3d 1088 (7th Cir. 2007) 19

State Cases:

Aguilera v. State,
425 S.W.3d 448 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) 10, 11, 12, 26

Allen v. State,
479 S.W.3d 341 (Tex. App.—El Paso 2015, no pet.) 8

Anrica v. State,
516 S.W.2d 924 (Tex. Crim. App. 1974) 26

Bates v. State,
494 S.W.3d 256 (Tex. App.—Texarkana 2015, pet. ref'd) 17

Clay v. State,
240 S.W.3d 895 (Tex. Crim. App. 2007) 33

Dancy v. State,
728 S.W.2d 772 (Tex. Crim. App. 1987) 12

Dowthitt v. State,
931 S.W.2d 244 (Tex. Crim. App. 1996) 9, 12, 16, 17, 26

Elizando v. State,
487 S.W.3d 185 (Tex. Crim. App. 2016) 32

Gardner v. State,
306 S.W.3d 274 (Tex. Crim. App. 2009) 11, 23

Harris v. State,
790 S.W.2d 568 (Tex. Crim. App. 1990) 34

Herrera v. State,
241 S.W.3d 520 (Tex. Crim. App. 2007) 9, 10, 12, 13, 16

In re D.J.C.,
312 S.W.3d 704 (Tex. App.—Houston [1st Dist.] 2009, no pet.) 12

Jones v. State,
795 S.W.2d 171 (Tex. Crim. App. 1990) 9, 31

Jones v. State,
119 S.W.3d 766 (Tex. Crim. App. 2003) 33

Kuether v. State,
523 S.W.3d 798 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) 8, 13

Martinez-Hernandez v. State,
468 S.W.3d 748 (Tex. App.—San Antonio 2015, no pet.) 30

Martinez v. State,
131 S.W.3d 22 (Tex. App.—San Antonio 2003, no pet.) 12

Martinez v. State,
337 S.W.3d 446 (Tex. App.—Eastland 2011, pet. ref'd) 25

Martinez v. State,
496 S.W.3d 215 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) 10, 11, 12, 23

McCarthy v. State,
65 S.W.3d 47 (Tex. Crim. App. 2001) 33

Medford v. State,
13 S.W.3d 769 (Tex. Crim. App. 2000) 25

Melton v. State,
790 S.W.2d 322 (Tex. Crim. App. 1990) 10

Miller v. State,
196 S.W.3d 256 (Tex. App.—Fort Worth 2006, pet. ref'd) 10, 23

Montgomery v. State,
810 S.W.2d 372 (Tex. Crim. App. 1991) 13

Mount v. State,
217 S.W.3d 716 (Tex. App.—Houston [14th Dist.] 2007, no pet.) 15

Ortiz v. State,
421 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) 8, 14

Ramirez v. State,
105 S.W.3d 730 (Tex. App.—Austin 2003, no pet.) 9, 11, 30, 31, 32

Ramos v. State,
273 S.W.3d 356 (Tex. App.—San Antonio 2008, pet. ref'd) 34

Rhodes v. State,
945 S.W.2d 115 (Tex. Crim. App. 1997) 16

Shannon v. Jones,
78 Tex. 141, 47 S.W. 477 (Tex. 1890) 25

State v. Dixon,
206 S.W.3d 587 (Tex. Crim. App. 2006) 13

State v. Ortiz,
346 S.W.3d 127 (Tex. App.—Amarillo 2011), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012) 16, 19, 30

State v. Ortiz,
382 S.W.3d 367 (Tex. Crim. App. 2012) 11, 23, 28, 29, 30

State v. Saenz,
411 S.W.3d 488 (Tex. Crim. App. 2013) 23

State v. Sheppard,
271 S.W.3d 281 (Tex. Crim. App. 2008) 15, 16

State v. Story,
445 S.W.3d 729 (Tex. Crim. App. 2014) 13

State v. Whittington,
401 S.W.3d 263 (Tex. App.—San Antonio 2013, no pet.) 15

Turner v. State,
252 S.W.3d 571 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) 24

Turrubiate v. State,
399 S.W.3d 147 (Tex. Crim. App. 2013) 12

Wesbrook v. State,
29 S.W.3d 103 (Tex. Crim. App. 2000) 33

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

Wyatt v. State,
120 Tex. Crim. 3, 47 S.W.2d 827 (Tex. Crim. App. 1932) 25

Constitutions

United States Constitution, Fifth Amendment 8

Statutes

Texas Code of Criminal Procedure Article 38.22, Section 2(a) 9

Texas Code of Criminal Procedure Article 38.22, Section 3 9

Texas Health and Safety Code Section 481.102 31

Texas Health and Safety Code Section 481.112(a) 31

Rules

Texas Rule of Appellate Procedure 44.2(a) 33

STATEMENT OF THE CASE

On August 18, 2016, a Harris County grand jury returned an indictment charging Appellant with the felony offense of possession with intent to deliver a controlled substance alleged to have occurred on or about June 16, 2016. (C.R. at 10). On June 27, 2017, a jury found the Appellant guilty as charged in the indictment. (4 R.R. (Trial) at 78; C.R. at 60-61).[1] On June 28, 2017, the trial court sentenced Appellant to 25-years' confinement in the Texas Department of Criminal Justice – Institutional Division. (7 R.R. (Trial) at 3-4; C.R. 60-61). On July 17, 2017, Appellant filed a motion for new trial and motion in arrest of judgment. (C.R. at 65-72). On July 28, 2017, Appellant filed an amended motion for new trial. (S.C.R. (08/07/18) at 4-19). Appellant timely filed her notice of appeal on July 17, 2017 and the trial court certified Appellant's right of appeal. (C.R. at 73-75). On May 31, 2018, the trial court denied Appellant's motion for new trial after a hearing. (4 R.R. (MNT) at 3).

On August 27, 2019, the Fourteenth Court of Appeals issued an opinion affirming the judgment of the trial court. *Wexler v. State*, 593 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2019, pet. granted). The majority held "that the record support[ed] the trial court's implied conclusion that appellant was temporarily detained, not under arrest, when Hill asked her were the drugs were located. As a result, Hill was not obligated to provide appellant the warnings required by *Miranda*

[1] For reference, Appellant will cite the Reporter's Record from Appellant's trial as (R.R. (Trial) and to the Reporter's Record from the hearing on Appellant's motion for new trial as (R.R. (MNT)).

and article 38.22 of the Code of Criminal Procedure." *Id.* at 777-780. Justice Hassan filed a dissenting opinion where she reasoned that "[t]he majority erroneously conclude[d] Appellant was not in custody at the time of her inculpatory and custodial interrogation" *Id.* at 782-786 (Hassan, J., dissenting).

On September 5, 2019, Appellant filed a motion for rehearing. After requesting a response from the State, a majority of the panel denied Appellant's motion for rehearing on November 19, 2019. Justice Hassan would have granted rehearing. On December 4, 2019, Appellant moved for *en banc* reconsideration. On February 27, 2020, the Fourteenth Court of Appeals denied Appellant's motion. Justices Hassan and Poissant would have granted *en banc* reconsideration. On June 17, 2020, this Court granted discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that oral argument will not be permitted in this case.

ISSUE PRESENTED

Whether the Court of Appeals erred by concluding that Appellant's statement to Detective Hill was not obtained via a custodial interrogation without the benefit of any warnings when the statement was made after Appellant was ordered to involuntarily leave a residence by an overwhelming police presence and placed into the back of a police car?

STATEMENT OF FACTS

Detective Jerome Hill, a narcotics detective with the South Houston Police Department, was investigating a residence located at 318 Avenue A for possible crystal methamphetamine. (3 R.R. (Trial) at 32, 34-35). Detective Hill asked a South Houston K-9 narcotics unit to monitor the residence to observe traffic coming and going from that residence. (3 R.R. (Trial) at 35-36). If the officers observed a traffic infraction, part of the operation was then to stop the vehicle and have a K-9 unit sniff for drugs. (3 R.R. (Trial) at 36). During this surveillance operation, several traffic stops were made on vehicles leaving the residence. (3 R.R. (Trial) at 36). The surveillance team made their first stop on June 5, 2016, arresting one individual and recovering 73 grams of crystal methamphetamine. (3 R.R. (Trial) at 36-37). A second stop was performed on a vehicle leaving the residence on June 9, 2016, resulting in an arrest and the recovery of 0.1 grams of crystal methamphetamine. (3 R.R. (Trial) at 37). A third traffic stop on a vehicle leaving the residence occurred on June 12, 2016, resulting in two arrests and the recovery of 5.3 grams of crystal methamphetamine. (3 R.R. (Trial) at 37-38). According to Detective Hill, this sort of activity was indicative of drug dealing. (3 R.R. (Trial) at 38). In his expert opinion, the narcotics seized from these vehicles were coming from 318 Avenue A. (3 R.R. (Trial) at 39). After the surveillance operation, Detective Hill obtained a search warrant to search the residence for narcotics and contraband. (3 R.R. (Trial) at 39-43; 7 R.R (Trial) State's Exhibit 2). Because of the surveillance operation, Detective Hill testified that

Appellant became a suspect eleven days prior to the raid. (3 R.R. (Trial) at 51-52). Specifically, Detective Hill testified he had information that crystal methamphetamine was being sold at the residence of 318 Avenue A by the Appellant and her boyfriend. (3 R.R. (Trial) at 114-115, 129-130).

After obtaining a search warrant, an operation was conceived where the Harris County Sheriff's Office High Risk Operations Unit ("HROU") would execute the warrant. (3 R.R. (Trial) at 43). Detective Hill described these deputies as being like a SWAT team with their job being to serve all the narcotics warrants where they believed there was a high risk of someone being shot. (3 R.R. (Trial) at 43-44). The evidence demonstrated that 20 to 25 twenty to twenty-five HROU deputies assisted with the execution of the warrant. (3 R.R. (Trial) at 43-44, 107). HROU's function was to secure the residence and detain anybody inside. (3 R.R. (Trial) at 44). In addition to the HROU officers, a number of uniformed police officers and narcotics K-9 units were present during the raid on the residence. (3 R.R. (Trial) at 45). Officers also utilized an armored vehicle during their raid. (3 R.R. (Trial) at 46). It was from this armored vehicle that officers announced their presence via a public announce system ("PA"). (3 R.R. (Trial) at 46). PA from this armored vehicle told everyone inside of the residence to come out of the house as a search warrant was being executed on the

residence. (3 R.R. (Trial) at 46, 50).[2] According to Detective Hill, the persons inside of the residence, including the Appellant, were aware that the residence was about to be searched. (3 R.R. (Trial) at 46, 50).

Appellant came out of the house and HROU officers immediately detained her. (3 R.R (Trial) at 46-47, 49). The HROU officers, who had already started to enter the house, then put Appellant into the backseat of the police car. (3 R.R. (Trial) at 49).[3] Detective Hill then approached the car and told Appellant that they had a search warrant. (3 R.R. (Trial) at 58). He then asked her to tell him where the drugs were in order to save time, as they would eventually find the drugs. (3 R.R. (Trial) at 58). His exact words to the Appellant were "We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." (3 R.R. (Trial) at 52, 58). Appellant told Detective Hill the narcotics would be in her bedroom in a dresser drawer. (3 R.R. (Trial) at 58). After speaking with Appellant, the narcotics team went into the house and started the search. (3 R.R. (Trial) at 58). Crystal methamphetamine was discovered in the dresser drawer where Appellant said it would be. (3 R.R. (Trial) at 82-83). The crystal methamphetamine weighed 26.95 grams. (3 R.R. (Trial) at 83). According to Detective Hill, the amount

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[2] In addition, Detective Hill testified that the HROU team would normally surround a house and block off the street on both ends of the block to make sure no traffic would come up. (3 R.R. (Trial) at 46, 126-127).

[3] Detective Hill believed that the HROU entered the home after Appellant had started to come outside, but he was not sure. (3 R.R. (Trial) at 51).

of crystal methamphetamine discovered in Appellant's dresser was consistent with dealing. (3 R.R. (Trial) at 101).[4]

SUMMARY OF THE ARGUMENT

The Fourteenth Court of Appeals erred by holding that Appellant was not subjected to a custodial interrogation when Detective Hill questioned Appellant as to where drugs were located after she was ordered to involuntarily leave a residence by an overwhelming police presence. Initially, Appellant contends the Fourteenth Court of Appeals improperly analyzed Appellant's contention. In a determination of whether an individual is in custody for purposes of *Miranda*, the Court of Appeals was required to consider whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. However, the Court of Appeals only conducted an analysis of whether Appellant was subjected to an investigation detention based entirely on whether the officers' actions were objectively reasonable from their point of view. The determination of whether a person is in custody for *Miranda* or Article 38.22 purposes does not turn on the reasonableness, under the Fourth Amendment of an officer's actions.

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[4] Brittany Disiere, a forensic chemist with the Harris County Institute of Forensic Sciences, tested two substances in this case. (4 R.R. (Trial) at 15-16; 7 R.R. (Trial) State's Exhibit 51). One of those substances was determined to be methamphetamine with a net weight of 25.077 plus or minus .047 grams with a 95.45 percent level of confidence. (4 R.R. (Trial) at 18).

Furthermore, in determining that Appellant was detained pursuant to an investigative detention, the Court of Appeals overlooked the circumstances as to why Appellant left the house and how she ended up in the back of the police car. Appellant was ordered to exit the residence by what were described as SWAT officers from an armored vehicle. Once Appellant stepped out of the house, these same SWAT officers detained her and placed her into the back of a police car. Immediately afterwards, Detective Hill interrogated her. During this interrogation, Detective Hill conveyed his subjective belief to Appellant that she was a suspect when he phrased his only question to her as him knowing that drugs were in the house, they had a search warrant and were going to find them, and Appellant should save them some trouble and tell him where the drugs were. Considering the totality of the objective circumstances, Appellant was physically deprived of her freedom of action in a significant way and officers created a situation that would have led Appellant to believe that her freedom of movement had been significantly restricted to the degree of an arrest. Appellant was neither free to leave, nor would have a reasonable person in her situation have believed she was free to leave. Thus, Appellant was subjected to a custodial interrogation without the benefit of any warnings.

ARGUMENT

Whether the Court of Appeals erred by concluding that Appellant's statement to Detective Hill was not obtained via a custodial interrogation without the benefit of any warnings when the statement was made after Appellant was ordered to involuntarily leave a residence by an overwhelming police presence and placed into the back of a police car?

A. Applicable Law

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself[.]" *Miranda* requires a law enforcement officer to warn an individual of certain constitutional rights if the individual is considered to be the subject of "custodial interrogation." *Allen v. State*, 479 S.W.3d 341, 348 (Tex. App.—El Paso 2015, no pet.), citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "The warnings set out by the United States Supreme Court in *Miranda* were established to safeguard an unrepresented individual's Fifth Amendment privilege against self-incrimination during custodial interrogation." *Kuether v. State*, 523 S.W.3d 798, 805 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd), citing *Miranda*, 384 U.S. at 442-457, 467-479 and *Ortiz v. State*, 421 S.W.3d 887, 890 fn. 2 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). "Unwarned statements obtained as a result of custodial interrogation may not be used as evidence by the State in a criminal proceeding during its case-in-chief." *Kuether*, 523 S.W.3d at 805, citing *Miranda*, 384 U.S. at 444 and *Ortiz*, 421 S.W.3d at 890 fn. 2. "'Interrogation,' under *Miranda*, refers to express questioning as well as words or actions by the police, other than those normally attendant to arrest and

custody, that police should know are reasonably likely to elicit an incriminating response.'" *Rhode Island v. Innis*, 466 U.S. 291, 301 (1980). "[T]he *Miranda* definition of 'incriminating' is quite broad: any inculpatory or exculpatory statement that the prosecution might wish to introduce." *Jones v. State*, 795 S.W.2d 171, 176 fn. 7 (Tex. Crim. App 1990), citing *Innis*, 446 U.S. at 301 fn. 5. "The likelihood of eliciting a response focuses on the perception of the suspect, not the intent of the police." *Ramirez v. State*, 105 S.W.3d 730, 741 (Tex. App.—Austin 2003, no pet.), citing *Innis*, 446 U.S. at 301. In *Innis*, the U.S. Supreme Court "noted that any practice the police should know is 'reasonably likely to evoke an incriminating response from a suspect' constitutes interrogation." *Id.*, quoting *Innis*, 446 U.S. at 301. The requirements of *Miranda* do not apply if the statements are not made as a result of a custodial interrogation. See *Dowthitt v. State*, 931 S.W.2d 244, 263 (Tex. Crim. App. 1996) and *Oregon v. Mathiason*, 429 U.S. 492 (1977).

"Article 38.22 of the Texas Code of Criminal Procedure governs the admissibility of statements made by a defendant during custodial interrogation in a criminal proceeding." *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). See also TEX. CODE OF CRIM. PROC. ART. 38.22, § 2(a), 3. "Section 3 provides that an oral statement is admissible against a defendant in a criminal proceeding if, among other things: (1) the statement was electronically recorded; (2) the defendant was given the warnings set out in Section 2(a) before the statement was made and it is included on the recording; and (3) the defendant "knowingly, intelligently, and

voluntarily" waived the rights set out in the warnings." *Id.* "The warnings provided in Section 2(a) are virtually identical to the *Miranda* warnings, with one exception--the warning that an accused "has the right to terminate the interview at any time" as set out in Section 2(a)(5) is not required by *Miranda.* As with the *Miranda* warnings, the warnings in Section 2(a) of Article 38.22 are required only when there is custodial interrogation." *Id.*

"A person is considered in custody if a reasonable person in the same circumstances would have perceived their physical freedom to be restricted 'to the degree associated with a formal arrest.'" *Martinez v. State*, 496 S.W.3d 215, 218-219 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). See also *Stansbury v. California*, 511 U.S. 318, 322 (1994). "Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miller v. State*, 196 S.W.3d 256, 264 (Tex. App.—Fort Worth 2006, pet. ref'd), citing *Miranda*, 384 U.S. at 444. "If an investigation is not at an accusatorial or custodial stage, a person's Fifth Amendment rights have not yet come into play and the voluntariness of those rights is not implicated." *Id.*, citing *Melton v. State*, 790 S.W.2d 322, 326 (Tex. Crim. App. 1990). "This determination focuses on the objective circumstances of the interrogation and not on the subjective views of either the interrogating officers or the person being questioned." *Aguilera v. State*, 425 S.W.3d 448, 456 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd), citing *Stansbury*, 511 U.S. at 322.

This Court has also established four general situations that may constitute custody:

> (1) if the suspect is physically deprived of his freedom of action in any significant way; (2) if a law-enforcement officer tells the suspect not to leave; (3) if a law-enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; or (4) if there is probable cause to arrest and law-enforcement officers did not tell the suspect he is free to leave."

Martinez, 496 S.W.3d at 218-219, citing *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009).[5]

"For the first three situations, the *Stansbury* decision suggests that the restriction of freedom of movement must elevate to the level of arrest, not merely investigative detention." *Ramirez*, 105 S.W.3d at 739. "Furthermore, in determining if a person is in custody, a court "consider[s] whether, in light of the particular circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave." *Aguilera*, 425 S.W.3d at 456, citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). "Factors relevant to a custody determination include: (1) probable cause to

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[5] These four factors are not exhaustive. See *State v. Ortiz*, 382 S.W.3d 367, 376-377 (Tex. Crim. App. 2012). In response to the State's contention in *Ortiz* "that the court of appeals was required to, but did not, fit the facts of the instant case into of the[] four *Dowthitt* categories before it could declare that the [defendant] was in custody for *Miranda* purposes[,]" this Court determined:

> this is a distortion of the import of our holding in *Dowthitt*. The *Dowthitt* categories were intended to be merely descriptive, not exhaustive. We held that the four categories "*at least*…may constitute custody. We never said that, in order for a set of circumstances to constitute custody, an appellate court must be able to fit it into one of these descriptive categories. The State's suggestion otherwise is at odds with out insistence, in *Dowthitt* itself, that Fifth Amendment custody determinations should be made on a case-by-case basis, considering all of the objective circumstances.

Id. at 376-377

arrest; (2) subjective intent of the police; (3) focus of the investigation; and (4) subjective belief of the defendant." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254. "Because, under *Stansbury*, the custody determination is based entirely on objective circumstances, factors two and four are irrelevant except to the extent that they are manifested in the words or actions of law enforcement officials." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254 and *Stansbury*, 511 U.S. at 323. "The meaning of 'custody' is the same for purposes of *Miranda* and article 38.22. *Martinez*, 496 S.W.3d at 219, citing *Herrera*, 241 S.W.3d at 526.

"When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time." *In re D.J.C.*, 312 S.W.3d 704, 713 (Tex. App.—Houston [1st Dist.] 2009, no pet.), citing *Dancy v. State*, 728 S.W.2d 772, 778-779 (Tex. Crim. App. 1987) and *Martinez v. State*, 131 S.W.3d 22, 32 (Tex. App.—San Antonio 2003, no pet.). A person held for investigative detention is not in custody. *Dowthitt*, 931 S.W.2d at 255. "It is the defendant's burden to show that a statement was the product of a custodial interrogation." *Martinez*, 496 S.W.3d at 218, citing *Herrera*, 241 S.W.3d at 526.

B. Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). "A trial judge's ultimate custody determination presents a

mixed question of law and fact." *Kuether*, 523 S.W.3d at 808, citing *Herrera*, 241 S.W.3d at 526. An appellate court affords "almost total deference to a trial court's custody determination when the questions of historical fact turn on credibility and demeanor." *Id.* Conversely, when the questions of historical fact do not turn on credibility and demeanor, [an appellate court] will review a trial court's custody determination de novo." *Id.* "When a trial court denies a motion to suppress and does not enter findings of fact, [an appellate court reviews] the evidence in the light most favorable to the trial court's ruling, and we assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record." *Id.*[6] "[T]he judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.". *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014), citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006) and *Montgomery v. State*, 810 S.W.2d 372, 391-392 (Tex. Crim. App. 1991).

C. Analysis

There was no dispute that Appellant was not given any warnings prior to her telling Detective Hill the narcotics would be in her bedroom in a dresser drawer. (3 R.R. at 52, 58). Thus, the issue turns on whether or not the Appellant was subjected to a custodial interrogation when Detective Hill told her "we have a search warrant.

[6] Appellant's trial counsel did not file a motion to suppress Appellant's statement and only objected to its admissibility during the State's case-in-chief. (3 R.R. (Trial) at 48-57). However, as the Fourteenth Court of Appeals stated in *Kuether*, "a motion to suppress is simply a specialized objection to the admissibility of evidence." *Kuether*, 523 S.W.3d at 807 fn. 20. The Fourteenth Court then applied "the same standard of review to the trial court's custody determination as if appellant had moved to suppress the statements." *Id.*

Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what."

In arriving at the conclusion that the officers' actions constituted an investigative detention, the majority determined that "[t]he fact that appellant's freedom of movement was restricted does not establish that she was under custodial arrest because a person temporarily detained for purposes of investigation also has her freedom of movement restricted." *Wexler*, 593 S.W.3d at 779, citing *Ortiz*, 421 S.W.3d at 890. In addition, the majority believed "[t]here [was] no evidence in the record that the police used physical force to remove appellant from the house, handcuffed her at any time, threatened her, displayed a firearm, or even spoke to her in a hostile tone." *Id.* at 780. Furthermore, the majority held "[t]here was also evidence that appellant's detention was relatively brief and that the police did not remove appellant from the scene prior to Hill's question." *Id.* Finally, the majority placed importance on the fact that Detective Hill did not inform Appellant that she was under arrest or even a suspect and he lacked probable cause to arrest her. *Id.* Based upon their analysis, the majority held "that the record supports the trial court's implied conclusion that appellant was temporarily detained, not under arrest, when Hill asked her were the drugs were located. As a result, Hill was not obligated to provide appellant the warnings required by *Miranda* and article 38.22 of the Code of Criminal Procedure." *Id.*

1. *The Court of Appeals analysis improperly focused on the reasonableness of the officers' actions in placing the Appellant in the back of a patrol car and failed to consider whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest*

Initially, Appellant contends that the majority's analysis is flawed as they improperly analyzed Appellant's issue primarily under the framework for determining whether a person was subjected to an investigative detention under the Fourth Amendment. See *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). In *Sheppard*, this Court "provided a list of factors properly considered when determining whether the seizure was a detention or arrest:

> [1] the amount of force displayed, [2] the duration of a detention, [3] the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, [4] the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and [5] any other relevant factors."

State v. Whittington, 401 S.W.3d 263, 272 (Tex. App.—San Antonio 2013, no pet.), quoting *Sheppard*, 271 S.W.3d at 291

The majority began by analyzing the amount of force that officers used and appeared to conclude that this factor weighed in favor of Appellant's seizure being an investigative detention. See *Wexler*, 593 S.W.3d at 779-780. Next, the majority determined that there was evidence in the record that supported a determination that an investigation was under way when Appellant was detained. *Id.* at 780, citing *Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.). In addition, the majority determined that Appellant "was detained so HROU could

perform a protective sweep of the house" and the detention was brief with her not being removed from the scene. *Id.*, citing *Sheppard*, 271 S.W.3d at 290. Finally, even when the majority seemed to analyze the fourth *Dowhitt* situation, the majority still analyzed this situation under the framework in *Sheppard*. ("Hill was the only officer to talk with appellant and he did not inform her that she was under arrest or even a suspect."). See *Sheppard*, 271 S.W.3d at 290 ("the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation") and *Herrera*, 241 S.W.3d at 525-526. In none of these determinations did the majority consider whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted 'to the degree associated with a formal arrest. See *Dowthitt*, 911 S.W.2d at 254. Instead, the majority focused on the reasonableness of the facts known to the officers and the reasonableness of their actions in light of those facts. See *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997) ("the test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical definition. 'Reasonableness' must be judged from the perspective of a reasonable officer at the scene, rather than within the advantage of hindsight.").

However, "the requirements of *Miranda* arise from Fifth Amendment protections." *State v. Ortiz*, 346 S.W.3d 127, 133 (Tex. App.—Amarillo 2011), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012), citing *Dickerson v. United State*, 530 U.S. 428, 440 fn. 4 (2000). Because of this, the determination of whether the Appellant being forced

to leave her residence by an overwhelming police presence and then put into the back of a patrol car by that same law enforcement personnel "placed [her] in custody for *Miranda* purposes does not turn on the reasonableness under the Fourth Amendment" of the officers' actions. *Id.*, citing *United States v. Newton*, 369 F.3d 659, 675 (2nd Cir. 2004), *Dowthitt*, 931 S.W.2d at 254, and *United States v. Revels*, 510 F.3d 1269, 1274 (10th Cir. 2007).[7] The decisions in *Newton* and *Revels* demonstrate that a person can be lawfully subjected to an investigative detention under the Fourth Amendment, but still be in custody for purposes of *Miranda*.

In *Newton,* the U.S Court of Appeals for the Second Circuit held that "*Miranda's* concern is not with the facts known to law enforcement officers or the objective reasonableness of their actions in light of those facts. *Miranda's* focus is on the facts known to the seized suspect and whether a reasonable person would have understood that his situation was comparable to a formal arrest." *Newton*, 369 F.3d at 675. In *Newton*, the defendant "was seized when he opened his apartment door to six law enforcement officers, one of whom promptly proceeded to handcuff him." *Id.* In the defendant's particular case, "[t]he number of officers on the scene would not, by itself, have led a reasonable person in Newton's shoes to conclude that he was in custody." *Id.* The handcuffs were the problematic factor for the Court and ultimately

[7] Notably, this Court's decision in in *Dowthitt* did not involve a Fourth Amendment issue and Appellant would contend that this Court's use of the term "investigative detention" in that case "did not have the same meaning as a *Terry* investigative stop." See *Bates v. State*, 494 S.W.3d 256, 277 (Tex. App.—Texarkana 2015, pet. ref'd) (Burgess, J., concurring).

were what led the Court to determine that "a reasonable person would have understood that his interrogation was being conducted pursuant to arrest-like restraints". *Id.* at 675-677. This conclusion was made even with officers specifically advising the defendant that he was not under arrest and the restraints were being placed on him for officer safety. *Id.* at 676. At the same time, however; the Court concluded, "Newton's seizure did not equate to a de facto arrest under the Fourth Amendment." *Id.* at 675.[8]

Similar to *Newton*, in *Revels,* the U.S. Court of Appeals for the Tenth Circuit held "that merely because a particular police-citizen encounter can be neatly packaged under the label 'investigatory detention' for purposes of the Fourth Amendment, it does not necessarily follow that police are freed of their obligation to inform the

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[8] Specifically, the Court determined:

> The record indicates that his seizure was certainly brief, lasting only the few minutes it took the officers to locate the sought-for firearm, after which Newton was formally arrested. Further, because the stop occurred at Newton's residence, he was subjected to neither the inconvenience nor the indignity associated with a compelled visit to the police station. To the extent Newton argues that it was unreasonable for six officers to be involved in his seizure, we disagree. The officers' purpose in going to Ms. Wright's apartment was to investigate a report that Newton illegally possessed a firearm and had recently threatened to kill his mother and her husband. Given the obvious dangers inherent in such a volatile situation, not only was it reasonable for six officers to go to the apartment; it was reasonable for them to handcuff Newton while they searched for the firearm. Indeed, under the circumstances, handcuffing was a less intimidating - and less dangerous - means of ensuring the safety of everyone on the premises than holding Newton at gunpoint during the search.

Newton, 369 F.3d at 675 (internal citation and quotation omitted)

citizen of her rights under *Miranda* in appropriate cases." *Revels*, 510 F.3d at 1274. See also *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) and *Berkemer v. McCarthy*, 468 U.S. 420 (1984). In addition, "whether the police subjected [a person] to a lawful investigative detention is not dispositive of whether the officers should [advise a defendant] of her *Miranda* rights." *Id.*, citing *Berkemer*, 468 U.S. at 441-442 ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation."), *Perdue*, 8 F.3d at 1463-66 and *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993). Ultimately, the Court in *Revels* determined that based on the totality of the circumstances the defendant was in custody and should have received *Miranda* warnings prior to her custodial interrogation. *Id.* at 1275-1277.

Omitted from the entirety of the majority's analysis is a discussion of whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. The determination of whether a person is in custody "for *Miranda* purposes does not turn on the reasonableness, under the Fourth Amendment" of an officers' actions. See *Ortiz*, 346 S.W.3d at 133, citing *Newton*, 369 F.3d at 675. See also *United States v. Martinez*, 462 F.3d 903, 908-909 (8th Cir. 2006) (relying on *Berkemer* to reject the government's argument that so long as the encounter remained a *Terry* stop, no *Miranda* warning were required."). "[W]hether the police subjected [a person] to a lawful investigative detention is not dispositive of whether the officers should [advise a defendant] of her *Miranda* rights." *Revels*, 510 F.3d at 1274. See also *Berkemer*, 468

U.S. at 441-442 ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation."). In a determination of whether an individual is in custody, the majority was required to consider whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. Instead of doing so, the majority made a determination of whether Appellant was in custody for purposes of *Miranda* and Article 38.22 based entirely on whether the officers' actions were objectively reasonable under the Fourth Amendment. The failure of the majority to conduct any analysis from the standpoint of whether a reasonable person in the same circumstances as the Appellant would have perceived their physical freedom to be restricted to the degree associated with a formal arrest was error. The omission of this analysis also lead to their erroneous conclusion that Appellant was not subjected to a custodial interrogation.

2. *The record demonstrates Appellant would have been aware that a large contingent of HROU officers and an armored vehicle were on scene*

In addition, Appellant takes issue with the majority's statement that"[w]hile there were numerous police officers on the scene, there is no evidence appellant was aware of that number, there is also no evidence appellant was aware that the police had blocked access to the street, or that there was armored vehicle on the scene." *Wexler*, 593 S.W.3d at 779-780. Appellant contends that the record does not support these statements.

Detective Hill testified officers with the HROU, whom he described as being like a SWAT team, executed the warrant. (3 R.R. (Trial at 43-46).[9] The evidence demonstrated that 20 to 25 HROU deputies helped execute the warrant. (3 R.R. (Trial) at 43-44, 107). HROU's function was to secure the residence and detain anybody inside. (3 R.R. (Trial) at 44). In addition, Detective Hill testified that officers with the HROU announced their presence through the PA system in an armored vehicle and that the people in the house knew it was about to be searched. (3 R.R. (Trial) at 46, 50). Specifically, PA from the armored vehicle told everyone inside to come out of the house and that a search warrant was being served on the residence. (3 R.R. (Trial) at 46). According to Detective Hill, when HROU arrived on scene, Appellant and another male responded to the broadcast and came out of the residence. (3 R.R. (Trial) at 46-47). Furthermore, once Appellant stepped out of the house the HROU officers, who appeared to be either entering the residence as Appellant was coming out or were already in the residence as she was coming out., detained her and placed her into the back of a police car. (3 R.R. (Trial) at 46-47, 49, 51).

Thus, contrary to the majority's statement, the evidence demonstrated that HROU officers were on scene when Appellant came out of the residence after being

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[9] The marked police units and uniformed officer would block off the street on both ends of the block to make sure that no traffic would come up while the warrant was being served. (3 R.R. (Trial at 45-46).

ordered to so. As Detective Hill testified, Appellant was aware that HROU had announced over a PA that they had a search warrant when she came out of the residence. This PA was from an armored vehicle. The HROU was described as being like a SWAT team. In addition, there were at least 20 to 25 officers on scene and almost certainly more as an unknown number of K-9 and uniformed police officers were on scene.[10] Based on the evidence, it would stand to reason that Appellant was aware that there were a number of SWAT like officers ("HROU") on scene executing a search warrant as those very same officers were the ones who detained her and placed her in the back of the patrol car. If she knew that officers had a search warrant as a result of hearing it on the PA as Detective Hill testified, it would also stand to reason that she was aware that officers had an armored vehicle on scene as that it is where the PA was broadcasted from.

3. *Appellant was subjected to a custodial interrogation without the benefit of any warnings*

Although not exhaustive, this Court has established four general situations that may constitute custody:

> (1) if the suspect is physically deprived of his freedom of action in any significant way; (2) if a law-enforcement officer tells the suspect not to leave; (3) if a law-enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; or (4) if there is probable cause to arrest and law-enforcement officers did not tell the suspect he is free to leave."

[10] In other words, the 20-25 members of the HROU team that were on scene are only the minimum amount of total officers that were on scene. There was no dispute as to the number of HROU officers at the scene during the Appellant's trial.

Martinez, 496 S.W.3d at 218-219, citing *Gardner*, 306 S.W.3d at 294

"The first three situations require that the restriction on freedom of movement must reach 'the degree associated with an arrest' as opposed to an investigative detention." *State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App. 2013). "The fourth situation requires that an officer's knowledge of probable cause be manifested to the suspect." *Id.* "In making the custody determination, the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement 'comparable to…formal arrest,' given all the objective circumstances." *State v. Ortiz*. 382 S.W.3d 367, 372 (Tex. Crim. App. 2012).

Regarding the first and third situations, Appellant did not voluntarily come out of the house on her own accord, she was ordered to do so by what were described as SWAT officers from an armored vehicle. (3 R.R. (Trial) at 43-46). *C.f. Miller*, 196 S.W.3d at 264 ("so long as the circumstances show that a person is acting only upon the invitations, request, or even urging of law enforcement, and there are not threats, either express or implied, that he will be taken forcibly, the accompaniment is voluntary, and such person is not in custody."). As Justice Hassan noted in her dissenting opinion, "Appellant left the protections of a private home after being instructed by an organized and well-equipped amassment of law enforcement personnel." *Wexler*, 593 S.W.3d at 784 (Hassan, J., dissenting). The undisputed testimony from Detective Hill indicated that HROU officers had announced their presence to the residence via PA from an armored vehicle telling everyone inside to

come out of the house as a search warrant was being executed. (3 R.R. (Trial) at 45-46). Detective Hill testified that the people in the residence knew it was about to be searched. (3 R.R. (Trial) at 50). The evidence demonstrated that there were at least 20 to 25 officers on scene and almost certainly more as an unknown number of K-9 and uniformed police officers were on scene. The amount of officers on scene more than outnumbered the Appellant and created a police dominated atmosphere. In addition, Detective Hill's testimony indicated that officers had blocked off the street at both ends of the block to make sure no traffic would come up while the warrant was being served on the residence. (3 R.R. (Trial) at 45-46). The residence was also potentially surrounded. (3 R.R. (Trial) at 45-46). Once Appellant stepped out of the house, HROU officers, who appeared to be either entering the residence as Appellant was coming out or were already in the residence as she was coming out, detained her and placed her into the back of a police car. (3 R.R. (Trial) at 46-47, 49, 51). In addition, although Detective Hill testified regarding some safety concerns as to why Appellant was ordered out of the residence, the record is devoid of any evidence that any officer communicated to the Appellant that she was being detained due to their safety concerns or for general questioning. See *Turner v. State*, 252 S.W.3d 571, 579-580 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (determination that defendant was not in custody for purposes of *Miranda* partly because officers informed the defendant he was not under arrest and that he was handcuffed merely for safety reasons). Officers had complete and total control of the Appellant. Finally, although Detective Hill did

not affirmatively state to Appellant that she could not leave, he did not affirmatively tell Appellant that she was free to leave either. In fact, Detective Hill later testified that Appellant was not free to go. (3 R.R. (Trial) at 111).

In addition, officers utilized an implied threat in order to have Appellant leave the residence into a police dominated atmosphere and from there to be immediately detained and placed into the back seat of a marked police car whereupon she was immediately questioned. That implied threat, as noted by Justice Hassan in her dissenting opinion was "that Appellant would (at least) be forcibly seized if she did not voluntarily leave the house (then submit to a detained interrogation)[.]" *Wexler*, 593 S.W.3d at 786 (Hassan, J., dissenting), citing *Martinez v. State*, 337 S.W.3d 446, 455 (Tex. App.—Eastland 2011, pet. ref'd). "Texas has long embraced the axiom that, aside from the assertion of physical dominion over a suspect, it is also possible an arrest can be accomplished once a suspect has submitted to the officer's authority." *Medford v. State*, 13 S.W.3d 769, 773 (Tex. Crim. App. 2000), citing *Wyatt v. State*, 120 Tex. Crim. 3, 47 S.W.2d 827, 829 (Tex. Crim. App. 1932) and *Shannon v. Jones*, 78 Tex. 141, 47 S.W. 477 (Tex. 1890). There can be no doubt in Appellant's case that she submitted to the officer's show of authority, a show of authority arising from having SWAT officers ordering her out of a residence because they had a search warrant from the PA of an armored vehicle. Officers continued to show their authority by having those same HROU officers immediately detain Appellant and place her in the back of a marked police car to where she was immediately questioned by Detective

Hill. Based on the foregoing, the first and third situations described in *Dowthitt* are implicated. Appellant was physically deprived of her freedom of action in a significant way and officers created a situation that would have led Appellant to believe that her freedom of movement had been significantly restricted. Appellant was neither free to leave, nor would have a reasonable person in her situation have believed she was free to leave. Appellant could not simply get out of the police car and walk away.

"Furthermore, in determining if a person is in custody, a court "consider[s] whether, in light of the particular circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave." *Aguilera*, 425 S.W.3d at 456. "Factors relevant to a custody determination include: (1) probable cause to arrest; (2) subjective intent of the police; (3) focus of the investigation; and (4) subjective belief of the defendant." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254. "Because, under *Stansbury*, the custody determination is based entirely on objective circumstances, factors two and four are irrelevant except to the extent that they are manifested in the words or actions of law enforcement officials." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254 and *Stansbury*, 511 U.S. at 323. As the dissenting opinion points out, "[t]he officers here were not conducting a general investigation; instead, they specifically targeted a specific house, acquired a warrant therefor, and then focused on (then detained) Appellant when she compliantly egressed therefrom." *Wexler*, 593 S.W.3d at 786 (Hassan, J., dissenting), citing *Anrica v. State*, 516 S.W.2d 924, 926 (Tex. Crim. App. 1974). Detective Hill testified that what led him to considering Appellant as a suspect

was information obtained during a surveillance operation that led him to believe that Appellant and her boyfriend were selling crystal methamphetamine at the residence. (3 R.R. (Trial) at 36-38, 114-115, 129-130). During this surveillance operation of the residence, several traffic stops were performed on vehicles leaving the residence. (3 R.R. (Trial) at 36). The surveillance team made their first stop on June 5, 2016, arresting one individual and recovering 73 grams of crystal methamphetamine. (3 R.R. (Trial) at 36-37). A second stop was performed on a vehicle leaving the residence on June 9, 2016, resulting in an arrest and 0.1 grams of crystal methamphetamine being recovered. (3 R.R. (Trial) at 37). A third traffic stop on a vehicle leaving the residence occurred on June 12, 2016, resulting in two arrests and 5.3 grams of crystal methamphetamine being recovered. (3 R.R. (Trial) at 37-38). According to Detective Hill, this sort of activity was indicative of drug dealing. (3 R.R. (Trial) at 38). In his expert opinion, the narcotics seized from these vehicles were coming from 318 Avenue A. (3 R.R. (Trial) at 39). After the surveillance operation, Detective Hill obtained a search warrant to search the residence for narcotics and contraband. (3 R.R. (Trial) at 39-43; 7 R.R (Trial) State's Exhibit 2). Because of the surveillance operation, Detective Hill testified that Appellant became a suspect eleven days prior to the raid. (3 R.R. (Trial) at 51-52). Specifically, Detective Hill testified he had information that crystal methamphetamine was being sold at the house by the Appellant and her boyfriend from 318 Avenue A. (3 R.R. (Trial) at 114-115, 129-130).

Thus, Appellant was clearly a focus of the investigation being conducted by Detective Hill.

The majority also determined that Detective Hill did not convey his belief that Appellant was a suspect by his question to her. *Wexler*, 593 S.W.3d at 780 ("Hill was the only officer to talk with appellant and he did not inform her that she under arrest or even a suspect."). However, "if an officer manifests his belief to the detainee's that he is a suspect, then that officer's subjective belief becomes relevant to the determination of whether a reasonable person in the detainee's position would believe he is in custody." *Ortiz*, 382 S.W.3d at 373). This is precisely what happened in Appellant's case and this Court's opinion in *Ortiz* is analogous. In *Ortiz*, an officer received conflicting information about where the defendant and his wife were traveling to after performing a traffic stop. *Id.* at 370. Prior to this, the defendant had informed officers he was on probation "'for drugs,' specifically 'one-eighth' of cocaine." *Id.* While the officer was waiting for backup, he returned to the defendant, "and asked him 'point blank,' 'How much drugs are in the car?'" *Id.* After the defendant responded "'No, No, No'", he consented to a search of his person and car. *Id.* Eventually, other officers arrived, had the defendant's spouse step out of the vehicle, patted her down, and handcuffed her. *Id.* Shortly after his wife was handcuffed, the officers signaled that they had discovered something and an officer turned to the defendant and said, "Yep. Turn around. Put your hands behind your back" and the defendant was handcuffed. *Id.* The officer also asked, "What kind of

drugs does your wife have, and the defendant responded with cocaine. *Id.* The defendant was not given *Miranda* warnings. *Id.* at 370-371.

In concluding that the defendant in *Ortiz* was subjected to a custodial interrogation without the benefit of any warnings, this Court determined:

> at the moment that Johnson elicited the cocaine statements from the appellee, a reasonable person in the appellee's position would have believed, given the accretion of objective circumstances, that he was in custody. The objective facts show that, by that time: (1) Johnson had expressed his suspicion to the appellee "point blank" that he had drugs in his possession; (2) two additional law enforcement officers had arrived on the scene; (3) Mrs. Ortiz and the appellee had both been patted down and handcuffed; and 4) the officers had manifested their belief to the appellee that he was connected to some sort of (albeit, as-yet undisclosed) illegal or dangerous activity on Mrs. Ortiz's part. These circumstances combine to lead a reasonable person to believe that his liberty was compromised to a degree associated with formal arrest.[11]

Id. at 373.

In this case, Detective Hill expressed his belief that Appellant was a suspect when he told her, "[W]e have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." (3 R.R. (Trial) at 52, 58). Detective Hill's question clearly and directly communicated to the Appellant his suspicion that she possessed narcotics and had them in the residence when he asked her to tell him "where the narcotics are" in order to expedite his search of the house. What Detective Hill asked Appellant is no different from what

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[11] In other words, the officer "unmistakably communicated to the [defendant] during course of the detention" his suspicion that the [defendant] had drugs when he asked ten minutes into a traffic stop "How much drugs are in the car" and the officer asked the [defendant] for permission to search his person and vehicle.

the officer in *Ortiz* asked (how much drugs are in the car?) which this Court determined expressed an officer's suspicion that the defendant possessed drugs. *Ortiz*, 382 S.W.3d at 372. In addition, similar to the defendant in *Ortiz*, Appellant was faced with the prospect of multiple officers being on scene. *Id.* at 374. Therefore, a reasonable person in the Appellant's situation would have believed that Detective Hill communicated to her that she was a suspect through his question. Based on the foregoing, Appellant was in custody at the time Detective Hill interrogated the Appellant.

"The need for *Miranda* safeguards arises when a person in custody 'is subjected to either express questioning or its functional equivalent." *Ramirez*, 105 S.W.3d at 740, quoting *Innis*, 446 U.S. at 300-301. "Interrogation arises when express questioning as well as any words or actions by the police—other than those normally attendant to arrest and custody—that police should know are reasonably likely to elicit an incriminating response." *Martinez-Hernandez v. State*, 468 S.W.3d 748, 758 (Tex. App.—San Antonio 2015, no pet.), quoting *Ortiz*, 346 S.W.3d at 134. "'Incriminating response' refers to both inculpatory and exculpatory responses that prosecutors may seek to introduce at trial." *Ramirez*, 105 S.W.3d at 740. "The likelihood of eliciting a response focuses on the perception of the suspect, not the intent of the police." *Id.* "[A]ny practice the police should know is 'reasonably likely to evoke an incriminating response from a suspect' constitutes interrogation." *Id.* Not all post-arrest questioning constitutes an interrogation. "For example, routine inquiries, questions incident to

booking, broad general questions such as 'what happened' upon arrival at the scene of a crime, and questions mandated by public safety concerns." See *Jones v. State*, 795 S.W.2d 171, 174 fn.3 (Tex. Crim. App. 1990).

However, the question that Detective Hill asked Appellant did not concern general matters such as routine questions incident to booking or attempting to ascertain Appellant's identification, but was a specific question regarding the location of illegal narcotics that Detective Hill suspected Appellant was selling out of the residence. In addition, the question was specifically designed to elicit an incriminating response from the Appellant, as her knowledge of the location of the crystal methamphetamine was certainly evidence that connected her to the controlled substance. See *Ramirez*, 105 S.W.3d at 741 ("By asking appellant whether there was 'anything else [he was] going to find in [the garage] that's illegal, any more marihuana,' [the officer] engaged in express questioning of appellant."). See also TEX. HEALTH & SAFETY CODE § 481.102 (methamphetamine in penalty group 1) and 481.112 (a) ("a person commits an offense if the person knowingly manufactures, delivers, or possess with intent to deliver a controlled substance listed in Penalty Group 1."). Furthermore, Detective Hill should have known that Appellant telling him where the crystal methamphetamine was located would be a statement that the State would introduce at a trial. Appellant knew that officers had a search warrant to search the residence and likely would have believed that they would find the illegal drugs. Thus, Detective Hill interrogated Appellant, as he should have known that the

circumstances under which Appellant was removed from the residence and his question would encourage her to provide him with an incriminating response. See *Innis*, 466 U.S. at 301.

"Voluntary statements generally do not occur in response to a direct question from a police office." *Ramirez*, 105 S.W.3d at 741. "Appellant complied with police instructions (conveyed via loudspeaker from an armored police vehicle by High Risk Operations Unit personnel), exited the residence in which she was previously located as an armed SWAT team prepared to enter and conduct a safety sweep, was placed in a police car, was informed a search of the home from which she just exited would be performed, was informed the drugs secreted therein would be found, was asked where said drugs would be found (an inherently inculpatory question under the circumstances) and was never informed she was free to leave." *Wexler*, 593 S.W.3d at 782-783. (Hassan, J., dissenting). Based on the foregoing, the totality of the circumstances demonstrated that Appellant was subjected to a custodial interrogation without the benefit of any warnings pursuant to ether *Miranda* or Article 38.22 of the Texas Code of Criminal Procedure. Thus, the majority in the Court of Appeals erred when they concluded otherwise.

D. Harm

"In cases where the court of appeals has not reached the issue of harm it is [this Court's] general practice to remand the case to the appellate court for a harm analysis." *Elizondo v. State*, 487 S.W.3d 185, 204 (Tex. Crim. App. 2016). "However,

'harm is always an issue properly before this Court whenever error is discovered." *Id.* In the event this Court finds error and wishes to address the issue of harm, Appellant offers the following harm analysis.

The admission into evidence of a statement taken in violation of *Miranda* rights is constitutional error subject to harmless error review. *Jones v. State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003). "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). See also *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007). A constitutional error does not contribute to the conviction or punishment if the jury's verdict would have been the same even if the erroneous evidence had not been admitted. *Clay*, 240 S.W.3d at 904. "If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error is not harmless beyond a reasonable doubt." *McCarthy v. State*, 65 S.W.3d 47, 55 (Tex. Crim. App. 2001), citing *Satterwhite v. Texas*, 486 U.S. 249, 256-257 (1998) and *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). "The reviewing court should calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence." *Id.*, citing *Wesbrook*, 29 S.W.3d at 119.

"In *Clay*, [this Court] listed several factors to be considered in determining whether constitutional error in the admission of evidence is harmless: 1) the

importance of the evidence to the State's case; 2) whether the evidence was cumulative of other evidence; 3) the presence or absence of other evidence corroborating or contradicting the evidence on material points; 4) the overall strength of the State's case; and 5) any other factor, as revealed by the record, that may shed light on the probable impact of the error on the minds of the average juror." *Ramos v. State*, 273 S.W.3d 356, 359 (Tex. App.—San Antonio 2008, pet. ref'd), citing *Clay*, 240 S.W.3d at 904. Other factors include "the source and nature of the error, the emphasis placed upon the evidence by the State, how much weight a juror might have placed on the evidence, and whether finding the error harmless would encourage the State to repeat the conduct." *Id.*, citing *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1990).

Appellant's statement was crucial to the State's case as the main disputed issue was whether or not the Appellants possessed the crystal methamphetamine with intent to deliver. Appellant's trial counsel presented evidence that the Appellant had moved out of the house, was living with Mr. Sherlock, and her ex-boyfriend, Jimmy McCullough owned the house (4 R.R. (Trial) at 26-37). The State countered by emphasizing that the Appellant had told Detective Hill where to find the narcotics and the crystal methamphetamine was found where the Appellant said it would be. (4 R.R. (Trial) at 57, 68). Specifically:

> So if that's not enough, then we have Detective Hill who says they set up a raid. The High Intensity or whatever unit he called was called out to do the SWAT raid and then narcotics came in. But before that, he asked

> her, he said, I know we're going to find them, so you might as well just tell me. And she does. She does. She knows where they are. They're going to be in the dresser in my room. Okay?
>
> Does that sound like somebody that doesn't live there? No. Do you have a dresser at your friend's house for no reason? Do you refer to it as my room for no reason? That is one heck of a coincidence if she doesn't live there and she doesn't know where the drugs are, that she just guesses correctly that they're in the top drawer of the dresser. One heck of a coincidence.
>
> So then they were there where she said they would be. But not just that. That's not all that was there. We're not just possessing drugs. We're dealing: Scale, syringes, scale with pink rhinestones, scale, heroin, meth, ammunition, pipes, magazines, methadone, more scales. That's not a casual user.

(4 R.R. (Trial) at 68)

Finally, the jury placed considerable weight on the Appellant's statement as the jury asked for a read back of Detective Hill's testimony regarding the Appellant's statements. (C.R. at 46; 4 R.R. (Trial) at 73-76). The jury specifically asked for the conversations between Detective Hill and the Appellant regarding his questioning of her about where in the house they would find drugs. (C.R. at 46; 4 R.R. (Trial) at 73-74). In response, the trial court read back Detective Hill's statement where the Appellant told him the narcotics would be in her bedroom in a dresser drawer. (4 R.R. (Trial) at 76-77). Afterwards, the jury sent out no further questions and found the Appellant guilty as charged.

The damaging effects of a confession have been stated by the U.S. Supreme Court:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him…The admissions of a defendant came from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told do so. While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Arizona v. Fulminante, 499 U.S. 279, 296 (1991)

Here, the trial court's error in the admission of Appellant's statement resulting from a custodial interrogation without the benefit of *Miranda* warnings contributed to Appellant's conviction and genuinely corrupted the fact-finding process. It cannot be said that the erroneous admission of Appellant's custodial statement did not contribute to the Appellant's conviction.

PRAYER

Appellant, Suzanne Elizabeth Wexler, prays for this Court to reverse the Fourteenth Court of Appeals' judgment and the trial court's judgment, and remand Appellant's case back to the trial court for a new trial. Alternatively, Appellant respectfully requests that this Court reverse the Fourteenth Court of Appeals judgment and remand Appellant's case back to the Fourteenth Court of Appeals for a determination of harm. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Brief on the Metis was served on John D. Crump of the Harris County District Attorney's Office and Stacey Soule of the Office of State Prosecuting Attorney on July 15, 2020, to the email address on file with the Texas e-filing system.

/s/ Nicholas Mensch
Nicholas Mensch

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/s/ Nicholas Mensch
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