No. _____

In The

Supreme Court of the United States

DAVID PENA III,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Third Court Of Appeals At Austin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Texas' Third Court of Appeals Erred by Finding that the Items Found in the Trunk of Petitioner's Car Did Not Constitute Fruit of the Poisonous Tree, the Discovery of Which Flowed Directly from Petitioner's Unwarned Statement to Police.

2. Whether Texas' Third Court of Appeals Erred by Finding That Petitioner's "Actions and Statements" Provided Probable Cause to Search Petitioner's Car, Including His Trunk, Because the Requirements of the Automobile Exception Were Satisfied.

RELATED CASES

Petitioner was charged by indictment with the possession of a controlled substance with the intent to deliver. See *State v. Pena*; No. CR2017-110 in the 207th District Court of Comal County, Texas. Petitioner's motion to suppress was granted on October 24, 2018. Texas' Third Court of Appeals reversed the judgment of the trial court on August 13, 2019, in case number 03-18-00765-CR. On February 26, 2020, the Court of Criminal Appeals refused the Petition for Discretionary Review (case number PD-0947-19).

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OPINIONS BELOW

The opinion from which review is sought was delivered by Texas' Third Court of Appeals at Austin in *State v. Pena*, 581 S.W.3d 467 (Tex.App. – Austin 2019).

STATEMENT REGARDING JURISDICTION

Discretionary review of the Court of Appeals' decision was timely requested on November 12, 2019. The petition was refused on February 26, 2020. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1257(a), as the opinion of the Court of Appeals is the final judgment rendered by the state courts of Texas.

STATUTORY PROVISIONS AT ISSUE

This case involves only issues of constitutional dimension.

CONSTITUTIONAL PROVISIONS AT ISSUE

The following provisions of the Constitution of the United States are involved in this case:

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

> upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides, in relevant part:

> (Section 1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a highway traffic stop during which an amount of controlled substance was found, and questions pertaining to the search of a vehicle and admissibility of unwarned incriminatory statements made during the traffic stop.

DISCUSSION REGARDING TIMELINESS

The Court of Criminal Appeals refused discretionary review on February 7, 2020. Pursuant to section 1

of Rule 13, "A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." Consequently, this petition would have been timely if filed on or before May 26, 2020. By Order of the Court dated March 19, 2020, this certiorari petition is timely if filed on or before July 27, 2020.

FACTS OF THE CASE
(From the Court of Appeals' Opinion)

[Appellee] filed a motion to suppress evidence pertaining to a statement that he made and to items that were seized from his trunk after he was arrested. During the suppression hearing, the arresting officer, Officer Christopher Koepp, was the only witness to testify.

Officer Koepp testified that he observed [Appellee] driving a car with an old and faded license plate and that he initiated a traffic stop for driving with an obscured license plate. See Tex. Transp. Code § 504.945(a). According to Officer Koepp, [Appellee] admitted that the writing on the plates was faded. Officer Koepp performed a warrant check and discovered a warrant for [Appellee]'s arrest for the offense of theft by check. Officer Koepp asked dispatch to confirm that the warrant was still active by contacting "the original agency that the warrant [wa]s out of." Dispatch later

confirmed that the warrant was active. Officer Koepp then arrested [Appellee] and discovered "a meth pipe in" [Appellee]'s pocket while arresting him. After finding the pipe, Officer Koepp searched the car. While searching the trunk, Officer Koepp and other officers found a handgun, "approximately 3.7 grams" of what appeared to be methamphetamine, multiple clear baggies, two digital scales, and another glass pipe "with pink residue inside the pipe." After the officers completed the search of the trunk and the remainder of the car, they released the car to [Appellee]'s son who had been a passenger in the car.

During the suppression hearing, a recording from Officer Koepp's dashboard camera was admitted into evidence. The district court reviewed the recording after the suppression hearing concluded. The recording is generally consistent with Officer Koepp's testimony regarding the reason that he initiated the traffic stop, regarding [Appellee]'s admission about the license plate's condition, regarding Officer Koepp's learning about a warrant for [Appellee]'s arrest, and regarding Officer Koepp's asking dispatch to confirm the warrant's status. On the recording, Officer Koepp informed [Appellee] that he will have to go to jail if the warrant is confirmed to be active. After dispatch verified that the warrant was active, Officer Koepp told [Appellee] that he was being arrested, placed him in handcuffs, performed a search of his person, and discovered a glass pipe in his pocket. Officer Koepp then asked [Appellee] if there was anything illegal in the car, and [Appellee] stated that there is "maybe a couple of grams"

and a weapon in a black bag in the trunk. Officer Koepp then placed [Appellee] in the back of his patrol car. Officer Koepp and two other officers searched the trunk and found a handgun and several baggies containing a white crystalline substance. Shortly thereafter, Officer Koepp read [Appellee] his *Miranda* rights, and [Appellee] stated that he understood those rights.

Pena, 581 S.W.3d at 471-472.

ARGUMENTS IN FAVOR OF ISSUING A WRIT OF CERTIORARI

The trial court granted Petitioner's motion to suppress, both as to statements he made during the traffic stop, and as to items found in the trunk of his vehicle. That court found that the only reason Deputy Koepp searched the trunk of Petitioner's car was on the basis of Petitioner's statement, which the trial court suppressed. Relying on *Contreras v. State*, 312 S.W.3d 566 (Tex.Cr.App. 2010), the Court of Appeals held that the deputy's "*failure to comply with the procedures listed in article 38.22 . . . did not compel a conclusion that the evidence discovered from that statement should be excluded under the Texas exclusionary rule found in article 38.23*." *Pena*, 581 S.W.3d at 480.

The Court further found that the trial court erred in determining that probable cause to search the trunk of Petitioner's vehicle did not exist. In doing so, the Court of Appeals included Petitioner's statement in the

"totality of the circumstances." *Pena*, 581 S.W.3d at 484.

Both the courts below which considered the merits of the claims decided that statements Petitioner made to Deputy Koepp were inadmissible. That much is not in question. The question in this case, therefore, is whether evidence found in the trunk of Petitioner's vehicle, the discovery of which flowed directly from Petitioner's statement, was also inadmissible. Petitioner asserts that it was, and regardless of whether Texas' exclusionary rules[1] required the suppression of the evidence located in the trunk of Petitioner's car, those items still constituted "fruit of the poisonous tree," and suppression was required under the existing federal constitutional case law. Further, Petitioner's statement should not have been considered when a probable cause determination was made, and, without reliance on Petitioner's statement, probable cause to search the trunk did not exist.

Fruits of Petitioner's Unwarned Statement

The Court of Appeals found that the district court did not err when it determined that Petitioner was in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), when Officer Koepp questioned him about a separate offense and that his statement about the contents of the trunk should be suppressed because he was not given the *Miranda* warnings before Officer Koepp questioned him (*Pena*, 581 S.W.3d at 476). The

[1] Article 38.22 or Article 38.23, C.Cr.P.

Court of Appeals further found that the district court did not err by determining that Petitioner's statement, made after he was placed in custody, was not admissible under Texas law (*Pena*, 581 S.W.3d at 477).[2]

The Court of Appeals ignored the fact that the District Court also found that Petitioner's statement was taken in violation of federal case law and the United States Constitution.

> Pursuant to both the U.S. and Texas Constitutions, our Bill of Rights and Texas Code of Criminal Procedure article 38.23, the Defendant's statement that there was something in the trunk should be, as a matter of law, suppressed as well as any evidence seized as a product of that unlawfully obtained statement.

App. 44. Petitioner further asserts that federal case law and the U.S. Constitution provide that the evidence located in the trunk of Petitioner's car constitute "fruit of the poisonous tree" and should have been suppressed.

Relying on *Akins v. State*, 202 S.W.3d 879, 891 (Tex.App. – Fort Worth 2006), the Court of Appeals held that, although statements "taken in violation of *Miranda* must be suppressed, other evidence

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[2] See Conclusion "R" (App. 44): "Pursuant to both the U.S. and Texas Constitutions, our Bill of Rights and Texas Code of Criminal Procedure article 38.23, the Defendant's statement that there was something in the trunk should be, as a matter of law, suppressed as well as any evidence seized as a product of that unlawfully obtained statement."

subsequently obtained as a result of that statement . . . need not be suppressed." *Pena*, 581 S.W.3d at 478. Petitioner asserts that the Court of Appeals is wrong.

Akins relied on *Michigan v. Tucker*, 417 U.S. 433, 448-449 (1974), and *Oregon v. Elstad*, 470 U.S. 298, 314 (1985), for the proposition that the rule in *Wong Sun v. U.S.*, 371 U.S. 471 (1963), "requires suppressing the fruits of a defendant's statement only when the statement was obtained through actual coercion." This is simply not correct, and the questions in *Tucker* and *Elstad* are not relevant to the questions in the instant case. Neither case involved an attempt to introduce evidence of the possession of contraband in a criminal trial, the seizure of which flowed directly from the defendant's statement.

First, the question in *Tucker* was whether the testimony of a witness [*not the defendant*] must be excluded simply because police had learned the identity of the witness by questioning the defendant at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent. While *Miranda* was not followed in its entirety by the officers in that case, this was because the interrogation occurred approximately two months *prior* to the decision in *Miranda*, and the *Tucker* Court stressed that warnings regarding the adverse use of potential admissions were given in that case. That is not the situation in this case, as the proper and long required warnings were not given to Petitioner.

Second, the question in *Elstad* was whether an initial failure of law enforcement officers to administer the warnings required by *Miranda*, without more, "taints" subsequent admissions which came after the suspect had been fully advised of and had waived his *Miranda* rights. In the instant case, Petitioner was *not* given *Miranda* warnings.

Finally, the "actual coercion" statement in *Tucker*, underpinning the core of *Akins*, appears in the concurring opinion of Justice White, not in the majority opinion, and is, thus, not controlling on the question of constitutional requirements. Additionally, the reference is taken out of context. In the passage in question, Justice White wrote:

> *Miranda* having been applied in this Court only to the exclusion of the defendant's own statements, I would not extend its prophylactic scope to bar the testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under *Miranda*. The arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth. The same results would not necessarily obtain with respect to the fruits of involuntary confessions.

Tucker, 417 U.S. at 461 (White, J., concurring). It is clear that Justice White's concurring opinion was *not*

that only statements which resulted from actual coercion were inadmissible. He also recognized that, in the future, had his opinion been adopted as the Court's opinion, it would be restricted to testimony of third parties found through inadmissible admissions.

It should be noted that the *Miranda* requirement that an individual must be properly warned of his or her rights, contrary to the belief of at least one inferior court,[3] is a constitutionally based mandate. See *Dickerson v. U.S.*, 530 U.S. 428, 432 (2000). Consequently, as Petitioner's statement which is at issue was taken in violation of *Miranda* and Petitioner's constitutional rights, the items seized from the trunk of his vehicle were the "fruit of the poisonous tree" under *Wong Sun*, and should have been suppressed. The trial court did not err.

No Probable Cause Without Petitioner's Unwarned Statement

The trial court concluded that the existence of the pipe in Petitioner's pocket did not constitute probable cause to believe additional evidence of the offense of arrest (theft by check), or evidence of the offense of possession of drug paraphernalia, would be found in Petitioner's vehicle,[4] and that, with or without the receipt of Petitioner's statement, sufficient probable cause to objectively justify a lawful search of the entire vehicle,

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[3] *U.S. v. Dickerson*, 166 F.3d 667, 689 (4th Cir. 1999).

[4] See conclusions of law "E" and "F" (App. 40-41).

with or without a warrant, did not exist.[5] The Court of Appeals disagreed, finding that Petitioner's "actions and statements" provided probable cause to search Petitioner's car, "including his trunk, because the requirements of the automobile exception[6] were satisfied here." *Pena*, 581 S.W.3d at 484.

To support the holding that probable cause existed in the instant case, the Court of Appeals relied on a more than twenty-year-old unpublished case from another intermediate appellate court.[7] The cited case, however, is inapposite.

In *Gallegos*, the arresting officer smelled marihuana while talking with defendant. That police officer initially looked for the source of smell "in the passenger compartment," then searched the trunk, even though there was no evidence the officer detected any odor of marihuana from the trunk. In the trunk, the officer found twelve blocks of green marihuana. The Court of Appeals concluded that, once the officer had probable cause to search the car for marihuana, he was authorized to search every part of the vehicle, "including the trunk and containers found therein." *Gallegos*, slip op., at 3.

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[5] See conclusions of law "V" and "W" (App. 45).

[6] Officers may search an automobile without having obtained a warrant, so long as they have probable cause to do so. See *Collins v. Virginia*, 584 U.S. ___ (No. 16-1027; May 29, 2018; slip op., at 5); *Cooper v. California*, 386 U.S. 58, 59 (1967); *Carroll v. U.S.*, 267 U.S. 132 (1925).

[7] *Gallegos v. State*, No. 05-95-00772-CR (Tex.App. – Dallas; July 9, 1999) (unpublished).

Smelling marihuana is substantively different than locating a "meth pipe" in Petitioner's pocket. Smelling marihuana without seeing any marihuana would lead to the inescapable conclusion that there is marihuana in the vehicle, and if it's not in the passenger compartment, the next place to look is the trunk. On the other hand, finding a meth pipe in someone's pocket does not suggest that there would be additional paraphernalia, or drugs, in the car. In short, finding the pipe in Petitioner's pocket did not provide probable cause to search the rest of this vehicle, and, without his statements, probable cause did not exist.

CONCLUSION

Under the well-known automobile exception, a warrantless search of a vehicle that has been stopped lawfully is permissible if the search is based upon probable cause. See *Carroll*, 267 U.S. at 153. In this case, however, as set out above, probable cause to search Petitioner's trunk did not exist. The trial court properly suppressed evidence found in the search of Petitioner's car as fruit of the poisonous tree. The Court of Appeals erred to find otherwise.

PRAYER FOR RELIEF

The above premises considered, David Pena III, Petitioner, respectfully prays that this Honorable Court will grant his Petition for Writ of Certiorari to

Texas' Third Court of Criminal Appeals of Texas, vacate the judgment of that court, and remand the issue presented to the Court of Appeals for reinstatement of the original ruling of the trial court.

Respectfully submitted,

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