No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEON GRUBB,
Petitioner,

-v-

STATE OF TEXAS
Respondent.

On Petition for a Writ of Certiorari to the 11th District Court of Appeals of Texas

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PETITION FOR WRIT OF CERTIORARI

Jacob Blizzard
Blizzard & Zimmerman, P.L.L.C.
Texas Bar No. 24068558
441 Butternut St.
Abilene, Texas 79602
Ph. 325-676-1000
Fax. 325-455-8842
Jacob.blizzard@blizzardlawfirm.com
Attorney for Petitioner,
Michael Leon Grubb

QUESTION PRESENTED

Whether the Supreme Court's 1987 decision in *Mauro* effectively abdicated its 1980 holding in *Innis* by creating an analytical escape hatch related to the definition of "interrogation," allowing law enforcement to avoid 5th Amendment protections through the creation of tricky scenarios intended to elicit confessions?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies both parties appearing before the Court of Appeals:

Petitioner and Defendant-Appellant

- Michael Leon Grubb

Respondents and Plaintiff-Appellee

- The State of Texas

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PROCEEDINGS

- *Grubb v. State*, No. 11-20-00037-CR, 11th District Court of Appeals of Texas, Judgment entered February 3, 2022.
- *Grubb v. State*, PD-0121022, Texas Court of Criminal Appeals, Petition refused on July 27, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael Leon Grubb, an inmate currently incarcerated at Stringfellow Unit in Rosharon, Texas, by and through Jacob Blizzard, his retained attorney, respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Court of Appeals in Eastland, Texas and subsequent refusal of discretionary review by the Texas Court of Criminal Appeals.

OPINION BELOW

The opinion by the Eleventh Court of Appeals affirming Petitioner's conviction is reported as *Grubb v. State*, Cause No. 11-20-00037-CR, 2022 Tex. App. LEXIS 797 (Tex. App.—Eastland February 3, 2022, pet. ref'd). That opinion is attached at Appendix ("App.") 1a. The Court of Criminal Appeals' petition for discretionary review refusal, PD-0121-22 is attached at App. 27a.

JURISDICTION

In this petition, Michael Grubb seeks review of the Texas Court of Criminal Appeals' July 27, 2022 refusal of his petition for discretionary review from the Eleventh Court of Appeals' affirmation of his conviction on April 16, 2021. Grubb's petition was due for filing 90 days following the Court of Criminal Appeals' refusal of his PDR; therefore this petition is timely, and the Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> US Const. amend. V.

STATEMENT OF THE CASE

On June 4, 2019, Grubb and his wife arrived at the Abilene Police Department Law Enforcement Center ("LEC") looking for their daughter, PSEUPO. Grubb did not know that PSEUPO had already arrived at the LEC with her grandfather. Grubb also did not know that PSEUPO had contacted her grandfather earlier that day and gave him a note which conveyed that Grubb had been sexually abusing her.

Shortly after arriving at the LEC, Grubb discovered that PSEUPO was already there. Police body camera footage shows that several officers stood in the parking lot and talked among themselves about Grubb, but not to Grubb, as Grubb stood by waiting for someone to explain to him what was going on. At one point, an officer took Grubb's keys, wallet, and phone. When Grubb's wife asked if she and Grubb could leave to speak more privately, they were told not to leave the LEC parking lot.

Officer Clopton directed Grubb and his wife to sit on the curb. Officer Clopton can later be heard on his body camera footage telling other officers that he placed Grubb and his wife together in hopes Grubb would talk and that Grubb had confessed.

While seated on the curb, before being *Mirandized*, but after having his belongings stripped away and after being told he could not leave, Grubb told his wife that the girls—PSEUPO's sister was initially involved as well—"were telling the truth;" he "was guilty;" and he "needed to own it." Grubb divulged details as well, stating he "did not try to

impregnate nobody;" "no penetration;" but he "did touch" and "needed to get help."

Later that evening, Grubb was escorted into the LEC and into an interview room by two police officers where he was eventually Mirandized by a detective and interviewed. In that interview, Grubb repeated his confession from the parking lot curb.

Texas Appellate Court Jurisdiction

The Eleventh Court of Appeals possessed jurisdiction pursuant to Texas Rule of Appellate Procedure 25.2 (2).

REASON FOR GRANTING THE PETITION

I. The Supreme Court's decision in *Innis* stands as law of the land, and an interrogation within the protections of the 5th Amendment occurs when law enforcement creates a scenario intended to elicit incriminating responses from a suspect in custody.

A. *Miranda*, *Innis*, *Brewer*, and *Massiah* Define Interrogation

In 1966, this Court established procedural safeguards to protect an individual's 5th Amendment right to self-incrimination. *Miranda v. Ariz.*, 384 U.S. 436 (1966). Law enforcement officer and officers of the court know those safeguards by heart: a defendant must be warned before questioning that he has the right to remain silent; anything he says can be used against him in a court of law; he has the right to the presence of an attorney; if he can't afford one, one will be appointed to him prior to any questioning. *Id.* A defendant must knowingly and intelligently waive those rights and agree to answer questions or make a statement. Otherwise, evidence obtained as a result of the interrogation cannot be used against a defendant at trial.

Since *Miranda*, questions have expectedly arisen about what qualifies as custody; what qualifies as interrogation; and this Court has answered them. One such question was answered in this Court's 1980 *Innis* opinion. There, this Court explained that a law enforcement officer's use of "subtle compulsion," when

coupled with the fact that a suspect's incriminating response was the product of words or actions on the part of the officer that he knew or should have known were reasonably likely to elicit an incriminating response amounts to the "functional equivalent" of questioning—that an officer need not ask direct questions of a defendant for a court to conclude that the defendant was interrogated. *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980).

The *Innis* Court established the inquiry that must accompany an "interrogation" analysis: Did officers engage in direct questioning of the suspect, including the "functional equivalent" of questioning? *Id.* at 302. There, as in the present case, the Court easily determined that no direct questioning occurred. *Id.* However, a court must continue its investigation to determine whether the "functional equivalent" did.

In *Innis*, this Court provided that "functional equivalent" of questioning includes "subtle compulsion" coupled with the fact that the suspect's incriminating response was the product of words or actions on the part of the officer that he should have known were reasonably likely to elicit an incriminating response *Id.* The *Innis* Court held that no "functional equivalent" of questioning occurred there because it was not established on the facts. There, the two officers, in carrying on a conversation in front of the suspect while all three were in their squad car, did not realize that the suspect was particularly susceptible to an appeal to his conscience concerning the safety of handicapped children, nor did the record suggest those officers knew the suspect was unusually disoriented or upset at the time of his arrest. Because the subtle compulsion could not be

coupled with the requisite knowledge of the officers—that they knew or should have known their dialogue would prompt an incriminating statement from the defendant—the Court determined that the "functional equivalent" of questioning did *not* occur; therefore, no interrogation following the defendant's invocation of his desire for counsel took place in violation of *Miranda* and the 5th Amendment.

The *Innis* Court clearly outlined the analytical approach to determine whether an interrogation—through direct questioning or its functional equivalent—triggered *Miranda* and 5th Amendment protections.

A prime example of the "functional equivalent" of questioning amounting to interrogation was presented in the 1977 Supreme Court case, *Brewer v. Williams*, 430 U.S.387 (1977). The facts in *Brewer* were similar to those in *Innis* insofar as two officers were transporting the defendant to another location in their police car. *Id*. There, the defendant was charged with abducting a young girl. Defendant was twice *Mirandized* before transport—once before a judge at his arraignment and again by one of the transport officers before getting into the police car. During the car ride, the defendant stated several times he would tell the whole story once he conferred with his attorney.

The officers then talked to the defendant and told him that it was going to be a cold night, and the girls' parents were entitled to a "Christian burial" of their daughter who'd been abducted on Christmas Eve. The defendant, upon hearing those things, directed the officers to the girl's body. Following defendant's trial and conviction for first-degree

murder, the Federal District Court granted the defendant's writ of habeas corpus on the ground that the evidence was wrongly admitted at trial. The Eight Circuit Court of Appeals affirmed, and this Court affirmed the Circuit Court. The second of the Court's three holdings there is most pertinent here: that the detective's "Christian burial" speech was tantamount to interrogation so to entitle the prisoner to the assistance of counsel at the time he made incriminating disclosures. *Id.* at 400.

The detective's speech contained no questions but nevertheless elicited incriminating statements from defendant. The *Brewer* Court reasoned that the circumstances there were "constitutionally indistinguishable from those presented in *Massiah v. United States* where federal agents deliberately elicited incriminating statements from the defendant in the absence of counsel." *Massiah v. United States*, 377 U.S. 201 (1964). The 1964 *Massiah* case predated *Miranda*, but this Court held that the petitioner was denied basic protections of the 6th Amendment guarantee. There, federal agents elicited damaging testimony from the defendant when he was out on bail. 377 U.S. 201 205-06 (1964). This Court quoted appellate Judge Hays' dissenting opinion to support its own reasoning: "if such a rule [speaking of the 6th Amendment right not to be interrogated without presence of counsel] is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In [that] case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." *Id.* at 206.

In *Massiah*, federal agents, with the cooperation of one of Massiah's co-defendants, Colson, placed a radio transmitter under the front seat of Colson's car. Colson then had a conversation with Massiah in that car about the case, and during that conversation, made several incriminating statements that were used against Massiah at trial. *Id.* at 203.

The facts of the present case concerning interrogation are reminiscent of those in *Brewer* and *Massiah*. Here, once Grubb arrived at the LEC, he was surrounded by officers talking to one another about him but not to him. There was a flurry of activity in that parking lot, and Grubb was told little of what was going on. He was stripped of his possessions and told he could not leave. Then, at the direction of Officer Clopton, Grubb was told he could only talk to his wife where he was—on the curb, within earshot of officers. No officer directly questioned Grubb, but the atmosphere was ripe for confession, and Officer Clopton knew it. He could see how distraught Grubb was becoming, and directing he and his wife to sit on the curb to talk was a calculated move on his part to elicit incriminating statements. He admitted as much at pre-trial motion to suppress hearing. When defense counsel asked him if he told another officer that he thought that if he put Grubb and Grubb's wife together, they might talk, he responded in the affirmative. *See* Appx. 043-044.

Then, Grubb's entire conversation can be heard on Officer Clopton's body camera recording. Grubb was not told he was being recorded; he was not told he had the right to remain silent or the right to an attorney before he was directed to sit on the curb. He said multiple incriminating statements to his wife,

which were later used against him at his sentencing trial.

The holdings in the cases above provided clear analytical frameworks for a court to determine whether a defendant was interrogated in violation of his 5th or 6th Amendment rights. Surreptitious maneuvers committed by law enforcement amount to interrogation. In *Massiah* and *Brewer*, the actions of the officers were clandestine and calculated to produce incriminating statements. This Court decidedly held that such actions amounted to interrogation and violated the defendant's constitutional rights.

In *Innis*, the officers' actions were not as calculatedly surreptitious, as the Court characterized them as "subtle compulsion." However, the *Innis* Court did not find a violation of defendant's 5th Amendment right against self-incrimination there simply because it was not convinced the officers knew or should have known their actions would elicit incriminating statements.

Here, Officer Clopton's actions were both surreptitious, and he admitted that his actions were purposeful—meant to elicit incriminating statements from Grubb. *See* Appx. 043-044.

B. ***Mauro's*** **Analytical Escape Hatch**

Seven years following *Innis*, in *Ariz. v. Mauro*, this Court analyzed whether officers, in allowing a defendant to speak with his wife, and knowing that he might make incriminating statements to her, constituted the functional equivalent of questioning.

Ariz. v. Mauro, 481 U.S. 520 (1987). The Court, based on the facts before it, held that it did not. At first blush, *Mauro* appears instructive, with similar facts and contemplating the same legal question. But the facts in *Mauro* are distinctly different from the present case.

There, the defendant had already been *Mirandized*. He knew his rights and waived them when he voluntarily offered incriminating information to his wife, knowing he was being recorded. *Id.* at 528-29. There, officers *discouraged* defendant's wife from talking to him. *Id.* at 529. And there, it was not a confession the defendant gave, but a statement used to rebut his later claim of insanity at trial. *Id.* at 527.

Here, Grubb was not *Mirandized*. He did not know his rights. He knew he was not free to leave, but didn't necessarily know he had the right to an attorney, or that anything he said, even to his own wife, could be used against him.

To Grubb's assertion that Officer Clopton's intentional act of keeping Grubb and his wife within earshot of his body camera was a psychological ploy amounting to interrogation, the 11th Court relied on *Mauro* to conclude that, because Officer Clopton did not ask Grubb any direct questions, after telling him and his wife that they could not speak in private, it was "irrelevant" that he told his fellow officers that he was "hoping" Grubb would say something incriminating because "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *See* Appx. 027-031.

The 11th Court's reasoning simply does not follow the Supreme Court precedent detailed above.

First, as clearly presented in *Innis*, an officer does not have to ask direct questions in order for an interrogation to take place in a custodial setting. There was no question that Grubb was in a custodial setting—his possessions were confiscated, and he was told he could not leave the area. He was in custody.

Further, as established in *Innis*, "subtle compulsion" coupled with an officer's actions that he knows or should know will produce incriminating statements amounts to interrogation. It is to that second portion of the interrogation analysis where the *Mauro* Court's dicta provides the unfortunate analytical escape hatch. The *Mauro* Court acknowledged the Arizona Supreme Court's analysis where that Court noted there was a "possibility" that Mauro would incriminate himself while talking to his wife and emphasized that the officers *were aware of that possibility* when they agreed to allow the Mauros to talk to each other. (emphasis added) *Mauro* at 528. The Arizona Supreme Court's reasoning aligned clearly with the *Innis* Court's standard as it considered what the officer knew or should have known, determining the officers were aware that Mauro might make incriminating statements if he talked to his wife. That begs the question: If an officer is aware of the possibility that incriminating statements could be made in a given situation, is that not the equivalent of his of the *Innis* inquiry of what an officer knows or should know will elicit incriminating statements?

The *Mauro* Court stated the actions in that case were less questionable than the "subtle compulsion" that was held *not* to be interrogation in *Innis*. *Id.* But that speaks to the first portion of the interrogation

analysis—so, no subtle compulsion found in *Mauro*. However, when considering what the officers knew or should have known, or in the language of the Arizona Supreme Court there, what the officers were aware of, the *Mauro* Court stated in dicta that "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Id.* at 529.

And it is that statement that many courts since have seized upon to abdicate the "actions officers knew or should have known" portion of the *Innis* interrogation analysis. From where does that hope manifest? From the officer's knowledge of a defendant's likely response to certain situations. An experienced officer, as in Grubb's case, can orchestrate a situation that he knows or should know will likely produce incriminating statements from a defendant; yet, if he voices that he *hoped* his actions would produce incriminating statements, the interrogation analysis is concluded pursuant to *Mauro* because an officer's hope does not amount to interrogation.

Here, Officer Clopton could be heard on his own body camera saying that he purposely placed Grubb and his wife together in hopes the suspect would talk. It stands to reason that he *knew* that his actions were reasonably likely to elicit an incriminating response. Officer Clopton was not "standing idly by." He was listening and capturing Grubb's statements. He orchestrated the situation. He may have used the word "hope," but that's merely a matter of semantics. "Hope" cannot, or at least should not abdicate the *Innis* Court's clear analysis of what constitutes interrogation: "subtle compulsion" + actions or words an officer knows or should know are reasonably likely

to elicit an incriminating response. An officer's subjective hope doesn't belong in the equation—only his objective words and actions analyzed through the totality of the circumstances.

C. "Hope" in *Mauro*

In the present case, the 11th Court of Appeals joined dozens of other federal and state courts where it truncated the *Innis* analytical approach to defining interrogation when it held that no interrogation took place to trigger *Miranda* or 5th Amendment protections. Had the 11th Court not seized on the "hope" dicta in *Mauro*, its decision likely would have been different. As explained above, when analyzed fully, in accordance with *Innis*, any deciding Court must find that the "functional equivalent" of questioning took place on that summer evening in Abilene, Texas. Grubb should have been *Mirandized* when he was placed in custody. He was not aware of his rights when he confessed to his wife within earshot of Officer Clopton's body camera, and his statements to his wife should have been suppressed.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court grant certiorari review of his question and restate that *Innis* provides the proper analysis to determine whether an interrogation or its functional equivalent occurred, and *Mauro's* dicta concerning an officer's hope must not abdicate the *Innis* approach.

Respectfully submitted,

Jacob Blizzard
Counsel of Record
Blizzard & Zimmerman, P.L.L.C.
441 Butternut St.
Abilene, Texas 79602
(325) 676-1000
Texas Bar No. 24068558
jacob.blizzard@blizzardlawfirm.com
Attorney for Petitioner,
Michael Leon Grubb

October 25, 2022

OPINION OF THE 11TH DISTRICT COURT OF APPEALS OF TEXAS
(FEBRUARY 3, 2022)

In The
Eleventh Court of Appeals

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No. 11-20-00037-CR

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MICHAEL LEON GRUBB, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 22033B

M E M O R A N D U M O P I N I O N

After the trial court denied his motion to suppress his confession and his motion for continuance, Appellant pleaded guilty to the offense of continuous sexual abuse of a young child. The jury sentenced Appellant to confinement for a term of forty years in the Institutional Division of the Texas Department of Criminal Justice. Appellant challenges his conviction in three issues. We affirm.

Background Facts

On June 4, 2019, PSEUPO made an outcry to her grandfather, J.O., that Appellant had been sexually abusing her. J.O. then took PSEUPO to the Law Enforcement Center (LEC) in Abilene. Prior to arriving at the LEC, J.O. made a call for service to the Abilene Police Department. Officer Kevin Pruitt responded to the call in the LEC parking lot around 7:30 p.m. Officer Pruitt immediately made contact with J.O., J.O.'s wife, and PSEUPO. Officer Pruitt spoke briefly with J.O. and PSEUPO before Appellant and his wife, Rebecca Grubb, arrived at the LEC.

J.O. informed Officer Pruitt that Appellant had arrived, and Officer Pruitt immediately requested assistance from other officers and went to intercept Appellant. Appellant informed Officer Pruitt that he was there to file a runaway report for his daughter, PSEUPO. Officer Pruitt informed Appellant that there were sexual assault allegations against him. Officer Matt Clopton responded to Officer Pruitt's request for assistance and stood with Appellant. Before Officer Pruitt returned to his conversation with J.O. and PSEUPO, Appellant handed his keys and other personal items to Officer Pruitt.

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[1]At Appellant's punishment trial, Officer Pruitt testified that he thought it was strange that Appellant personally surrendered his belongings.

Throughout much of his time with Appellant, Officer Clopton was unaware of the allegations made against Appellant. Officer Clopton spent around forty minutes standing with Appellant. During the first half of their time together, much of their conversation centered on things not involving the sexual abuse allegations. However, Appellant's wife, who had previously remained in the car, joined Officer Clopton's and Appellant's conversation. Appellant's wife asked Officer Clopton if she could have a private moment with Appellant, but Officer Clopton denied her request. Without any prompting from Officer Clopton, Appellant's wife began asking Appellant if the allegations against him were true.

In response to his wife's questions, Appellant admitted that PSEUPO and PSEUMM (Appellant's stepchild) were telling the truth and that he was guilty. However, Appellant maintained that he had only inappropriately touched the kids, and it only occurred when he was still drinking heavily.[2]

After making the admission to his wife, Appellant was taken inside the LEC, where Detective Frank Shoemaker interviewed him. Detective Shoemaker gave Appellant *Miranda*[3] warnings, and Appellant waived his rights. During this interview, Appellant made functionally the same admissions to Detective Shoemaker that he had previously made to his wife.

Following the interview, the police arrested Appellant. This case was originally set to go to trial in October 2019. However, on September 25, 2019, Appellant's counsel asked that the case be reset for a later date. The case was then set to occur on December 9, 2019. Again, Appellant's counsel requested the trial court to reset the case for a later date. Following this second reset, the case was set for January 6, 2020.On November26, 2019, the trial court held a docket call, but Appellant's counsel was unable to attend. The trial court administrator testified that she sent Appellant's counsel's office a letter dated November26, 2019,stating that the case was set for January 6as the number one case on the jury trial docket for that date. However, Appellant's counsel claimed that his office never received that letter and maintained that he did not know of the number one status of the case for January 6 until shortly before the January 2 hearing on Appellant's motion for continuance.

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[2]Appellant's mother, Kathy Grubb, testified that prior to the events of June 4, 2019, Appellant was an alcoholic. However, around 2016, Appellant joined a small religious group that helped him overcome his addiction to alcohol. Appellant and his family remained heavily involved with this religious group from the time they joined it until police arrested Appellant. Following his departure from the religious group, Appellant reconnected with the mother of his only biological son, Sarah Baxter.

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

The trial court denied Appellant's motion for continuance, and the case proceeded to trial on January 6, 2020.

Prior to jury selection, the trial court heard Appellant's motion to suppress his confession to Detective Shoemaker. The trial court denied the motion to suppress. The day after jury selection concluded, Appellant waived his right to have a jury decide his guilt and he pleaded guilty before the jury. Following Appellant's plea, the trial proceeded to punishment.

Appellant subsequently filed a motion for new trial. In the motion, Appellant asserted that "[d]ue to insufficient time to prepare, [he] was deprived of the ability to call witnesses on his behalf that would benefit his sentencing determination." The trial court denied the motion for new trial.

Analysis

Motion to Suppress Confession

In Appellant's first issue, he contends that the trial court erred by denying his motion to suppress his confession. Appellant asserts that his second statement to the police was tainted by the illegality of his first statement to the police, thus making neither statement admissible. Specifically, Appellant contends that his confession to his wife, which Officer Clopton recorded, was a custodial

interrogation for which he was not given *Miranda* warnings.

Appellate courts review a trial court's ruling on a motion to suppress for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013). We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018) (citing *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016)); *see Guzman v. State*, 955 S.W.2d 85, 88–89 (Tex. Crim. App. 1997). At a hearing on a motion to suppress, the trial judge is the sole trier of fact and judge of the credibility of witnesses and the weight to be given to their testimony. *Lerma*, 543 S.W.3d at 190 (citing *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000)). Therefore, we afford almost complete deference to the trial court in determining historical facts. *Id.* (citing *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000)). When the trial court makes no express findings of fact, appellate courts must review the evidence in the light most favorable to the trial court's ruling. *Carmouche*, 10 S.W.3d at 327–28.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The State

may not use statements from "custodial interrogations of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Wilkerson v. State*, 173 S.W.3d 521, 526 (Tex. Crim. App. 2005) (citing *Miranda*, 384 U.S. at 444). The primary purpose of the *Miranda* rule is to guard "against coercive custodial questioning by police; it protects a suspect from the possibility of physical or psychological 'third degree' procedures." *Id.* at 527 (quoting *Cobb v. State*, 85 S.W.3d 258, 263 (Tex. Crim. App. 2002)). This rule, and the procedural warnings, are codified as Article 38.22 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2018).

Generally, the protections of *Miranda* are only triggered when the accused makes a statement while in custody and during a police interrogation. *See* George E. Dix & John M. Schmolesky, 41 *Texas Practice Series: Criminal Practice & Procedure* § 16:24 (3d ed.). Under *Miranda*, the custody analysis requires that courts consider "the circumstances surrounding the interrogation and whether a reasonable person in those circumstances would have felt that she was not free to leave." *Wexler v. State*, 625 S.W.3d 162, 167 (Tex. Crim. App. 2021) (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Ultimately, our inquiry "is whether, under the circumstances, a reasonable person would have believed that her freedom of movement was

restricted to the degree associated with a formal arrest." *Wexler*, 625 S.W.3d at 167 (citing *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)).

Under *Miranda*, an interrogation is "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." *State v. Cruz*, 461 S.W.3d 531, 536 (Tex. Crim. App. 2015) (alteration in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980)). When applying the test for whether an interrogation has occurred, the primary focus is on the perceptions of the suspect, rather than what the police intended. *Id.* at 536–37 (citing *Innis*, 446 U.S. at 301). However, "volunteered statements are not barred by *Miranda*, even when the accused is in custody." *Pugh v. State*, 624 S.W.3d 565, 568 (Tex. Crim. App. 2021) (citing *Arizona v. Mauro*, 481 U.S. 520, 529 (1987)).

We conclude that Officer Clopton's actions did not amount to a custodial interrogation of Appellant. Officer Clopton's involvement in this case began when Officer Pruitt asked him to supervise Appellant in the parking lot. Throughout much of the time Officer Clopton spent with Appellant, the two primarily discussed Appellant's line of work. However, Officer Clopton made it clear to Appellant

that Appellant had more information than Officer Clopton did regarding the outcry.

After Officer Clopton and Appellant had been speaking for about thirty minutes, Appellant's wife asked if she could have a private moment with Appellant. Officer Clopton denied her request. Following this denial, Appellant's wife began asking Appellant if there was any validity to the victim's outcry, and Appellant admitted to her there was. After not allowing Appellant and his wife to have a private conversation, Officer Clopton stood idly by Appellant and never asked him any questions, nor did Officer Clopton force Appellant to respond to any of his wife's questions. "Private citizens ordinarily are not regarded as law enforcement officers and thus cannot engage in custodial interrogation[.]" *Hailey v. State*, 413 S.W.3d 457, 474 (Tex. App.—Fort Worth 2012, pet. ref'd).

A case that is instructive to the outcome of this issue is *Arizona v. Mauro*. In *Mauro*, the police arrested the defendant and took him to the local police station. 481 U.S. at 522. Following his arrest, police gave the defendant his *Miranda* warnings, and he invoked his right to counsel. *Id.* The police held the defendant in the captain's office. *Id.* Sometime after the police secured the defendant in the captain's office, the defendant's wife arrived at the police station and demanded that she be allowed to speak

with him. *Id.* The police granted her request to speak with her husband on the conditions that an officer be in the room with them and that the conversation be recorded. *Id.* While speaking to his wife, the defendant told his wife "not to answer questions until a lawyer was present." *Id.* The State then used this statement as evidence that the defendant was not insane at the time he committed his offense. *Id.* at 523.

The Supreme Court held that the defendant was not subject to a custodial interrogation during his conversation with his wife. *Id.* at 530. In reaching its conclusion, the Court focused on the following factors: the officer's decision to allow the defendant's wife to speak to him was not a psychological ploy; no evidence existed to show that officers sent the defendant's wife into the room with him with the purpose of eliciting any information; and when viewing the situation from the defendant's perspective, there was little chance that the defendant would feel that he was being coerced into making a confession. *Id.* at 527–28.

Appellant contends that *Mauro* is inapplicable to our facts because in *Mauro*, the defendant was given his *Miranda* rights and had invoked his rights before he made any statement. *Id.* at 522. However, we find this distinction immaterial to the question of whether a custodial interrogation occurred when

Officer Clopton recorded Appellant speaking to his wife. As was the case in *Mauro,* there is no evidence that the Abilene Police Department sent Appellant's wife to talk to him in order to circumvent the *Miranda* requirements. Additionally, when viewing the situation from Appellant's perspective, there is very little chance that he could feel coerced into incriminating himself because Officer Clopton was not asking him any questions regarding the outcry.

Appellant contends that Officer Clopton's act of keeping him and his wife together, within earshot of Officer Clopton's body camera, was a psychological ploy that ultimately amounted to an interrogation. Specifically, Appellant asserts that Officer Clopton's admission to his fellow officers that he kept Appellant with his wife hoping they would talk is evidence of a psychological ploy. In *Mauro*, however, the Court noted that "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Id.* at 529; *see Escamilla v. State*, 143 S.W.3d 814, 822–24 (Tex. Crim. App. 2004) (custodial interrogation did not occur when reporter interviewed suspect even though police hoped suspect would confess during the interview). Additionally, the *Mauro* Court stated that "[p]olice departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private." *Id.* at 530. Here, because Officer Clopton did not ask Appellant any direct

questions, after telling him and his wife that they could not speak in private, it is irrelevant that he told his fellow officers that he was hoping Appellant would say something incriminating. Further, Officer Clopton had legitimate safety reasons to keep Appellant and his wife together. This is because Appellant and the outcry victim were both still in the parking lot of the LEC when Officer Clopton began supervising him.

We conclude that neither Officer Clopton nor Appellant's wife conducted a custodial interrogation of Appellant when Appellant answered his wife's questions regarding the outcry. Therefore, we overrule Appellant's first issue.

Motion for Continuance

In Appellant's second issue, he asserts that the trial court erred by denying his motion for continuance. Appellant contends that the trial court provided his trial counsel with inadequate notice of the January 6, 2020 trial setting, and that as a result, he and his trial counsel had inadequate time to prepare for trial. Specifically, Appellant asserts that the trial court did not give his trial counsel adequate notice that his case was "set number one" for January 6. In this regard, there are at least two other instances in the clerk's record where Appellant's trial counsel was notified in writing that the case was set for trial on January 6: (1) a setting

letter dated October 9, 2019 and (2) a docket call notification dated November 5, 2019. The trial court also issued a setting letter on November 26, 2019, stating that the case was "set #1" for January 6. Appellant's trial counsel asserts that he never received this letter.

We review a trial court's ruling on a motion for continuance for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007) (citing *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996)). A defendant must satisfy a two-prong test to show reversible error predicated on the denial of a pretrial motion for continuance. *See Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010). First, the defendant must show that "the case made for delay was so convincing that no reasonable trial judge could conclude that scheduling and other considerations as well as fairness to the State outweighed the defendant's interest in delay of the trial." *Id.* (quoting George E. Dix & Robert O. Dawson, 42 *Texas Practice Series: Criminal Practice & Procedure* § 28.56 (2d ed. 2001)). Second, the defendant must show that he was actually prejudiced by the denial of his motion. *Id.*

In both his written motion for continuance and at the hearing on the motion, Appellant asserted that he and his trial counsel were unfairly surprised by

the January 6 setting that the case was number one, thus causing him prejudice.[4] In support of this assertion, Appellant claims that they never received the November 26 setting letter. However, at the hearing on the motion for continuance, the trial court's administrator testified that she called the office of Appellant's trial counsel in November and notified counsel's secretary of the January 6 setting. She further testified that she placed a notice letter in counsel's box at the courthouse on November 26 notifying him of the trial setting. Accordingly, the matter of timely notice to Appellant's trial counsel of the January 6 setting as the number one case was a disputed issue at the hearing. "Appellate courts view the evidence in the light most favorable to the trial court's ruling, defer to the court's credibility determinations, and presume that all reasonable fact findings in support of the ruling have been made." *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014) (addressing a motion for new trial).

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Appellant essentially based his motion for continuance on the ground that he needed additional time for trial preparation. As noted by the court in *Gonzales*, a defendant filing a motion for continuance based upon a need for additional trial preparation must show diligence as a precondition to the motion.304 S.W.3d at843(citing *Wrightv.State*,28 S.W.3d 526,533 (Tex.Crim.App.2000)). As noted by the court, "[a] request for delay to permit further investigation or other preparation for trial is based on non-statutory and therefore equitable grounds. It is particularly within the discretion of the trial court."*Id.*at 844 n.11 (quoting Dix & Dawson, §28.56).

The record before the trial court at the time of the hearing on the motion for new trial does not show diligence in trial preparation. The January 6 setting was the third setting in the case. The case was originally set for October, and then December, before the January 6 setting. The case was reset on the two

prior occasions at the request of Appellant's trial counsel. In addition to the November 26 setting letter, the trial court's setting letter dated October 9, 2019, and the docket notification dated November 5, 2019, notified Appellant's trial counsel that the case was set for trial on January 6. The trial court, when determining whether to grant a motion for continuance, may consider the history of the case with respect to previous continuances and a party's request to reset the trial setting. *See Rosales v. State*, 841 S.W.2d 368, 374 (Tex. Crim. App. 1992) (stating that "whether other continuances were . . . granted" is a factor relevant to the need for continuance in some contexts). The record does not show that the trial court abused its discretion by denying Appellant's motion for continuance based upon his claims of unfair surprise and the need for more time to prepare for trial. We overrule Appellant's second issue.

Motion for New Trial

In Appellant's third issue, he contends that the trial court erred by denying his motion for a new

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[4]Appellant's trial counsel also indicated at the hearing on the motion for continuance that he was "still in the same position" because Appellant "hasn't fully paid me for trial."

trial. Specifically, Appellant contends that he presented material and favorable evidence at his new-trial hearing that he would have presented at trial had his motion for continuance been granted. "We review a trial court's denial of a motion for new trial under an abuse of discretion standard." *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012). We do not substitute our judgment for the trial court's judgment but, instead, determine whether the trial court's decision was arbitrary or unreasonable. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). The trial court is the sole judge of a witness's credibility. *Id.* "Even if the testimony is not controverted or subject to cross-examination, the trial judge has discretion to disbelieve that testimony." *Id.* "We view the evidence in the light most favorable to the trial judge's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party." *Id.* When denying a motion for a new trial, a trial court abuses its discretion only if no reasonable view of the record could support the ruling. *Id.*

With one major exception, Appellant's motion for new trial was an extension of his motion for continuance. The exception concerned witness testimony that Appellant asserts he was deprived of using because the trial court did not grant his motion for continuance. He asserts on appeal that his motion for continuance was based on an absent

witness. This assertion is incorrect because Appellant sought a continuance based upon his claims of unfair surprise and inadequate time for his trial counsel to prepare for trial.

When a motion for continuance is based upon an absent witness, a defendant must show that he has exercised diligence to procure the witness's attendance, that the witness is not absent by the procurement or consent of the defendant, and that the motion is not made for delay; he must also state the facts expected to be proved by the absent witness. CRIM. PROC. art. 29.06 (West 2006); *Harrison v. State*, 187 S.W.3d 429, 434 (Tex. Crim. App. 2005). It must appear to the trial court that the facts which are expected to be proved by the witness are material. CRIM. PROC. art. 29.06(3). Appellant's motion for continuance did not meet any of these requirements because Appellant did not identify the absent witnesses or the substance of their anticipated testimony. Appellant's motion merely stated that "[d]efendant . . . received insufficient notice of trial and cannot be ready for trial at the currently scheduled date, and counsel for defendant cannot render effective assistance of counsel."

Appellant's trial counsel testified at the hearing on the motion for new trial about the matters raised in the motion for continuance. He testified that his

office "never received written notice of the number one setting in this case" for the January 6 setting. Appellant's trial counsel also testified that, if he had been provided more notice of the number one status of the case for the January 6 setting, "there were a number of things that they planned to do" including having Appellant tested for the HPV virus to establish that he would have conceivably transmitted it to PSEUPO. He further testified that the short timeframe required him to make a number of judgment calls regarding the witnesses that would be called at trial. Counsel stated that he had insufficient time to interview witnesses and get subpoenas issued for them.

On cross-examination, Appellant's trial counsel testified that he had been representing Appellant for six months prior to the January 6 setting. Counsel acknowledged that he knew about the witnesses that he wanted to call for "several months prior to trial" but that he did not utilize the e-filing system to seek the issuance of subpoenas for them. Counsel also testified that he had access to an online docketing system that indicated the settings in the case. Thus, the testimony offered at the hearing on the motion for new trial supported the trial court's implicit determination of a lack of diligence in trial preparation. *See Gonzales*, 304 S.W.3d at 843.

Regardless of whether Appellant met his burden under the first prong of *Gonzales* to show diligence in preparing for trial, the record also does not establish that Appellant suffered prejudice by not having more time to prepare. Appellant's trial counsel was able to prepare a motion to suppress Appellant's confession for the trial court to consider. Trial counsel was also able to review the Child Advocacy Center's videos of the victims before trial. Additionally, Appellant's trial counsel was able to skillfully cross-examine each witness. Because Appellant's counsel was able to present his motion to suppress and was able to cross-examine each witness, Appellant was not prejudiced by the trial court's decision to deny his continuance motion for lack of additional preparation time.

Moreover, the record does not establish that the trial court abused its discretion by determining that Appellant was not prejudiced by not being able to call the additional witnesses that he wanted to call. The first witness Appellant presented at his motion for new trial was Bill Roberson, Appellant's pastor. Appellant asserts that Roberson would have been a potential fact and character witness. During his testimony at the hearing on the motion for new trial, Roberson testified about Appellant's struggles with alcohol and how Appellant overcame his addiction. Roberson also testified that at the time of Appellant's punishment trial, there were two

reasons why he would have hesitated to appear in court. First, Roberson did not want to swear under oath. Second, Roberson testified that he was hesitant to testify at trial because he "knew the ramification of what [Appellant] had been basically convicted of. [He] knew the damage, the other things that [Appellant] had caused." Additionally, Roberson testified to the importance of showing grace and that at first blush, forty years with no opportunity of parole seemed harsh to him. However, upon further questioning, Roberson stated that he could possibly consider the jury's sentence as reasonable if he had received all the information that the jury had at trial.

Furthermore, during Appellant's case-in-chief at punishment, Appellant's mother essentially provided the same relevant testimony that Roberson would have provided. She testified that Appellant had stopped drinking after joining Roberson's group. Accordingly, the testimony that Roberson might have provided at trial was not necessarily favorable to Appellant or material.

The next witness Appellant presented at his motion for a new trial was Sarah Baxter, the mother of Appellant's biological son. He contends that Baxter would have been a material fact and character witness for him. Appellant points to two aspects of Baxter's testimony that he contends makes her a

material witness. First, Baxter testified that Appellant was "a good man" with a "good heart." She further testified that Appellant was "a helpful person" and "a good family man" who had made some bad choices. However, during cross-examination, Baxter testified as follows:

Q. I mean, you understand that was the evidence in the trial was, that along with several things, performing oral sex on his own biological daughter was one of the accusations?

A. I did not know that.

Q. What do you think about a man that performs oral sex on his biological daughter? Do you think that's a good family man?

A. I think there's some issues there that need to be addressed.

Q. Encourages and, in fact, teaches his biological daughter to perform oral sex on him.

A. Yeah. That's not right.

This testimony suggests that Baxter, as a character witness, was not fully informed of Appellant's character. Moreover, during Appellant's punishment trial, the jury heard essentially the

same testimony from Appellant's mother to the effect that he was "a great dad."

The second aspect of Baxter's testimony that Appellant contends warranted a new trial on both guilt/innocence and punishment is that she is HPV positive. Appellant asserts that this aspect of Baxter's testimony is material because it would have "sown doubt as to whether PSEUPO's allegation of vaginal intercourse was true." During her testimony at the new trial hearing, Baxter testified as follows:

Q. All right. Let's move on to a different topic here for a minute. Do you have the HPV virus?

A. Yes, sir.

Q. All right. And do you believe that [Appellant] may have the HPV virus?

A. Yes, sir.

Appellant asserts that if his pretrial continuance would have been granted, he could have learned that Baxter had HPV before trial and gotten tested himself to further develop his theory. However, the State later elicited testimony from Appellant's trial counsel that he had no evidence to present at the new-trial hearing that Appellant had HPV, or any

STD for that matter. Accordingly, the trial court could have reasonably concluded that Baxter's testimony would not have been material.

The third witness Appellant attempted to present at his new trial hearing was Justin Jackson, Appellant's coworker. Jackson did not appear at Appellant's hearing despite having been issued a subpoena. Appellant relied on a prior interview and his written motion for a new trial to establish what Jackson's testimony would have been. Appellant contends that he established that Jackson would have testified as a character witness for him. Appellant contends that Jackson would have testified that Appellant was a "straightforward, honest guy" who was also a very hard worker. Additionally, Jackson would have testified that Appellant "didn't say foul things" and "never really participated in foul stuff because of his religious beliefs." However, during Appellant's punishment trial, Appellant's mother offered functionally the same testimony that Jackson would have given:

Q. . . . [W]hat personality traits would you highlight to the jury that have stood out to you about [Appellant] and who he is?

A. Your willingness to stand by you regardless of what others may say about you or . . . or how it hurts, or how it would . . . distance him from . . . other

people that he loved . . . and that he would stand beside you, made a commitment and would stay with you. Growing up, he held himself accountable for . . . things that he had done. . . . [S]ince he was -- became sober, he's the one that if you called him . . . being an electrician, family members always called him, said, Hey, [Appellant], says, looking to do this. Would you come help me? He was there. Helped them. Uh, he had communication with a lot of my different family in that way, uh, more than I had.

. . . .

A. Very hard working.

The trial court did not abuse its discretion by its implicit determination that Jackson's testimony was not material. We overrule Appellant's third issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

February 3, 2022
Do not publish. *See* TEX. R. APP. P. 47.2(b).
Panel consists of: Bailey, C.J.,
Trotter, J., and Williams, J.

JUDGMENT OF THE 11TH DISTRICT COURT
OF APPEALS OF TEXAS

(FEB. 3, 2022)

THE STATE OF TEXAS
ELEVENTH COURT OF APPEALS

11TH COURT OF APPEALS
EASTLAND, TEXAS
JUDGMENT

Michael Leon Grubb, * From the 104th District Court
of Taylor County,
Trial Court No. 22033B
Vs. No. 11-20-00037-CR * February 3, 2022

The State of Texas, * Memorandum Opinion by Bailey, C.J.
(Panel consists of: Bailey, C.J.,
Trotter, J., and Williams, J.)

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed.

REFUSAL OF PETITION FOR DISCRETIONARY REVIEW FROM THE TEXAS COURT OF CRIMINAL APPEALS
(JULY 27, 2022)

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

7/27/2022 COA No. 11-20-00037-CR
GRUBB, MICHAEL LEON Tr. Ct. No. 22033B
PD-0121-22

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

JACOB BLIZZARD
BLIZZARD & ZIMMERMAN ATTORNEYS
441 BUTTERNUT ST
ABILENE, TX 79602

* DELIVERED VIA E-MAIL *