Cause No. 14-24-00657-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

KEONA MOUTON,
Appellant

v.

THE STATE OF TEXAS
Appellee

Appeal from the 182nd Judicial District Court of Harris County, Texas
In Trial Court Cause No. 1663515
Hon. Marc Brown, Judge Presiding

APPELLANT'S BRIEF
(corrected)

Matthew J. Hefti (*Lead Counsel*)
SBOT No. 24099300
LOONEY SMITH CONRAD & HEFTI P.C.
11767 Katy Freeway, Ste. 740
Houston, Texas 77079
Tel: 281-597-8818
Fax: 281-597-8284
mjhefti@looneyconrad.com

Wade B. Smith
SBOT No. 24080313
LOONEY SMITH CONRAD & HEFTI P.C.
11767 Katy Freeway, Ste. 740
Houston, Texas 77079
Tel: 281-597-8818
Fax: 281-597-8284
wbsmith@looneyconrad.com

Counsel for Appellant

Ms. Mouton Requests Oral Argument

IDENTITY OF PARTIES AND COUNSEL

Appellant:	Keona Mouton
Mouton's Counsel on Appeal:	Matthew J. Hefti Wade B. Smith **LOONEY SMITH CONRAD & HEFTI P.C.** 11767 Katy Freeway, Ste. 740 Houston, Texas 77079 Phone: 281-597-8818 mjhefti@looneyconrad.com wbsmith@looneyconrad.com
Mouton's Counsel at Trial:	Wade B. Smith Matthew J. Hefti Paul C. Looney Clay S. Conrad **LOONEY SMITH CONRAD & HEFTI P.C.** 11767 Katy Freeway, Ste. 740 Houston, Texas 77079
State's Counsel on Appeal:	ADA Jessica A. Caird **Harris County District Attorney's Office** 1201 Franklin Street Houston, TX 77002 Phone: 713-274-5826 Caird_jessica@dao.hctx.net
State of Texas at trial:	ADA Sarah Seeley ADA Maroun Koutani ADA Jessica Caird **Harris County District Attorney's Office**
Trial Court:	182nd Judicial District Court, Harris County Hon. Judge Danilo Lacayo *(pretrial)* Hon. Judge Mark Kent Ellis *(trial guilt-innocence)* Hon. Judge Marc Brown *(punishment / judgment)*

Table of Contents

Index of Authorities

Cases

Statutes

Rules

Constitutional Provisions

Statement of the Case

On September 10, 2019, the State filed a petition against Keona Mouton in the 313th District Court sitting as a Juvenile Court, on the charge of Murder (28RR67 – 68).[1] On January 23, 2020, the 313th District Court sitting as a Juvenile Court, certified that it waived jurisdiction and transferred the case to the 183rd District Court so Ms. Mouton would be tried as an adult for Murder. (1CR9). A grand jury indictment on the Murder charge was filed in the case on March 18, 2020. (1CR21). On October 28, 2022, the case was transferred from the 183rd District Court to the 182nd District Court. (1CR167). After a not guilty plea and a jury trial, the jury found Appellant guilty. (2CR248; 26RR55). The jury assessed punishment at 23 years confinement by the Texas Department of Criminal Justice. (2CR248; 27RR82). No motion for new trial was filed. Appellant timely filed a Notice of Appeal on August 22, 2024. (2CR433). The trial court's certification of defendant's right of appeal ensures Appellant has the legal right to appeal. (2CR1152). Appellant, who is represented by retained counsel, timely filed her brief on the merits by the extended deadline of April 14, 2025, and filed this CORRECTED brief accompanied by a motion for leave to file on April 15, 2025.

[1] Throughout this brief the citations to the Clerk's Record are styled as ([vol.]CR[pg.#]) with the page number referring to the page number of that volume rather than the overall page number of the Clerk's Record. Citations to the Reporters Record are styled as ([vol.]RR[pg.#]).

Statement Regarding Oral Argument

The issues in this case are of constitutional magnitude and go to the heart of the lengths that the State is allowed to go to coerce and induce confessions from juveniles and to secure waivers of important constitutional rights from unrepresented juveniles without any warnings of rights. Because these matters are of such significance statewide and are factually complex, Ms. Mouton requests oral argument.

Issues Presented

1. The trial court committed reversible error in denying Ms. Mouton's motion to suppress her recorded statement of December 5, 2018, because she was in custody and was not advised of her rights in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); Article 38.22 of the Texas Code of Criminal Procedure; and section 51.095 of the Texas Family Code.

2. The trial court committed reversible error in denying Ms. Mouton's motion to suppress her recorded statements of December 5, 2018, and March 8, 2019, because her statements were made pursuant to unlawful inducement or coercion and were thus involuntary.

3. The trial court committed reversible error in denying Ms. Mouton's motion to suppress her statements because specific performance of the promises made by law enforcement to induce Ms. Mouton's cooperation entitled her to use-immunity for the statements provided in consideration for the promise.

4. The trial court erred in denying Ms. Mouton's motion to suppress the fruits of the search of her cell phone conducted after the seizure of her cell phone on June 4, 2019, because it was conducted without a warrant and the consent was involuntary.

5. The trial court committed reversible error in admitting 26 gruesome autopsy photos over objection because they had no probative value to any fact at issue and their admission only served to inflame the jury.

6. The state committed misconduct, and the trial court committed reversible error in denying a mistrial after the state provoked an extreme outburst from the victim's mother by showing her a gruesome autopsy photo for no legitimate purpose.

7. Where the main issue for the jury to determine was whether Ms. Mouton believed her actions would only lead to a fight instead of a shooting, the trial court denied Ms. Mouton her right to present a complete defense by denying defense counsel the opportunity to question a witness about a fist fight he had seen between the victim and another boy mere weeks before the shooting.

Statement of Facts

The murder for which Appellant Keona Mouton was convicted as a party occurred on November 13, 2018. (5RR78). Ms. Mouton was 16 years old. (5RR171).

On the morning of November 13, 2018, Delindsey Mack (known as Poppy), Robin Hale, and Appellant Keona Mouton were in a combined class at Lamar High School. (23RR17 – 18). Two members of a gang that rivaled Mack's came into the classroom, making Mack uncomfortable enough that he wanted to leave school for the day. (23RR20). He called his mother and asked her to pick him up from school. (24RR139).

Mack usually left school around noon. (23RR20). His uncle usually dropped him off and picked him up. (23RR21). Around noon, when Mack was getting

ready to leave school for the day and Hale was taking her lunch, Mack, Hale and Ms. Mouton all walked off campus together to go smoke marijuana. (23RR21).

It was cold and windy, affecting Mack's ability to prepare his marijuana, so Hale suggested they cross through the nearby church parking lot to stand by two gray generators or electrical boxes. (23RR23 – 24, 55). When Hale and Mack got to the electrical boxes, Ms. Mouton was no longer with them. (23RR26).

Within about ten seconds, a car pulled up, and somebody got out of the back seat and started shooting. (23RR29). Hale ran away toward the church. (23RR30 – 31). She was grazed by a bullet. (23RR31). Hale saw Ms. Mouton also as she fled, and the two entered the church together. (23RR32 – 33). Mack was killed by multiple gunshot wounds. (23RR256 – 257).

In the church, Detective Keidra James interviewed Ms. Mouton. (21RR188 – 193). Ms. Mouton withheld any facts of her involvement or of her knowledge of any participants. (SX123). Detective James collected Ms. Mouton's phone and password. (8RR33, 35). By the time Ms. Mouton had turned over her phone, unbeknownst to officers, she had deleted text messages from her phone. (8RR36).

Ms. Mouton's phone was returned to her in a November 15, 2018, interview. (8RR45).

After conducting a forensic analysis of the contents of Ms. Mouton's phone, police discovered a deleted text string that indicated Ms. Mouton knew more than

she had previously shared. Detectives asked Ms. Mouton to come into the police station for another interview on December 5, 2018. That interview became the subject of a later suppression motion and issues which will be discussed in more detail, *infra*.

Detective Miller confronted Ms. Mouton with the deleted messages on her phone. (23RR133).

Between 8:00 AM and 8:21 AM on the morning of the shooting, a person then unknown to police and Ms. Mouton exchanged the following texts:

> UNKNOWN: Don't say it but what we talked bout yesterday U was like u was gone let me kno
>
> MOUTON: that's crazy cause he right next to me & his homeboy behind me
>
> UNKNOWN: Aight bet don't text none bout it just call me
>
> MOUTON: I got you
>
> UNKNOWN: & ke?
>
> MOUTON: yes
>
> UNKNOWN: Don't betray me keep yo mouth closed & I'll do the same
>
> MOUTON: come on now is you over any of these ni***s.
>
> UNKNOWN: Overstood
>
> MOUTON: ima call you in 15 minutes
>
> UNKNOWN: Bet.

(SX137).

The next time she spoke to the person was several minutes before the murder happened, at 11:55 AM, when the following text exchange occurred:

UNKNOWN: He left yet

MOUTON: no

UNKNOWN: Bet

(25RR208 – 209; SX137).

There was no other message of any other kind or any indication on her phone records to indicate Ms. Mouton told Johnson or anyone else they were leaving school or going over to the electrical boxes. (23RR217).

After being confronted with the deleted texts, being threatened with a long time in prison, and being promised treatment as a witness instead of a suspect, Ms. Mouton then confessed her involvement and told Detective Miller about Kendrick Johnson's involvement. (23RR195). Kendrick Johnson was the person she was texting in the deleted text thread. (23RR195).

Up to this point, police had no other leads about who was involved besides Ms. Mouton. (23RR195). Ms. Mouton said the only person that told her anything about what was going to happen was Kendrick Johnson, and he told her it was going to be a fight. (23RR216). From her interview of December 5, 2018, through trial, Ms. Mouton remained consistent that she thought it would be a fight, and that she had no idea they planned to kill Mack. (23RR216 – 217).

The information Ms. Mouton communicated to Detective Miller was "the key" into looking into Kendrick Johnson, the shooter in this murder. (5RR58). Kendrick Johnson was ultimately charged as one of the shooters. (23RR129). Daveon Thomas was charged as the driver. (23RR129). The second shooter has never been charged. (23RR130).

Ms. Mouton continued to talk with police, believing she was fulfilling her end of the bargain that she would be treated as a witness rather than a suspect if she cooperated. She went into the station for another interview on March 18, 2019. (5RR150). That interview was also the subject of a motion to suppress and is the subject of issues in this appeal.

Ms. Mouton believed her agreement with Detective Miller applied to Detective Hogue as well, because she knew they were partners. (6RR24). Detective Hogue continued to ask her about suspects that they believe might be involved. (6RR24). It was the influence of that sham agreement that led her to speak with Detective Hogue. (6RR27). During this interview, Detective Hogue falsely told Ms. Mouton she would have no choice but to testify to the grand jury if she were subpoenaed. (5RR173 – 174).

A few months later, on June 3, 2019, at around 4:00 or 5:00 PM in the evening, Ms. Mouton was subpoenaed to appear at a grand jury proceeding the very next day. (6RR28; 28RR550). While at the courthouse, in the courtroom, and

testifying under subpoena, the DA's office secured a consent to search form from Ms. Mouton and confiscated her phone for another digital download. (9RR51 – 52, 147, 149). That search was also the subject of a motion to suppress and is the subject of an issue in this appeal.

At trial, the State alleged Ms. Mouton's guilt under a theory of party liability. (26RR9). They argued that Ms. Mouton alerted Kendrick Johnson as to where Mack would be and gave the green light for the shooting. (26RR51). They relied on Ms. Mouton's deleted text messages, her statements to law enforcement, and social media posts and phone records obtained after the incident that indicated her continued contact with Kendrick Johnson and other people connected with the Third Ward 103. (26RR12, 39 – 41, 44 – 45, 47 – 49).

Ms. Mouton testified at trial in her own defense. (25RR173). Ms. Mouton first encountered Kendrick Johnson through Instagram, when he sent her a direct message. (25RR176). She had never heard of Johnson before that day, but she later found out that he was in the same gang as her on-again off-again boyfriend, Brent Williams. (25RR175 – 177). She was attracted to Johnson, and they flirted through shallow conversations. (25RR178).

Mouton met Delindsey Mack in the fall of 2018. (25RR179). The two started talking, and Mack asked for Mouton's phone number. (25RR179). Mack expressed that he had some feelings for her, but Mouton told him in text and in

person that she did not reciprocate. (25RR180). Mack continued to tell Mouton that he like her, continued to pursue her, but she was "adamant" that she didn't feel the same way. (25RR180). She continued to talk to him, nevertheless, with friendly conversations because she believed he was a cool person to talk to and very funny. (25RR180 – 181).

Mack learned Ms. Mouton was talking to Johnson through social media. (25RR186). As Mack pursued Mouton, he told her that Johnson had murdered one of his own friends and that he or one of his friends had gotten in a fight with one of Mack's friends and someone got their nose broken. (25RR186). Ms. Mouton didn't believe it for three reasons: 1) she had never heard from anyone else that Johnson was like that; 2) she had never seen anything about him killing anyone on social media; and 3) Johnson had never talked to her about anything like that. (25RR186 – 187). Nevertheless, she asked him directly about what Mack had told her, and Johnson laughed, denied it, and told her not to believe everything she heard. (25RR187).

She believed Johnson over Mack because she had known him longer. (25RR187). She admitted her romantic interest in Johnson had something to do with her believing him over Mack. (25RR187 – 188). This was coupled with the fact that Mack told Ms. Mouton that he himself had participated in shootings against the 103 gang and had engaged in acts of violence against them. (25RR189).

Ms. Mouton met Johnson in person for the very first time on November 12, 2018, the day before the shooting. (25RR191). Johnson and a friend of his picked Ms. Mouton up from school. (25RR192). After getting some food, Johnson and Ms. Mouton ended up at Johnson's older sister's house. (25RR193).

Johnson took Ms. Mouton into a bedroom in the house and locked the door. (25RR194). Johnson initiated sex. (25RR195). Johnson was 19 years old. (25RR191). Ms. Mouton was 16 years old. (5RR9 – 10).

While they were laying in bed after having sex, Johnson asked Ms. Mouton to tell her again what Mack had told her about Johnson. (25RR195). When she told him, he laughed again and asked what time Mack got picked up from school. (25RR196). She told him that Mack got picked up at noon on the east side by Westheimer. (25RR196).

After she told him when Mack got out of school and where he got picked up, Johnson told her that they wanted to teach him a lesson by jumping him because of what Mack was telling Ms. Mouton about Johnson. (25RR196 – 197). Johnson asked her to tell him when Mack left school. (25RR197). Still lying in bed naked and influenced by the sex she just had with this older man, Ms. Mouton said she would. (25RR197 – 198).

They never discussed the specific spot, the electrical boxes or generators on Bammel Street where the shooting occurred. (25RR198). Johnson never mentioned

that he planned to bring a weapon to the fight. (25RR198). He changed the subject right away, and Ms. Mouton didn't think he was serious. (25RR198). She didn't give any more thought to the conversation that night after that. (25RR203).

Ms. Mouton admitted in her testimony that she told Detective Miller during her interrogation that she had this conversation with Johnson over FaceTime rather than in person because she didn't feel comfortable enough with him to tell him it happened right after they had sex while she was skipping school. (25RR199).

The next morning, between 8:00 AM and 8:21 AM, Johnson and Ms. Mouton exchanged the deleted text messages that were later found. Ms. Mouton deleted these texts when she sat in the church to which she had fled immediately after the shooting. (25RR278).

Ms. Mouton acknowledged in her testimony that she understood these texts to be about the conversation Johnson had with her about jumping Mack. (25RR205 – 206). She had no idea it would be more than a fight between Johnson and Mack. (25RR206). She had previously agreed to let Johnson know when Mack left school, but they never agreed on a particular spot or location where Mack would be. (25RR206).

Ms. Mouton testified she never called Johnson that morning. (25RR208). Phone records show Ms. Mouton never made a call to Johnson despite texting him that she would. (23RR217).

Ms. Mouton did not realize until that morning through Johnson's texts that he was serious about fighting Mack. (25RR210). She did not really want it to happen, so she intentionally stopped providing information to Johnson. (25RR210). Mouton sent no more messages to Johnson after she told him that Mack had not yet left because she did not want Mack to get jumped. (25RR210).

The theory of defense was that Ms. Mouton did not intend the murder of Mack, and that Ms. Mouton made a mistake of fact, and that she reasonably believed Johnson only wanted to jump or fight Mack, not kill him. (2CR414).

Argument and Authorities

I. The trial court committed reversible error in denying Ms. Mouton's various motions to suppress her recorded statements of December 5, 2018, and March 8, 2019.

A. Summary of the Arguments on Motions to Suppress Statements

Ms. Mouton presents three issues related to her recorded statements and three different legal grounds for suppression of those statements. All issues related to the statements were preserved with pretrial motions to suppress, which were litigated in a multi-day hearing. (1CR269, 704, 706, 709; 2CR299). The Court denied the motions by written order. (2CR1059).

Under any of the three legal grounds for suppression, the statements made by Ms. Mouton were inadmissible as evidence against her. She could not be expected to comprehend the situation she was in without the guidance of counsel. Instead, she was manipulated by trained, purposeful adults to her detriment.

First, the statements should have been suppressed because what began as a noncustodial interview turned into a custodial interview, and law enforcement failed inform Ms. Mouton of her *Miranda* rights and failed to adhere to Article 38.22 of the Texas Code of Criminal Procedure and section 51.095 of the Texas Family Code. Detective Miller told Ms. Mouton he had probable cause to arrest her, did not tell her she was free to leave, and failed to read her *Miranda* warnings or have her taken in front of a magistrate to have her informed of her rights and to determine the voluntariness of her statements.

Additionally, the statements should have been suppressed because they were involuntary and the product of coercion and improper inducement. Detective Miller made promises to Ms. Mouton that she'd be treated as a witness and not a suspect if she cooperated. He made the promise to induce her to cooperate. Detective Miller represented to Ms. Mouton that he was the authority making charging decisions. Miller informed her he had enough information to have her imprisoned for a very long time, and only by cooperating with him could she avoid that fate. He made a promise that she could get out from under the charges if she cooperated. These threats and promises made her statement involuntary.

Finally, the statements should have been suppressed because the affirmative promise of Detective Miller and performance of Ms. Mouton in cooperating created an enforceable contract, entitling Ms. Mouton to use-immunity from the

statements that she provided in consideration for the promise made to her that she could get out from under the charges by cooperating.

B. Common Standard of Review

As the first four issues all argue that evidence should have been suppressed, the common standards of review for motions to suppress is consolidated here, and where the law is more specific or differs on each issue, that law is briefed under the specific issue, *infra*.

This Court reviews a lower court's ruling on a motion to suppress for an abuse of discretion. *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014). The record is viewed in the light most favorable to the trial court's determination, and the judgment is only reversed if it is "outside the zone of reasonable disagreement." *Id.* If the court below made the judgment for a wrong reason, this Court will still uphold the ruling if it is correct on any theory of law applicable to the case. *Id*.

The trial judge is the sole judge of the credibility and demeanor of witnesses and the weight given to their testimony. *Lerma v. State*, 543 S.W.3d 184, 190 (Tex. Crim. App. 2018). This Court gives almost total deference to the trial judge's determination of facts, but only if those facts are supported by the record. *State v. Duran*, 396 S.W.3d 563, 570 (Tex. Crim. App. 2013). The deferential standard also applies when the trial court's determination is based on video evidence

contained in a videotape in certain situations, for example, "whether a witness actually saw what was depicted on a videotape or heard what was said during a recorded conversation." *Id.* However, this Court may review *de novo* "indisputable visual evidence" contained in a video. *Id.*

"[M]ixed questions of law and fact that are not based on evaluations of credibility or demeanor, such as the question of whether an interrogation is custodial, are reviewed *de novo*." *Matthews v. State*, 513 S.W.3d 45, 62 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd)

C. ISSUE ONE: The trial court committed reversible error in denying Ms. Mouton's motion to suppress her recorded statement of December 5, 2018, because she was in custody and was not advised of her rights in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); Article 38.22 of the Texas Code of Criminal Procedure; and section 51.095 of the Texas Family Code.

Ms. Mouton was a juvenile during her interrogations. (5RR171). There is no dispute that she was not advised of her *Miranda* rights in either interview, nor was she taken before a magistrate to exercise a waiver of her rights. (5RR12 – 13, 153). During her statement of December 5, 2018, she was separated from her mother, (5RR11 – 12), confronted with evidence indicating probable cause, (5RR41), threatened with prison for a long time, (5RR124), and restricted in her movement (5RR12, 89, 91, 131 – 132). The first question for this Court, then, is whether her statement was custodial. If it was, the trial court committed reversible error in denying Ms. Moutons motions to suppress her statements on that ground.

1. Standard of Review and Governing Law

The common standards of review on motions to suppress and this Court's review of the record are contained in §I.B., *supra*. The question of whether an interrogation was custodial, is reviewed *de novo*. *Matthews*, 513 S.W.3d at 62.

"Both the United States Constitution and the Texas Constitution provide protection from self-incrimination. In the case of *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), the U.S. Supreme Court applied the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), to juveniles." *In re J.*, 511 S.W.2d 347, 348-49 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

Article 38.22, § 3, of the Texas Code of Criminal Procedure mandates that no oral statement of an accused made as a result of custodial interrogation is admissible against the accused in a criminal proceeding unless the accused knowingly, intelligently, and voluntarily waives all rights set out in § 2 of Article 38.22.[2] For custodial statements of a juvenile to be admissible, Section 51.095 of the Texas Family Code requires that a juvenile be informed of the same rights, but

[2] Hereafter, all references to Article 38.22 or any other "Article" refer to Articles in the Texas Code of Criminal Procedure, unless otherwise noted.

it further requires that any waiver of those rights by a juvenile must happen in the presence of a magistrate with no law enforcement officer or prosecutor present.[3]

Even when a conversation with police begins as consensual and noncustodial, police behavior during questioning may cause the encounter to escalate into a custodial interrogation. *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) (citing *Ussery v. State*, 651 S.W. 2d 767, 770 (Tex. Crim. App. 1983)).

Under *Dowthitt*, the "determination of custody must be made on an ad hoc basis, after considering all of the (objective) circumstances." *Id* at 255. The Court recognized four general situations which may constitute custody:

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

Id.

The standard with a juvenile is not a "reasonable person" standard but is instead a "reasonable child" standard: *i.e.*, "whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of

---

[3] Hereafter, all references to Section 51.095 or any other "Section" refer to Sections in the Texas Family Code.

movement was significantly restricted." *Jeffley v. State*, 38 S.W.3d 847, 855 (Tex. App.—Houston [14th Dist.] 2001, pet. Ref'd). As the Supreme Court has noted, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011).

2. Ms. Mouton was in custody during her December 5, 2018 interview.

Detective Travis Miller had Ms. Mouton's mother bring her to a police station for questioning on December 5, 2018. (5RR10). During that interview, Ms. Mouton was separated from her mother. (5RR11 – 12). Detective Miller testified that Ms. Mouton's mother was with his partner, Chad Hogue, at a computer watching this interview. (5RR12). Nobody could corroborate this claim. Detective Miller testified he had no independent recollection. (5RR69). Ms. Mouton's mother denied that she was watching this interview and says she was left in the lobby. (9RR74). Chad Hogue could not recall. (5RR144-145). Ms. Mouton stated that her mother was asked to stay in the lobby. (6RR10).

Detective Miller confirmed her date of birth, and thus knew she was 16 at the time of the interview. (5RR9 – 10). She didn't believe she'd be allowed to ask for her mother to be in the room. (6RR10). Nor did her mother. (9RR75).

A reasonable sixteen-year-old girl would have believed her freedom of movement was significantly restricted and would not have felt free to get up and

leave. *Jeffley*, 38 S.W.3d at 855. At no time was Ms. Mouton informed she was free to leave. (5RR15, 29 – 30). The interview took place in an adult homicide interrogation room, not a juvenile facility. (5RR12). Ms. Mouton had to sign in, go through security, and get an escort to take her through a locked door to then escort her upstairs. (5RR89). Even with a visitor's badge, Ms. Mouton would only have been allowed limited movement with an escort. (5RR91). Detective Miller conceded that Ms. Mouton could not leave the office unescorted, and she reasonably would have believed him to be her escort. (5RR131 – 132).

Where officers have probable cause to arrest and do not tell a suspect she is free to leave, custody may arise. *Dowthitt*, 931 S.W.2d at 255. For such a situation to substantiate custody, probable cause must be manifested. *Jeffley*, 38 S.W.3d at 855. The manifestation of probable cause occurs if the information substantiating probable cause is related by the officers to the suspect or from the suspect to the officers. *Id*. "Custody is established under the fourth situation if the manifestation of probable cause, combined with other circumstances, would lead a reasonable [child] to believe that she is under restraint to the degree associated with an arrest." *Id.*

Just as in *Jeffley*, what may have began as a voluntary questioning, escalated into a custodial interrogation. 38 S.W.3d at 856. Detective Miller manifested his probable cause to Ms. Mouton and combined it with threats of prison. Detective

Miller confronted Ms. Mouton with deleted text messages from her phone. (SX138 9:12:53 – 9:14:28; 5RR26). He told her that her deleted text messages made it look like she set up the murder. (SX138 9:12:53 – 9:13:10). He told her of facts that could lead her to be charged with murder. (5RR41). He told her the DA already wanted to charge her with murder because of the things he had shown them. (SX138 9:14:48 – 9:14:52). Detective Miller admitted he relayed facts he knew of that could lead her to be charged in this case. (5RR41).

As the interview went on, Detective Miller admitted his tone became more aggressive. (5RR62). Detective Miller threatened Ms. Mouton with "a very long time in prison" in order to frighten her into cooperating. (5RR124). He admits she did appear "partially" scared of him. (5RR96). Detective Miller testified that about 16-17 minutes into the interview he became more aggressive with Ms. Mouton, making demands, and that Ms. Mouton acquiesced to his demands. (5RR62 – 63). He demanded access to her phone, and she again acquiesced. (5RR64 – 65).

Detective Miller testified he was only "vaguely" familiar with the Texas Family Code as it governs proceedings involving juveniles. (5RR13). Ms. Mouton was neither read her *Miranda* rights nor appointed counsel and taken before a magistrate prior to waiving her rights. (5RR12 – 14); *Miranda v. Arizona*, 384 U.S. 436 (1966).

Under the *Dowthitt* standard, especially as seen through the lens of *J.D.B. v. North Carolina*, Ms. Mouton was in custody. The pressures applied to her would be problematic when applied to an *adult.* They are exponentially more problematic applied to a juvenile. She was infinitely more suggestible, malleable and vulnerable than an adult would ever be – and that persists through every issue raised herein. Because the interview turned custodial and Ms. Mouton was not read her *Miranda* rights, was not taken before a magistrate, and was not provided with the warnings as required by Article 38.22 and Section 51.095, the trial court erred in denying Ms. Mouton's motion to suppress the statement.

D. ISSUE TWO: The trial court committed reversible error in denying Ms. Mouton's motion to suppress her recorded statements of December 5, 2018, and March 8, 2019, because her statements were made pursuant to unlawful inducement or coercion and were thus involuntary.

Ms. Mouton's cooperation and inculpatory statements were illegally induced through improper threats and affirmative promises made by Detective Miller, making them involuntary. Detective Miller directly induced inculpatory statements in his interrogation of Ms. Mouton on December 5, 2018, by representing himself as the charging authority, threatening her with a murder charge, and promising her that he would treat her as a witness instead of a suspect and that she could "get out from under" the charges by cooperating. In his interview of Ms. Mouton on March 8, 2019, Detective Hogue, who knew of the promises made by Detective Miller,

never disabused Ms. Mouton of the notion that she was a cooperating witness who had been promised that her way out from under the charges was through her cooperation with the police investigation. The conviction was founded upon an involuntary confession, and the trial court committed reversible error in denying Ms. Mouton's motions to suppress her statements on that ground.

1. Standard of Review and Governing Law

The common standards of review on motions to suppress and this Court's review of the record are contained in §I.B., *supra*. While this court defers to the trial court's findings of historical fact, this Court determines *de novo* whether those facts show that the juvenile's statement was voluntary. *In re Z.L.B.*, 115 S.W.3d 188, 190 (Tex. App.—Dallas 2003, no pet.).

It is not necessary for this Court to find Ms. Mouton in custody for her to prevail because her constitutional right to due process and her right to not be compelled to be a witness against herself are both violated if an involuntary statement is admitted against her.

An involuntary statement violates due process regardless of custody. See *Brown v. Mississippi*, 297 U.S. 278 (1936); *Carter v. State*, 309 S.W.3d 31, 41 (Tex. Crim. App. 2010). "[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even

though there is ample evidence aside from the confession to support the conviction." *Jackson v. Denno*, 378 U.S. 368, 376 (1964). "[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram v. United States*, 168 U.S. 532, 542, 18 S. Ct. 183, 187 (1897).

A statement is not voluntary if there was "official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker." *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). Article 38.21 provides: "A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed."

A promise makes a confession involuntary if it: "(1) is of some benefit to the accused; (2) is positive; (3) is made or sanctioned by a person in authority; and (4) is of such a character as would likely influence the accused to speak untruthfully." *Smith v. State*, 779 S.W.2d 417, 427 (Tex. Crim. App. 1989).

Law enforcement may not elicit confessions by making false promises. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (holding defendant's will was

overborne by police promise not to take away children if defendant confessed); *see also Gipson v. State*, 844 S.W.2d 738, 739–40 (Tex. Crim. App.1992) (affirming court of appeals' decision holding improper an officer's implied inducement to defendant that his confession might be used for him or on his behalf).

Cases from the United States Supreme Court have made clear over the years that a finding of coercion need not depend on actual violence by a governmental agent; a credible threat is sufficient. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). As the Court has said: "Coercion can be mental as well as physical and.... the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *Blackburn v. Alabama*, 361 U.S. 199, 206 (1966); see also *Reck v. Pate*, 367 U.S. 433, 440–41 (1961); *Rogers v. Richmond*, 365 U.S. 534, 540 (1961); *Payne v. Arkansas*, 356 U.S. 560, 561 (1958).

2. The interview on December 5, 2018, was improperly coerced by threats and improperly induced through promises, making it involuntary.

Detective Miller combined his manifestation of probable cause with explicit threats. He threatened Ms. Mouton with a very long time in prison. (5RR124). He told her, "Do you understand? Do you understand what this is? This is a very long

time in prison away from all of your friends away from your family away from everyone for setting up the murder of Poppy." (SX138 9:14:33 – 9:14:43).

Detective Miller offered her a way out, she immediately began to cooperate, and when she hesitated, he again threatened her:

> MILLER: Keona, I don't believe you. This is the time that you can get out from under this and tell me who you were texting at that time, telling them that they had not left yet. Because I'm charging people in this, and right now, I'm going to be charging you. Now the way you get out from under this is to tell me who else I'm going to charge, besides you, and I can treat you as a witness rather than the murder suspect.
>
> MOUTON: Ok, uh, ok, so the truth is the person told me they were going to jump him. They didn't tell me they was going to kill him.
>
> MILLER: And who was it?
>
> MOUTON: Will they know if I say?
>
> MILLER: You want to go to prison for a very long time?
>
> MOUTON: No.
>
> MILLER: Then you need to start telling me the truth.
>
> MOUTON: It was this boy we call Daddy.
>
> MILLER: A boy you call Daddy? Tell me more about Daddy.

(SX138 9:15:35 – 9:16:32).

Detective Miller didn't merely suggest leniency. He admitted he gave Ms. Mouton an either/or choice between herself and the others. Detective Miller

admitted that when she asked, “Will they know if I say?” that he understood it could be an expression of concern for her safety. (5RR35). He also admitted he intended to give her a choice with his response. (5RR37):

> DEFENSE: I’m going to ask you again, how did you meet her—what you described as an expression of concern for her safety if other people found out that she was talking to you, how did you meet that expression?
>
> MILLER: I asked her to choose between her and the other ones. Asking, do you want to go to prison for a long time, meaning do you want to be held responsible or do you want to help me hold the others responsible.
>
> DEFENSE: And be a witness?
>
> MILLER: And be a witness.

(5RR37).

He further admitted that after telling Ms. Mouton that he would treat her as a witness if she talked to him, she provided information. (5RR38). He admitted she agreed to his proposition by providing the information. (5RR40).

Detective Miller admitted he relayed facts he knew of that could lead her to be charged in this case. (5RR41). Detective Miller admitted he was intentionally making Ms. Mouton fearful of the consequences. (5RR41 – 42). Detective Miller’s promise in exchange for cooperation was unambiguous and was done for the express purpose of inducing Ms. Mouton to talk. He testified as much:

> MILLER: I told her that she would be a witness if under the condition that she cooperated with the investigation.

DEFENSE: Okay. And did she begin to cooperate?

MILLER: She began to cooperate, yes.

DEFENSE: Okay. And what was your intention of telling her that she would be a witness if she cooperated?

MILLER: To entice her to cooperate with the investigation.

(5RR41).

Detective Miller flatly admitted that he employed both fear and enticement in order to induce Ms. Mouton's confession. (5RR41, 96, 124).

The law defines what constitutes a "promise" in this context. According to *Espinosa v. State*, 899 S.W.2d 359, 362–63 (Tex. App.-Houston [14th Dist.] 1995, pet. ref'd), "a 'promise' is an offer to perform or withhold action within a party's control." Det. Miller went out of his way to demonstrate to Ms. Mouton that *he* was in control of whether or not she was charged in this case. He stated he was keeping the D.A.'s office at bay.

Detective Miller made threats to Ms. Mouton. Detective Miller explicitly said he was the one charging people, and that he was going to charge her unless she told him the truth about what happened. (SX138 9:15:35 – 9:16:32). Detective Miller informed her anyone involved in this incident can be charged and convicted of murder. (5RR20 – 21; SX138 09:11:42 – 09:12:36). He told her that a way a person can "get out from under something like that, get out in front of it, is to come

forward with the truth very on," and that she could help herself. (SX138 9:12:43 – 9:12:48).

Detective Miller made promises to induce her cooperation, which she accepted. He admitted he told her a party to the offense could get out from under it. (5RR30). He admitted he put a condition on that. (5RR30, 32). He admitted it was conditioned on her assisting in the investigation. (5RR30). He admitted it also included that the cooperation had to be early, and he told her it was still early. (5RR30). He told her she can "get out from under this" by cooperating. (5RR31 – 32). He reiterated this several times. (5RR32). He said her cooperation would lead to her being treated as a witness, not a suspect. (5RR32). He admitted that after he told her all this was when she began cooperating. (5RR32).

He told her he was the only thing standing between her and being charged with murder; that the prosecutor wanted to charge her, but she could "get out from under this" by cooperating. He concedes he "told her that she would be a witness if under the condition that she cooperated with the investigation" in order to "entice" her into cooperating with the investigation. (5RR41).

In response, Keona began to cooperate. She began by expressing her fears, asking "will they know if I said it," or something like that. (5RR34). Det. Miller responded by asking her "Do you want to go to prison for a long time, meaning do you want to be held responsible or do you want to help me hold the others

responsible." (5RR37).[4] Det. Miller stated, in response, she told him who she had been sending the deleted text messages to. (5RR39).

That was the first time Kendrick Johnson became a suspect according to Det. Miller and his partner Chad Hogue. (5RR53, 178). Two days later, following up on Ms. Mouton's lead, Mr. Johnson was arrested and additional evidence discovered establishing his guilt. (5RR53 – 56, 58). The information Ms. Mouton communicated to Detective Miller was "the key" into looking into Kendrick Johnson, the shooter in this murder. (5RR58).

3. The interview on March 8, 2019, was improperly coerced by threats and improperly induced through the same promises, making it involuntary.

At the time of Detective Hogue's interview with Ms. Mouton on March, 8, 2019, he was aware of her age. (5RR171). Ms. Mouton's mother was again told to wait outside. (9RR77). Detective Hogue began by telling Ms. Mouton she'd be going home that day. (5RR155 – 156). He told her that she needed to pick a team. (5RR159). He warned her that people who would lie, obfuscate, distort, distract or deflect from the truth have to worry. (5RR160). Ms. Mouton never stopped answering his questions. (5RR163).

---

[4] This concession from Det. Miller belies the State's claim that the word "other" references other people *in addition* to her and not other people *instead* of her. It meant the latter according to Det. Miller himself.

While Ms. Mouton was not subject to the same level of restraint as she was on December 5, 2018 (because she was told at the outset that she'd be going home), Detective Hogue went out of his way to emphasize that she could be held responsible, and he had probable cause against her. (SX188 13:26:57 – 13:28:24). ("The person that alerted them and walked out there with him. You were involved. You're not charged *right now*, but you are involved." And, "Whatever you thought was going to happen, you took him to what ultimately became his death.") (emphasis added).

He continued to threaten her, hanging charges over her head if she did not continue to cooperate. Detective told her she "wasn't out of the woods yet," meaning that she *could* still be held responsible, and emphasized that she should choose to be on his "team," or she would have to worry. (5RR159 – 162).

The taint of the coercion and promises of the December 5, 2018, interview was never attenuated, and in fact, was only reinforced by what occurred on March 8, 2019. Detective Hogue conceded he never rescinded Det. Miller's agreement with Ms. Mouton. (5RR151). Ms. Mouton still believed Detective Miller's promise to her held true. (6RR19). Ms. Mouton reasonably believed her agreement with Detective Miller was with both officers, because they were partners and were working together. (6RR24). In fact, the statements Detective Hogue made to Ms. Mouton reinforce that agreement—that she would not be taken into custody, that

people who do not cooperate with him "have to worry," but she would be going home. She believed Detective Hogue's statement that she should keep her ears open meant that she should continue to listen for what members of the 103 gang had to say. (6RR25). Nothing had occurred to give her cause to believe Det. Miller's assurances to her were no longer to be relied upon.

It is the State's burden to demonstrate that the taint of the primary illegality has been attenuated by intervening events. *Pham v. State*, 125 S.W.3d 622, 626 (Tex.App. Houston [1st. Dist.] 2003); *Roquemore v. State*, 60 S.W.3d 862, 871 n. 14 (Tex.Crim.App.2001) (attenuation not considered as not raised by the State). In spite of the three-months between the December 5, 2018 and March 8, 2019, interviews, nothing had transpired to lead Ms. Mouton to believe the promises made by Det. Miller no longer applied. According to uncontradicted testimony the State elicited, there were no intervening events. (9RR19, 34 – 35). Her belief on March 8, 2019, was that Miller's promise was still in full force. Without some action on the part of the State disavowing those agreements, which the police and the District Attorney's Office were all aware of, there was no possibility for the taint of the initial illegality to be attenuated.

Moreover, Det. Hogue advised Ms. Mouton that *she had no choice but to testify if called to do so.* (5RR173-174). This could only be true if she'd been given a promise of immunity and was solely testifying as a fact witness. He recognized at

the hearing that she had a right not to say anything that might incriminate her, but he informed her contrariwise that she had no choice in the matter. (5RR173). He told her not to talk to *anybody* about this; that would encompass both her parents and a lawyer on her behalf. (5RR170-171). He used his position of authority so as to intentionally interfere with her rights to counsel and her rights to remain silent by disavowing the very existence of such rights. She, being a child, believed him.

The right to remain silent "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972). It is one violation that Detective Miller did not inform Ms. Mouton of her right to remain silent. Now Detective Hogue affirmatively misadvised Ms. Mouton that *she had no such right.* Whether in custody or not, a police officer telling a schoolgirl, under threat of prosecution, that she had no right to remain silent shocks the conscience. It is plain overreaching and violates due process. It renders any statements or evidence she subsequently gave involuntary and inadmissible

These tactics were used on a sixteen-year-old schoolgirl. Just as with Detective Miller, we must look at what was said through the eyes of a reasonable child. See *J.D.B. v. North Carolina*, *supra*. Detective Hogue was invoking fear by

telling Ms. Mouton she could still be charged with murder, but she'd be "fine" so long as she played on his "team," and she had no choice but to testify if called. The due process violations that began on December 5, 2018, were only amplified.

4. The trial court should have suppressed the statements of December 5 and March 8.

Ms. Mouton only cooperated and provided information because of the threats and promises. Detective Miller testified that by providing the requested information, Keona was indicating she had agreed to his proposition—to cooperate in exchange for being a witness instead of a suspect. (5RR32, 37 – 40).

Ultimately, the law on this subject is the same now as it was over 125 years ago: "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement *of any sort*." *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896)) (emphasis added). For a statement to be admissible, it must not have been extracted by "any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187 (1897).

Ms. Mouton was given the promise that she would be treated as a witness, not a suspect, if she cooperated. In exchange, she cooperated. Under the law, this is a promise. It was of benefit to Ms. Mouton, it was positive, it was made by a person in authority, and it was of such a character as would likely influence an

accused to speak untruthfully. *Smith v. State*, 779 S.W.2d 417, 427 (Tex. Crim. App. 1989). See also *Washington v. State*, 582 S.W.2d 122, 124 (Tex. Crim. App. 1979); *Fisher v. State*, 379 S.W.2d 900, 902 (Tex. Crim. App. 1964). She was an easily manipulated schoolgirl. She would have said whatever would get her the promised benefit.

Ms. Mouton's statement was coerced. "The question is whether the accused was deprived of [her] free choice to admit, to deny, or to refuse to answer." *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967). Ms. Mouton had an either/or choice between being charged and being a cooperator. Even more so than in *Garrity*, the choice given to Miss Mouton was the antithesis of free choice.

> [A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction.

Jackson v. Denno, 378 U.S. 368, 376 (1964).

In this case, Ms. Mouton's pivotal confessions were extracted by direct threats and direct and implied promises. The State significantly relied on the statements throughout trial and closing argument, violating Ms. Mouton's due process rights. The trial court committed reversible error in not suppressing them.

E. ISSUE THREE: The trial court committed reversible error in denying Ms. Mouton's motion to suppress her statements because specific performance of the promises made by law enforcement to induce Ms. Mouton's cooperation entitled her to use-immunity for the statements provided in consideration for the promise.

1. Summary of the Argument

If the promises from Detective Miller were not of such a character that they would induce Ms. Mouton to speak untruthfully, they still created a binding agreement, and Ms. Mouton was entitled to the benefit of the bargain. Detective Miller represented himself to Ms. Mouton as the charging authority and made a binding promise to her that if she told him who else was involved, Ms. Mouton could get out from under the charges. Detective Miller had apparent authority to extend the offer. Immediately after the offer was extended, Ms. Mouton accepted and began performance. While the agreement is not enforceable as a transactional immunity agreement, Ms. Mouton was entitled to specific performance of an agreement for use-immunity, even without court approval. Because there was a binding agreement to the extent that it conferred use-immunity, evidence obtained from Ms. Mouton as a result of the agreement could not be used against her at trial, and the trial court committed reversible error in denying her motions to suppress her statements.

2. Standard of Review and Governing Law

The common standards of review on motions to suppress and this Court's review of the record are contained in §I.B., *supra*.

"The initial burden is on the defendant to show the existence of an agreement by a preponderance of the evidence." *Zani v. State*, 701 S.W.2d 249, 254 (Tex. Crim. App. 1985). Once the existence of an immunity agreement is shown by a preponderance of the evidence, the burden shifts to the State to show beyond a reasonable doubt why the agreement is invalid. *Id*.

A prosecutor's agreement to *transaction* immunity is not binding without court approval. *Graham v. State*, 994 S.W.2d 651, 656 (Tex. Crim. App. 1999). However, because a prosecutor has discretion to decide what evidence to introduce at trial, no court approval is required for a binding *use*-immunity agreement. *Id*.

The State may agree to provide certain offers to a witness in exchange for information, "But an agreement can lead to a contract, and parties to a contract will be held to their agreement." *State v. Hatter*, 665 S.W.3d 584, 593 n.6 (Tex. Crim. App. 2023).

When the State wants a witness to relinquish their Fifth Amendment right against self-incrimination, the State ***must*** grant use-immunity for the information obtained from the witness's waiver of their fundamental right not to incriminate herself. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964). The analysis relates to what the witness reasonably believes may be used against them in a later proceeding. *See*, e.g., *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

3. Ms. Mouton was entitled to the benefit of her bargain, and the evidence she provided as consideration for the promise that she could "get out from under this" and be treated as a witness instead of a suspect, should have been suppressed.

The objective, unambiguous, and recorded plain language of the exchange between a police detective and a child being interrogated prove by a preponderance of the evidence that an agreement existed. This is true whether Detective Miller intended an agreement or not, as the analysis relates to what the witness reasonably believes may be used against them in a later proceeding. *See*, e.g., *Kastigar*, 406 U.S. at 444. The cost to Miss Mouton was relinquishment of her right not to incriminate herself. She paid that price, and she provided the necessary information that the State desired, while also implicating herself. The benefit gained by the State was the information they did not have but needed to arrest and convict a murderer, who not only shot a man in cold blood, but seduced, abused, and manipulated a child to facilitate his criminal activity.

Detective Miller's promise in exchange for cooperation was unambiguous and was done for the express purpose of inducing Ms. Mouton to talk. He testified as much:

> MILLER: I told her that she would be a witness if under the condition that she cooperated with the investigation.
>
> DEFENSE: Okay. And did she begin to cooperate?
>
> MILLER: She began to cooperate, yes.

> DEFENSE: Okay. And what was your intention of telling her that she would be a witness if she cooperated?
>
> MILLER: To entice her to cooperate with the investigation.

(5RR41).

Such an agreement does not carry with it the requirement that the promise must be of a sort to make a witness speak untruthfully. From the government perspective, when the State or its agents make an agreement in exchange for information, the entire point is to secure truthful information.

That Ms. Mouton did not perfectly perform is of no account. "[I]t is risky business for an adult to knowingly enter into a contract with a person under the age of 18. This is so because the adult is on notice that as a matter of law the minor can during his minority avoid and disaffirm the contract." *Youngblood v. State*, 658 S.W.2d 598, 599 (Tex. Crim. App. 1983). "The law holds that infants are lacking in judgment and understanding sufficient to enable them to guard their own interests, and the law protects them against their own improvidence and the designs of others, by allowing them to avoid any act, contract, or conveyance not manifestly for their interest; and the general rule seems to be, no express contract, when repudiated or disaffirmed by the minor, can be enforced against him. *Jones v. State*, 31 Tex. Crim. 252, 256 (Tex. Crim. App. 1892).

As discussed, *supra*, Ms. Mouton did perform. Detective Miller made promises to induce her cooperation, which she accepted. He admitted he told her a

party to the offense could get out from under it. (5RR30). He admitted he put a condition on that. (5RR30, 32). He admitted it was conditioned on her assisting in the investigation. (5RR30). He admitted it also included that the cooperation had to be early, and he told her it was still early. (5RR30). He told her she can "get out from under this" by cooperating. (5RR31 – 32). He reiterated this several times. (5RR32). He said her cooperation would lead to her being treated as a witness, not a suspect. (5RR32). He admitted that after he told her all this was when she began cooperating. (5RR32).

Assurances to treat a culpable party as a witness instead of a suspect in exchange for information such as those offered by the State's investigators in this case demonstrates a willingness to offer "a premium to treachery." *Zani*, 701 S.W.2d at 252.

Accordingly, to strike the balance between the State's power to compel and the privilege against self-incrimination, the law is reluctantly willing to offer a premium to treachery, recognizing that "immunity is a pragmatic and necessary tool in criminal prosecution and prevention." *State v. Hatter*, 665 S.W.3d 584, 590 (Tex. Crim. App. 2023) (quoting *Zani*, 701 S.W.2d at 253). However, if the government wants to offer such a premium to treachery, "Immunity . . . is the coin the government ***must*** pay to obtain the waiver of a person's right against self-

incrimination and the information that he has about some crime." *Hatter*, 665 S.W.3d at 590.

When the State wants to compel a witness to incriminate herself because of their difficulty in uncovering or prosecuting criminal activity, "the government may compel the witness to testify, but in return for [her] testimony, the State ***must*** offer immunity from prosecution or from ***any use of that evidence***." *Hatter*, at 590 (citing *Murphy*, 378 U.S. at 79) (emphasis added).

It makes no difference whether the assurance in exchange for information was made by law enforcement or the prosecutor. In *Graham*, to entice her cooperation as a witness, the Sheriff's Department of Hardin County gave Alisa Graham assurances that if she cooperated in the investigation and prosecution of a murder, she would not be prosecuted. *Graham*, 994 S.W.2d at 652. In reliance on the sheriff's explicit assurances, Graham gave statements to assist in the investigation and prosecution. *Id.* The trial court refused to suppress certain items of evidence. *Id*. at 652 – 53. The Court of Criminal Appeals held that the Sheriff's Department did not, and could not, make an enforceable *transactional* immunity agreement because such an agreement must be approved by the court.

However, the Court's analysis did not stop there. While many cases refer broadly to "immunity," there is a fundamental difference between *transactional* immunity, a promise not to prosecute at all; and *contractual or use* immunity on

the other hand, an enforceable promise not to use as evidence the information provided against the person providing the information.

While a prosecutor's agreement to transactional immunity may require court approval, the State may bind itself to an agreement for use immunity without obtaining any such approval from the court. *Id.* at 656. The Court of Criminal Appeals went on to state, "In this case, Hardin County was bound to the extent that the agreement conferred use immunity. Evidence obtained from appellant pursuant to the agreement could not be used against her at trial in Hardin County." *Id.*

It would be unconscionable if it were otherwise. "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity*, 385 U.S. at 500. These include the rights against self-incrimination under the Fifth Amendment and the protection of the individual under the Fourteenth Amendment. *Id.* In *Garrity*, police officers under investigation were given a choice between answering questions and being removed from their positions as police officers. Appellants answered the questions. *Id.* at 495. They were not given promises of immunity, as no immunity statute existed specific to those factual circumstances. *Id.* The State of New Jersey claimed that there was a voluntary waiver of that right. *Id.* at 498. The U.S. Supreme Court said, "That, however, is a federal question for us to decide." *Id.*

The U.S. Supreme Court held that the choice given to police officer petitioners between self-incrimination and their jobs vitiated their confessions, noting, "Subtle pressures may be as telling as coarse and vulgar ones." *Id.* at 496. The choice given to them was "the antithesis of free choice to speak out or remain silent." *Id*. at 497. If an adult law enforcement officer well-versed in the tactics of police and the law is given the choice between their right to remain silent or lose their job, and that choice is enough coercion to require the State to refrain from using those statements and their fruits as evidence, how much more so should that be the case when an experienced detective presents a child without the assistance of counsel the choice between cooperating and spending the rest of her life in prison on a murder charge?

Ms. Mouton was a 16-year-old girl who was presented with an unambiguous cooperation agreement by a person with apparent authority. Without the advice of counsel, she accepted and began cooperating. The State was bound by that agreement to the extent that the statements Ms. Mouton offered as consideration could not be used against her as a suspect rather than as merely a fact witness.

II. ISSUE FOUR: The trial court erred in denying Ms. Mouton's motion to suppress the fruits of the search of her cell phone conducted after the seizure of her cell phone on June 4, 2019, because it was conducted without a warrant and the consent was involuntary.

A. Summary of the Argument on the Motion to Suppress the Cell Phone Search of June 4, 2019

Ms. Mouton's Motion to Suppress the fruits of her cell phone search was preserved by a pretrial written motion to suppress which was litigated in a multi-day hearing. (1CR291, 311, 704, 706, 709; 2CR299). The Court denied the motions to suppress the fruits of the cell phone search. (11RR33). While at the courthouse, in the courtroom, and testifying under subpoena, the DA's office secured a consent to search form from Ms. Mouton and confiscated her phone to conduct a forensic search. (9RR51 – 52, 147, 149). The State did not have a warrant for the search. (9RR151). The consent was involuntary because Ms. Mouton was not free to leave; she was formally restrained by a grand jury subpoena; she was the target of a grand jury proceeding; she was merely acquiescing to authority in providing consent to search her phone; she was not provided counsel as required by Sections 51.09; and she was not competent to waive her important Fourth Amendment rights without counsel.

B. Standard of Review and Governing Law

The common standards of review on motions to suppress and this Court's review of the record are contained in §I.B., *supra*. Appellate review of the trial court's findings of historical fact is deferential because the trial court is in a better

position to weigh credibility and make such determinations, but review of the application of the law to the facts is de novo because the trial court is in no better position to decide legal issues than the appellate court. *In re R.J.H.*, 79 S.W.3d 1, 6 (Tex. 2002).

A child has a constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and Article 1, Section 9 of the Texas Constitution. To conduct a search for evidence of a crime, officers must usually secure a warrant supported by probable cause to believe the search will yield evidence of a crime. *See* U.S. Const. amend. IV.

Consent to search must be voluntary, and a search is not voluntary if it is the product of duress or coercion, express or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Section 51.09 of the Family Code provides:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
>
> (1) the waiver is made by the child *and the attorney* for the child (emphasis added);
>
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
>
> (3) the waiver is voluntary; and,
>
> (4) the waiver is made in writing or in court proceedings that are recorded.

Under Article 38.23, evidence that law enforcement obtains in violation of the U.S. Constitution or of any laws of the State of Texas, must be suppressed.

C. Ms. Mouton's consent to search her cell phone was the involuntary product of an uncounseled waiver of important rights, conducted in a coercive atmosphere where she was under subpoena, was not free to leave, and was the target of a grand jury.

On June 3, 2019, at around 4:00 or 5:00 PM in the evening, Ms. Mouton was subpoenaed to appear at a grand jury proceeding the very next day. (6RR28; 28RR550). While in the grand jury room, the prosecutor read Ms. Mouton the "Grand Jury Appearance Target Warning" advising Ms. Mouton that she was a murder suspect. (2CR336, FOF59). While at the courthouse, in the courtroom, and testifying under subpoena, the DA's office secured a consent to search form from Ms. Mouton and confiscated her phone for a forensic search. (9RR51 – 52, 147, 149). Ms. Mouton came out of the courtroom to get her phone from her mom, telling her mom, "They need my phone." (9RR84, 121). Ms. Mouton signed a consent to search form, which prosecutor Sarah Seely filled out. (9RR51 – 52, 147). No one drafted a search warrant for the phone. (9RR151). Investigator Tory Tyrell received Ms. Mouton's cell phone. (9RR146 – 147). While Ms. Mouton was still in the grand jury room, Investigator Tyrell took Ms. Mouton's phone to forensics and had it downloaded. (9RR149). Investigator Tyrell returned the phone before Ms. Mouton left. (9RR149).

The State did not have a warrant for the search of Ms. Mouton's cell phone on June 4, (9RR151), so the State relies entirely on the apparent consent given by Ms. Mouton. Coercion, either express or implied, vitiates apparent consent. *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 237 (E.D. Tex. 1980). A coercive atmosphere can also vitiate consent. *Id.*

Ms. Mouton's consent to search her phone at the grand jury proceeding was coercive and done in a coercive environment. Consent was not signed voluntarily. First, Ms. Mouton had already been given the offer to remain a witness, not a suspect, if she cooperated—and the consent was part and parcel of that agreement. Additionally, she was appearing at the Grand Jury under subpoena. She was not there voluntarily. She believed she had no choice but to comply with any requests the Grand Jury prosecutors made. No warrant or subpoena duces tecum had been issued for the telephone, but the Grand Jury subpoena was abused to give Ms. Mouton the impression that she had no choice but to comply.

Finally, Ms. Mouton was too young to waive her substantial legal rights under the Fourth Amendment without the advice of counsel. Tex. Fam. Code § 51.09. Ms. Mouton was a minor, and a minor has the same constitutional right to be secure in her person as an adult. *Vasquezv. State*, 739 S.W.2d 37, 44 (Tex. Crim. App. 1987). A grand jury proceeding at which Ms. Mouton was a target is a proceeding under section 51.09, requiring Ms. Mouton to have counsel and the

appropriate safeguards mandated by section 51.09 and section 51.095. *See* Tex. Fam. Code § 53.035. None of those safeguards were afforded to Ms. Mouton.

The Grand Jury process was abused when it was used as a tool for obtaining Ms. Mouton's involuntary consent under the influence of the subpoena. "A grand jury subpoena is one of the State's most powerful tools. In the event the State abuses or misuses this power, it may result in an illegal seizure and a breakdown of our constitutional guarantees. The prosecutor and the investigators stepped outside the scope of their authority in abusing the power of the grand jury subpoena." *Guardiola v. State*, 20 S.W.3d 216, 225-226 (Tex. App. Hou. [14th Dist.] 2000).

At trial, the State used evidence from the forensic search of the phone obtained on June 4, 2019, and the trial court committed reversible error by refusing to suppress it.

III. ISSUE FIVE: The trial court committed reversible error in admitting 26 gruesome autopsy photos over objection because they had no probative value to any fact at issue, and their admission only served to inflame the jury.

A. Summary of the Argument

The State introduced 26 gruesome autopsy photos over objection. (23RR242 – 243). The photos had no relevance to any fact of consequence in determining guilt or innocence. The gruesome photos served only to inflame the passions and prejudice of the jury, and the prejudice was so great, the trial court committed reversible error in admitting them.

B. Standard of Review and Governing Law

This Court reviews the trial court's decision to admit or exclude evidence, including whether the probative value of evidence was substantially outweighed by the danger of unfair prejudice, for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). "The trial court abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably." *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). When its decision lies outside the zone of reasonable disagreement, the trial court abuses its discretion. *Martinez*, 327 S.W.3d at 736.

Under Texas Rule of Evidence 401, evidence is relevant only if it has any tendency to make a fact more or less probable than it would be without the evidence; ***and*** that fact is of consequence in determining the action. For a gruesome photograph, or any photograph, to be admissible, it must be relevant and *helpful* to the jury. *Erazo v. State*, 144 S.W.3d 487, 491 (Tex. Crim. App. 2004). "Like other demonstrative evidence, photographs should assist the jury with its decision, whether that be deciding guilt or punishment. A photograph should add something that is relevant, legitimate, and logical to the testimony that accompanies it and that assists the jury in its decision-making duties." *Id.*

Texas Rule of Evidence 403 prohibits the admission of evidence that is substantially more prejudicial than probative in criminal trials. Evidence is unfairly

prejudicial when it has "an undue tendency to suggest that a decision be made on an improper basis." *Reese v. State*, 33 S.W.3d 238, 240 (Tex. Crim. App. 2000).

> A Rule 403 analysis by the trial court should include, but is not limited to, the following factors:
>
> (1) how probative is the evidence;
> (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way;
> (3) the time the proponent needs to develop the evidence; and
> (4) the proponent's need for the evidence.

Id. at 240 – 241.

Generally, the erroneous admission of the State's evidence over objection is non-constitutional error. *Easley v. State*, 424 S.W.3d 535, 540 (Tex. Crim. App. 2014). Non-constitutional error may be disregarded unless it affects the substantial rights of the accused. Tex. R. App. Proc. 44.2(b). To disregard the error, the Court—after examining the record as a whole—must have a fair assurance that the error did not influence the jury or had but a slight effect. *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). The erroneous admission of evidence is a reversible error if it had a substantial and injurious effect or influence in determining the jury's verdict. *Whitaker v. State*, 286 S.W.3d 355, 363 (Tex. Crim. App. 2009); *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

C. The photos served no legitimate purpose but to inflame the jury, and the trial court committed reversible error in refusing to exclude them.

The Court of Criminal Appeals set out the balancing factors and considerations in *Reese v. State*:

> [W]here the relevant criteria, viewed as objectively as possible, lead to the conclusion that the danger of unfair prejudice substantially outweighed the probative value of the proffered evidence, the appellate court should declare that the trial court erred in failing to exclude it. Relevant criteria gleaned from authorities include, *inter alia*, that the ultimate issue was not seriously contested by the opponent; that the State had other convincing evidence to establish the ultimate issue to which the [evidence] was relevant; that the probative value of the . . . evidence was not, either alone or in combination with other evidence, particularly compelling; that the [evidence] was of such a nature that a jury instruction to disregard it for any but its proffered purpose would not likely have been efficacious. Accordingly, when the record reveals one or more such relevant criteria reasonably conducing to a risk that the probative value of the tendered evidence is substantially outweighed by unfair prejudice, then an appellate court should conclude that the trial court acted irrationally in failing to exclude it, and thus abused its discretion. The trial court has no "right" to be "wrong" if that means to admit evidence which appears to the appellate court, affording all due deference to the trial court's decision, nevertheless to be substantially more prejudicial than probative.
>
> In the context of the trial court's admitting a photograph, we should consider: the number of photographs, the size of the photograph, whether it is in color or black and white, the detail shown in the photograph, whether the photograph is gruesome, whether the body is naked or clothed, and whether the body has been altered since the crime in some way that might enhance the gruesomeness of the photograph to the appellant's detriment.

33 S.W.3d at 241.

The relevant balancing criteria in *Reese* mandated excluding the gruesome photographs in this case. 33 S.W.3d at 241.

The issue of Mack's cause of death and manner of death was entirely uncontested. The defense theory entirely rested upon whether Ms. Mouton had the specific knowledge and intent that the homicide would occur. The judge acknowledged that no one was disputing that Mack died from multiple gunshot wounds. (23RR237). Referring to the photos, the trial court said: "As to your client's guilt or innocence this makes no difference." (23RR236). The trial court recognized: "Now, the problem I see, is there is no issue in this case as to how he died. There just is no issue. The issue is whether she's responsible or not." (23RR239). Nevertheless, he admitted 26 autopsy photos over objection. (23RR242 – 243).

The State had other compelling evidence to prove any ultimate issue to which the photographs were relevant, and they introduced that evidence. They introduced gruesome bodycam footage from the scene. (SX14). They did not need the photographs for identification purposes. Mack's identification was on him. (SX10). They introduced the testimony of multiple eyewitnesses who saw the homicide and knew the decedent. Both Robin Hale and Ms. Mouton testified as to identity. The State also introduced the testimony of Mack's uncle, who identified

him on the scene and confirmed where Mack kept his ID. (21RR80). The State did not need the photos to prove cause and manner of death or pathological findings because they introduced the autopsy report, (SX197), and had testimony as to the cause and manner of death. (23RR256 – 257).

The number of photographs was extensive, and the prosecutor went through them methodically, one by one, taking up 11 transcript pages publishing the photos to the jury during the medical examiner's testimony. (23RR244 – 255; *see* SX199, SX200, SX202, SX204, SX206, SX208, SX213, SX215, SX218, SX219, SX221, SX222, SX223, SX226, SX227, SX229, SX231, SX233, SX235, SX236, SX241, SX244, SX247, SX250, SX251, and SX253). The photographs were full-sized and projected onto a large-screen television. *Id.* The photographs were detailed in high-definition color. *Id.* They were horribly gruesome, as acknowledged by the trial court. Although the photos did not show Mack's genitalia, some were gruesome closeups and the others depicted Mack unclothed. *Id*.

The evidence alone or in combination with other evidence was not particularly compelling, nor could it be, given that any issues it went to prove were uncontested. The State did not proffer the gruesome evidence for a narrow purpose, and the evidence was so gruesome, repetitive, and cumulative that no limiting instruction would have been effective.

The trial court referenced a death penalty case in which he would only admit 51 pictures where a two-year-old girl had 49 injuries, "and it was the worst thing ever." (23RR237). The trial court warned the observers in the gallery that "these are terrible photographs, and if you don't want to see them, you should really step out. (23RR239). He reiterated again, "These are terrible pictures." (23RR239).

Because the record reveals that one or more of these criteria reasonably led to a risk that the probative value of the tendered evidence is substantially outweighed by unfair prejudice, then this Court should conclude that the trial court acted irrationally in failing to exclude it, and thus abused its discretion. *Reese*, 33 S.W.3d at 241. With these criteria in mind, the trial court had no "right to be wrong" even with all due deference from this Court. *Id*.

This Court cannot have fair assurance that the error did not influence the jury or that its influence was only slight. *Solomon*, 49 S.W.3d at 365. In this case, the error had a substantial and injurious effect or influence in determining the jury's verdict. *Whitaker*, 286 S.W. 3d at 363.

IV. ISSUE SIX: The state committed misconduct, and the trial court committed reversible error in denying a mistrial after the state provoked an extreme outburst from the victim's mother by showing her a gruesome autopsy photo for no legitimate purpose.

A. Summary of the Argument

The State committed misconduct by provoking an unnecessary outburst from the victim's mother by showing her a gruesome photo of her son. The trial court

had to send the jury out for an extended period of time. The trial court acknowledged the witness "freaked out," and the State acknowledged they had no need for the evidence. A curative instruction was given, but it was insufficient.

B. Standard of Review and Governing Law

The trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard, and the ruling must be upheld if it was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). Where an outburst interfered with the normal proceedings of a trial, as it did here, if the defendant shows a reasonable probability that the conduct interfered with a jury's verdict, it rises to the level of reversible error. *Stahl v. State*, 749 S.W.2d 826, 829 (Tex. Crim. App. 1988).

The Court of Criminal Appeals "has never established a general test for all types of prosecutorial misconduct. Instead, [they] have examined such claims on a case by case basis." *Stahl*, 749 S.W.2d at 830 (Tex. Crim. App. 1988). The prosecutor commits misconduct in violation of a defendant's due process rights when it seeks "to introduce evidence which was clearly calculated to prejudice the appellant's right to a fair trial." *Koller v. State*, 518 S.W.2d 373, 378 (Tex. Crim. App. 1975).

C. The prosecutor provoked the witness's outburst and had no legitimate reason to do so other than to inflame or prejudice the minds of the jurors.

It is of "critical importance" to convict an accused "only upon the evidence presented which shows that he is guilty of the offense charged, and not through attempting to inflame or prejudice the minds of the jurors." *Koller*, 518 S.W.2d at 378.

The State called the victim's mother, Dahlia Mack, to testify. The Defense objected at the outset that she had no relevant knowledge, that all she could testify to would be improper victim-impact testimony, that her testimony would be cumulative, and that her testimony would be an attempt to curry favor with jurors and an attempt to inflame their sensibilities; but those objections were overruled. (24RR132 – 133).

At the end of Mack's testimony, the prosecutor showed her SX199, a gruesome photograph of her son's face. The victim had an outburst that disrupted the proceedings, and the jury had to be excused. (24RR140). The following exchange happened outside the presence of the jury:

> DEFENSE: [T]he prosecutor walked over to Ms. Mack with autopsy photos for her to identify her son, and when the folder was opened […] Exhibit No. 199 was shown to Ms. Mack. I believe that is the photo of his face, which is incredibly gruesome because of the entry and exit wounds, and then the nature of an autopsy with, you know, a mouth half open.
>
> THE COURT: It's a terrible photo.

> DEFENSE: It's an absolutely terrible photo. And for the record, as soon as Ms. Mack saw the photo, she immediately shrieked very loudly, turned away, and began crying, and the Court had to immediately retire the jury. […] the jury saw all of that in great detail. And I understand the State has, as one of the things it has to prove is identification of the deceased; however, they had their choice of witnesses to do so and they chose the mother of this young man who -- and I just don't see any way that the jury is not impacted by her reaction, because as the Court noted, it's a terrible photo and no mother should have to see that.
>
> And the prejudicial effect that this is going to have on the jury and the inflammation of the jury, I think just wildly prejudices Ms. Mouton, and I would have to ask for a mistrial because I think this is something that cannot be instructed around or disregarded by anybody. And it would affect all of her rights under due process and due course of law. And the right to a fair and impartial jury. And for the record, the jury has now been out for about ten minutes. We've been talking for about, I don't know, three minutes or four minutes. And so it's taken some time for Ms. Mack to compose herself, as everyone understands, no one's commenting on that, but just for the record, that's what's been happening, so that the appellate courts know.

(24RR141 – 142).

The Court agreed with defense counsel's rendition of events for purposes of the record. (24RR146). The trial court denied the Defense motion for a mistrial. (24RR145). The trial court gave a curative instruction. (24RR146 – 147). The State asked no further questions and then rested its case. (24RR147).

It was clear that the State had no need to show Ms. Mack that photo and no need of her testimony for identification or any other purpose. The Court asked

whether the State intended to press the witness to answer the question asked before the witness "freaked out." (24RR145). The State did not. (24RR145). The Defense moved for a directed verdict for lack of identification evidence, and the State argued they already had identification evidence. (24RR151 – 153). Alternatively, the defense re-urged its motion for a mistrial. (24RR151 – 153). Those too were denied. (24RR153).

As stated in *Koller*, "The conduct of the prosecutor could have served no other purpose than to deprive the appellant of a fair trial by prejudicing the jury against [her]." *Koller*, 518 S.W.2d at 378. The harm was compounded by the fact that the photo should never have been admitted in the first place. *See* ISSSUE FIVE, *supra.* The only appropriate remedy was a mistrial. Since it cannot be shown that the error was harmless beyond a reasonable doubt, reversal is appropriate. *See Stahl*, 749 S.W.2d at 832.

V. ISSUE SEVEN: Where the main issue for the jury to determine was whether Ms. Mouton believed her actions would only lead to a fight instead of a shooting, the trial court denied Ms. Mouton her right to present a complete defense by denying defense counsel the opportunity to question a witness about a fist fight he had seen between the victim and another boy mere weeks before the shooting.

A. Summary of the Argument

The theory of defense was that Ms. Mouton did not intend the murder of Mack, that Ms. Mouton made a mistake of fact, and that she reasonably believed Johnson only wanted to jump or fight Mack, not kill him. (2CR414). The State

argued extensively that such a belief was unreasonable. (26RR38 – 41). The Defense was prohibited from introducing eyewitness evidence from Trenton Smith that Mack indeed engaged in fights, which would make Ms. Mouton's belief objectively reasonable, irrespective of her knowledge. (24RR201 – 204). The trial court's refusal to allow the Defense to elicit such testimony violated Ms. Mouton's rights to compulsory process and to present a complete defense.

B. Standard of Review and Governing Law

Character evidence is not *per se* inadmissible, but generally evidence of a person's character or character trait cannot be used to show that on a particular occasion the person acted in accordance with his character or that character trait. Tex. Evid. R. 404(a). However, in a criminal case, a defendant may offer evidence of a victim's pertinent trait. (Tex. R. Evid. R. 404(a)). Similarly, evidence of a crime, wrong, or other act is inadmissible to prove character to show that on a particular occasion the person acted in accordance with the character. Tex. Evid. R. 404(b). However, this evidence may be admissible for another purpose. Tex. Evid. R. 404(b).

In general, Texas courts review evidentiary rulings under an abuse of discretion standard. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). In *Potier v. State*, 68 S.W.3d 657 (Tex. Crim. App. 2002), the Texas Court of Criminal Appeals noted that "[e]rroneous evidentiary rulings rarely rise to the level

of denying the fundamental constitutional rights to present a meaningful defense." 68 S.W.3d at 663. Non-constitutional error may be disregarded unless it affects the substantial rights of the accused. Tex. R. App. Proc. 44.2(b).

Nevertheless, "Under the Due Process Clause of the Fourteenth Amendment, a defendant must be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 484 (1984). While not every erroneous exclusion of evidence amounts to a constitutional violation, such exclusion rises to a constitutional magnitude if the evidence forms such a vital portion of the defense case that its exclusion functionally precludes the defendant from presenting his case. *Potier*, 68 S.W.3d at 665. If the error is constitutional, this Court must reverse unless the Court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. Proc. 44.2(a).

C. The trial court's refusing to allow the Defense to present eyewitness testimony that would prove it was objectively reasonable to believe the decedent would engage in a fistfight was constitutional error.

Based on the jury instructions, the jury had to acquit Ms. Mouton if they had a reasonable doubt whether Ms. Mouton had a belief that Kendrick Johnson intended to jump and/or fight Delindsey Mack rather than murder Delindsey Mack if that belief was reasonable. The Defense was prohibited from entering evidence that would have a tendency to show that her belief was objectively reasonable.

The Defense called witness Trenton Smith via Zoom. (24 RR198). Mr. Smith was a construction worker who commonly ate lunch in his car near the scene of the shooting. (24RR200). He was familiar with the victim in this case. (24RR201). While the defense questioned him, the following exchanges occurred:

> DEFENSE: Okay. Had you ever seen any incidents with that young man that you remember specifically?
>
> STATE: I'm going to object, improper character evidence.
>
> COURT: Sustained.

(24RR201 – 202).

> DEFENSE: Your Honor, I would like to ask him if he remembers an incident involving the young -- Delindsey, because part of the State's case is, one, that Delindsey didn't go out there very often, which he's already said he sees them there, he saw him there regularly, but the other part of their case is that this -- this -- there was no way this was going to be a fistfight, and he has information that recently before the shooting he had seen the young man engage in a fistfight. So that goes to rebut --
>
> COURT: No.

(24RR203).

> STATE: It's improper character evidence.
>
> DEFENSE: I don't see how that's --
>
> COURT: It's not relevant to this case.
>
> DEFENSE: But it goes to rebut the State's theory, your Honor.
>
> THE COURT: What, that he was standing there and got shot? I mean, no.

> DEFENSE: Part of their theory is that this would not have been a fistfight and that Keona should have known that it wasn't going to be a fistfight. This goes to show that sometimes these guys did resolve their differences with mere fistfights.
>
> STATE: Judge --
>
> THE COURT: No. No. No.
>
> DEFENSE: Okay. Then I need to offer a bill with this witness in question-and-answer format, or I can proffer it myself, whichever the Court prefers, but I do need to make a bill for this.
>
> COURT: Your client wasn't present for whatever this thing was, right?
>
> DEFENSE: No, I don't believe so.

(24RR204).

Defense counsel proffered Trenton Smith's testimony in a bill of exceptions in question-and-answer format outside the presence of the jury. (24RR207 – 210). Trenton Smith had seen the victim on many occasions. (24RR208). Two to three weeks prior to the shooting, Trenton Smith saw the victim get into a physical fight with another young man. (24RR208). No weapons were used. (24RR208 – 209). It was a fistfight that lasted fewer than two minutes and was then broken up by a group of people. (24RR209).

The State objected that it was improper character evidence. The Defense was entitled to introduce evidence of the victim's trait for resolving differences by fighting. Tex. R. Evid. R. 404(a). Furthermore, the Defense was entitled to

introduce the evidence for the permissible purpose of rebutting the State's theory that it was unreasonable to believe that the gang members involved resolved differences with fights. Tex. Evid. R. 404(b). The defense proffered their evidence and articulated the reason why it should be admitted. It was an abuse of discretion to disallow it.

Irrespective of Ms. Mouton's knowledge of that specific fight, the fact that the victim did in fact get in fights made her belief objectively reasonable. The evidence was such a vital portion of the defense case that its exclusion functionally precluded the defendant from presenting her case and arguing about the objective reasonableness of believing that someone who did in fact get in fights would be the victim of a fight rather than a murder. *Potier*, 68 S.W.3d at 665.

"[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *United States v. Agurs*, 427 U.S. 97, 112 (1976) (cited with approval in *Potier*, 68 S.W.3d at 664).

In this case, the error is constitutional because it went to the heart of the case and could have created a reasonable doubt about whether or not Ms. Mouton's belief that Mack was going to be fought instead of murdered was objectively reasonable. "[A]dditional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id*. (cited with approval in *Potier*, 68 S.W.3d at 664).

Prayer for Relief

Appellant requests that this Court reverse the judgment of the trial court and remand for a new trial.

Respectfully Submitted,

/s/ Matthew J. Hefti
Matthew J. Hefti
Texas Bar No. 24099300
Wade B. Smith
Texas Bar No. 24080313
LOONEY SMITH CONRAD & HEFTI P.C.
11767 Katy Freeway, Ste. 740
Houston, Texas 77079
Tel. (281)-597-8818
Fax (281) 597-8284
mjhefti@looneyconrad.com
Attorneys for Appellant

Certificate of Service

A true and correct copy of this Petition for Discretionary Review was served on counsel for the State via electronic service through the Texas e-filing manager on the same date as the original was electronically filed with the Clerk of this Court.

Matthew J. Hefti

Certificate of Compliance

According to Microsoft Word's word count, this brief contains 14,534 words, not including the caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, signature, certificate of service, and certificate of compliance.

Matthew J. Hefti

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Matthew Hefti on behalf of Matthew Hefti
Bar No. 24099300
mjhefti@looneyconrad.com
Envelope ID: 99688240
Filing Code Description: Motion
Filing Description: Motion for Leave to File Corrected Brief After the Deadline
Status as of 4/15/2025 12:53 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	4/15/2025 12:45:17 PM	SENT
Paul CLooney		info@looneyconrad.com	4/15/2025 12:45:17 PM	SENT
Wade BSmith		wbsmith@looneyconrad.com	4/15/2025 12:45:17 PM	SENT
Sean Teare	24054113	DAOeservice@dao.hctx.net	4/15/2025 12:45:17 PM	SENT
Matthew Hefti		mjhefti@looneyconrad.com	4/15/2025 12:45:17 PM	SENT