No. 24-

IN THE

Supreme Court of the United States

SEAN MICHAEL MCGUIRE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A police officer may arrest without a warrant for a misdemeanor or felony committed in his presence and for a felony not committed in his presence if there was probable cause for the arrest. *United States v. Watson*, 423 U.S. 411, 423-24 (1976). This case asks whether an officer may arrest for a felony not committed in his presence if the probable cause was only for a misdemeanor.

This case involves a fatal car accident allegedly caused by petitioner's driving while intoxicated. A jury convicted him of felony-murder and failure to stop and render aid and assessed prison sentences in 2014. A Texas appellate court reversed the felony-murder conviction because the warrantless seizure of his blood was unconstitutional. This Court denied the State's request to review that decision.

On remand, the trial court granted petitioner's motion to suppress other evidence seized as a result of his warrantless arrest. The Texas Court of Criminal Appeals (TCCA) reversed and held that exigent circumstances authorized the arrest. It dodged the question on which it initially granted review: whether exigent circumstances must exist before the police may make a warrantless felony arrest of a person found in a suspicious place.

The question presented is:

> Does the Fourth Amendment permit a police officer to make a warrantless arrest for a felony not committed in his presence where probable cause only exists to arrest for a misdemeanor?

RELATED CASES

- *State of Texas v. McGuire*, Nos. 10-DCR-055898 & 11-DCR-057073, 268th District Court of Texas. Judgments and Convictions entered March 19, 2014.

- *McGuire v. State of Texas*, 493 S.W.3d 177, Nos. 01-14-00240-CR, 01-14-00241-CR & 01-14-01023-CR, Court of Appeals for the First District of Texas. Opinion entered May 10, 2016.

- *McGuire v. State of Texas*, Nos. PD-0626-16 & PD-0948-16, Texas Court of Criminal Appeals. Orders refusing discretionary review entered October 12, 2016, and November 2, 2016.

- *State of Texas v. McGuire*, No. 581 U.S. 1006, No. 16-919, United States Supreme Court. Order denying petition for a writ of certiorari entered May 30, 2017.

- *State of Texas v. McGuire*, No. 10-DCR-055898, 268th District Court of Texas. Order suppressing evidence entered February 23, 2018.

- *McGuire v. State of Texas*, 586 S.W.3d 451, No. 01-18-00146-CR, Court of Appeals for the First District of Texas. Opinion entered August 29, 2019.

- *McGuire v. State of Texas*, 689 S.W.3d 596, No. PD-0984-19, Texas Court of Criminal Appeals. Opinion entered February 21, 2024.

- *McGuire v. State of Texas*, No. PD-0984-19, Texas Court of Criminal Appeals. Order denying rehearing entered June 19, 2024

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sean Michael McGuire, respectfully petitions for a writ of certiorari to review the judgment of the TCCA.

OPINIONS BELOW

The TCCA's order denying rehearing (App. 1) is unreported. The TCCA's plurality opinion reversing the judgment of the Texas Court of Appeals (App. 2-24) and concurring opinion (App. 25-28) are reported at 689 S.W.3d 596. The Texas Court of Appeals' majority opinion affirming the trial court's order suppressing evidence (App. 29-51) and dissenting opinion (App. 52-72) are reported at 586 S.W.3d 451. The state trial court's order granting petitioner's motion to suppress evidence is unreported.

JURISDICTION

The TCCA reversed the Texas Court of Appeals' judgment on February 21, 2024, and denied rehearing on June 19, 2024. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

A. Procedural History

Petitioner was charged with felony-murder and failing to stop and render aid (FSRA) in Texas in 2010. He pled not guilty. A jury convicted him of both offenses and assessed prison sentences in 2014.

The First Court of Appeals of Texas reversed the felony-murder conviction in a published opinion in 2016 because the State obtained petitioner's blood-alcohol evidence without a search warrant and in violation of the Fourth Amendment. It affirmed the FSRA conviction, and he served that sentence. The TCCA refused the State's petition for discretionary review, and this Court denied the State's petition for a writ of certiorari. *McGuire v. State of Texas*, 493 S.W.3d 177 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *cert. denied*, 581 U.S. 1006 (2017).

After the appellate courts decided that the blood-alcohol evidence was inadmissible, on remand petitioner moved to suppress other evidence seized as a result of his warrantless arrest. The trial court granted that request on February 23, 2018, and suppressed evidence of photographs, video recordings, and audio recordings of petitioner; post-arrest statements that he made to police; and other tangible evidence seized as a result of his warrantless arrest. The State appealed, which stayed a retrial.

The First Court of Appeals of Texas affirmed the trial court's order suppressing evidence in a published opinion in 2019. *McGuire v. State*, 586 S.W.3d 451 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) (App. 29-51). One justice dissented (App. 52-72). The TCCA granted the State's petition for discretionary review to resolve two grounds: (1) whether article 14.03(a)(1) of the Texas Code of Criminal Procedure has an exigency requirement for warrantless arrests; and (2) if there is an exigency requirement, whether the State met that burden in this case.

The TCCA reversed the judgment of the court of appeals and the trial court's order suppressing the evidence in a published plurality opinion issued on February 21, 2024. *McGuire v. State*, 689 S.W.3d 596 (Tex. Crim. App. 2024) (App. 2-24). Four judges joined the plurality opinion, and four judges joined a concurring opinion (App. 25-28). A ninth judge concurred in the judgment without joining or issuing an opinion. Although all nine judges of the TCCA agreed to reverse the judgment of the court of appeals, they divided 4-4-1 on the rationale for that decision. The TCCA denied rehearing on June 19, 2024 (App. 1).

B. Factual Statement

A car accident occurred late at night on August 1, 2010. Petitioner stopped at a nearby gas station and called two police officers whom he knew to report that he hit someone or something, but he did not see anything when he looked. One of the officers notified dispatch, and two troopers responded to the call.

Trooper Devon Wiles testified at a pre-trial hearing in 2012 and at trial in 2014. He did not have a warrant to arrest petitioner, and petitioner could not leave after police placed him in a patrol car. Wiles did not see petitioner commit an offense. Petitioner smelled of alcohol, his eyes were red and glassy, and he showed signs of intoxication. But Wiles never saw him drink alcohol; there were no open alcoholic drinks; and petitioner had not lost the normal use of his mental or physical faculties. The place where he found petitioner was not suspicious, and petitioner did not act suspiciously. There was no evidence of any bad driving facts, and petitioner was coherent and responded appropriately.

Trooper Alton Tomlin also testified at the pre-trial hearing and at trial. Tomlin saw a piece of metal from the deceased's motorcycle wrapped around the front of petitioner's truck. Petitioner was detained within a few minutes after policed arrived. Tomlin did not have an arrest warrant. At the time of arrest, there was no evidence regarding who caused the collision. Tomlin did not see petitioner commit a crime in his presence. Nor did Tomlin have evidence of an offense before arresting petitioner. The place where he found petitioner was not suspicious.

Concluding that petitioner was driving while intoxicated at the time of the collision that resulted in the other driver's death, police arrested him without a warrant on two felony offenses—suspicion of causing death as a result of operating a motor vehicle while intoxicated and

FSRA. They arrested him at the scene by placing him in handcuffs and reading the *Miranda* warnings.

REASON FOR GRANTING CERTIORARI

WHETHER THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO MAKE A WARRANTLESS ARREST FOR A FELONY NOT COMMITTED IN HIS PRESENCE WHERE PROBABLE CAUSE ONLY EXISTS TO ARREST FOR A MISDEMEANOR.

Texas statutory law allows a police officer to arrest a person without a warrant if (1) the person is found in a suspicious place and (2) under circumstances that reasonably show that the person is guilty of a felony, disorderly conduct, breach of the peace, public intoxication, or is about to commit an offense. Tex. Crim. Proc. Code Art. 14.03(a)(1). To limit abuse of this authority, Texas courts construe this statute "parallel to the requirements of the Fourth Amendment on the federal side." *McGuire v. State*, 689 S.W.3d 596, 602 (Tex. Crim. App. 2024) (App. 13). This standard is satisfied if (1) the suspect was arrested at a crime scene or somewhere linked to it, (2) shortly after a crime occurred, and (3) the totality of the facts known to the police objectively point to the suspect's guilt of a felony or other breach of the peace under the statute. *Id.* at 603 (App. 14).

Petitioner was involved in a car accident late at night and pulled into a gas station located 0.1 miles from the scene of the accident. He immediately called two police

officers whom he knew to report that he had just hit someone or something but could not see who or what when he looked. One of those officers notified police dispatch, which sent two troopers to the scene to investigate. Petitioner showed signs of intoxication at the gas station. Police smelled an odor of alcohol coming from him, and his eyes were red and glassy. However, they did not have any evidence at that time to establish an objectively reasonable belief that he *caused* the accident or the other person's death, or that he had committed any felony. He did not commit a crime in their presence, nor did they have reason to believe that he was about to commit a crime.

The police concluded that petitioner was driving while intoxicated at the time of the collision that resulted in the other driver's death. Within a few minutes of arriving at the scene, they arrested him for two felony offenses—suspicion of causing death as a result of operating a motor vehicle while intoxicated and failing to stop and render aid (FSRA). They did not have an arrest warrant.

The TCCA concluded that the police had probable cause to believe that petitioner had committed "intoxication manslaughter if not felony murder" and that he failed to stop and render aid in a motor collision resulting in serious injury. 689 S.W.3d at 604 (App. 17). Probable cause arguably would have existed to arrest him for the *misdemeanor* offense of driving while intoxicated based on their observations of him at the scene and his admission that he was operating a motor vehicle in a public road. But they could not have arrested him for that *misdemeanor*

offense because he did not commit it in their presence. And without having investigated the accident, who caused it, or what caused the other driver's death, the police did not have probable cause to arrest him for the felony offense of causing the death while in the course of driving while intoxicated. Nor did they have probable cause to arrest him for FSRA where he stopped at a nearby safe location—a gas station located 0.1 miles from the scene; immediately called police officers to report what happened; and waited at that location for them to arrive.[1]

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Seizures include warrantless arrests. And warrantless arrests are "reasonable under the Fourth Amendment where there is probable cause," which "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). The question is whether, under the totality of the circumstances, "a reasonable officer could conclude . . . that there was a substantial chance of criminal activity." *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018).

The Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (quotation

1. Texas law permits the operator of a motor vehicle who is involved in an accident that results in the injury or death of another person to stop his vehicle "as close to the scene as possible." Tex. Trans. Code §550.021(a)(1).

marks omitted). This Court "look[s] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). If "history has not provided a conclusive answer" to this question, this Court turns to "traditional standards of reasonableness" and analyzes probable cause by balancing the private and public interests at play. *Id.* at 171.

The common law tends to suggest that police officers may conduct warrantless arrests for felonies committed outside of their presence, but not for misdemeanors. *See*, *e.g.*, 1 Matthew Hale, *Pleas of the Crown* *587–90 (1736); 2 Matthew Hale, *Pleas of the Crown* *86–90 (1736); 4 William Blackstone, *Commentaries* *288–92 (1772). Since then, Fourth Amendment jurisprudence has wrestled with the contours of a common law dichotomy between felony and misdemeanor warrantless arrests, specifically in delineating when and to what extent a crime must be committed within an officer's presence to establish probable cause.

A line of Supreme Court cases dating back a century describes the "usual" common law rule as establishing that "a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." *Carroll v. United States*, 267 U.S. 132, 156-57 (1925). In a seminal decision 50 years later, the Court

clarified that a police officer may "arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground [probable cause] for making the arrest." *United States v. Watson*, 423 U.S. 411, 423-24 (1976).

But since then, constitutional jurisprudence has retreated from this restrictive reading. This Court has declined to explicitly decide whether the Fourth Amendment demands an in-the-presence requirement for warrantless misdemeanor arrests. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 340 n.11 (2001); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.").

The "ultimate touchstone of the Fourth Amendment is reasonableness." *Lange*, 141 S. Ct. at 2017 (quotation marks omitted). This Court has long explained that the reasonableness of an arrest turns on probable cause, which involves a totality-of-the-circumstances inquiry that favors fluidity rather than categorical buckets. *See Wesby*, 583 U.S. at 56-57; *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) ("'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person . . . in believing, in the circumstances shown, that the suspect has committed,

is committing, or is about to commit an offense."). As it stands, the Court's probable cause doctrine provides the favored avenue to challenge the constitutionality of any arrest.

But the Court has not decided whether the Fourth Amendment permits a police officer to make a warrantless arrest for a felony not committed in his presence where probable cause only exists that the person committed a misdemeanor. The Court should resolve that question now. Unless it does so, a police officer can circumvent the longstanding rule that requires probable cause to make a warrantless arrest for a felony, where probable cause only exists for a misdemeanor but the officer cannot lawfully make a warrantless arrest because the misdemeanor was not committed in his presence. The TCCA's decision in this case permits such a misapplication of Fourth Amendment jurisprudence.

This Court should grant certiorari because the TCCA has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). The Court should grant review and order briefing and arguments on this important constitutional question.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 2024

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APPENDIX A — DENIAL OF MOTION FOR REHEARING OF THE COURT OF CRIMINAL APPEALS OF TEXAS, DATED JUNE 19, 2024

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308,
CAPITOL STATION,
AUSTIN, TEXAS 78711

June 19, 2024

COA No. 01-18-00146-CR

MCGUIRE, SEAN MICHAEL
Tr. Ct. No. 10-DCR-055898
PD-0984-19

On this day, the Appellee's motion for rehearing has been denied.

Deana Williamson, Clerk

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* DELIVERED VIA E-MAIL *

APPENDIX B — OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS, DATED FEBRUARY 21, 2024

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0984-19

SEAN MICHAEL MCGUIRE,

Appellee,

v.

THE STATE OF TEXAS,

Appellant.

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS FORT BEND COUNTY

RICHARDSON, J., announced the judgment of the Court and filed an opinion in which HERVEY, NEWELL, and WALKER, JJ., joined. KEEL, J., filed a concurring opinion in which KELLER, P.J., YEARY, and SLAUGHTER, JJ., joined. MCCLURE, J., concurred.

February 21, 2024, Delivered;
February 21, 2024, Filed

Appendix B

OPINION

Can a peace officer legally arrest a suspect, without a warrant, for killing another person while driving intoxicated, even though the accident did not occur in the officer's presence? Yes. The Texas Code of Criminal Procedure 14.03(a)(1) has been interpreted to allow any peace officer to arrest a person found in a "suspicious place" and the circumstances of the case reasonably show that the person is guilty of a felony or breach of the peace. We find that the arrest met the requirements of this statute, and that the officer formed probable cause to believe that both a felony and breach of the peace had occurred. Accordingly, we reverse the court of appeals and the trial court's suppression of Appellee's arrest and all evidence arising from it and remand the case to the trial court for further proceedings.

PROCEDURAL HISTORY

This case has travelled a long and convoluted journey to reach this Court for the third time. Prior to our Court granting review, this case has been before both Houston courts of appeals on four separate occasions, petitions for discretionary review were filed and denied twice at our Court, and the State's petition for writ of *certiorari* was subsequently denied at the United States Supreme Court. Appellee was tried and convicted on two separate charges by a jury. The conviction for felony murder was reversed by the First Court of Appeals and remanded for a new trial. The conviction for failure to stop and render aid was affirmed by the First Court of Appeals and is not

before this Court. This case has also been presided over by seven successive trial judges. The original judge on the case became ill prior to trial and another was recused in a contested motion to recuse. There was no live testimony presented on the current issue before this Court; the trial judge simply relied on the records and testimonies taken during prior pretrial proceedings and the jury trial. As a result, the transcripts of this proceeding had to be supplemented. The latest ruling now before this Court was made by Judge Brady Elliott who is no longer the judge of the 268th District Court. On remand, consequently, an eighth judge will continue with this case.

FACTS

On the date alleged in the indictment, at approximately 12:35 am, Appellee Sean Michael McGuire, with his wife as a passenger, drove his truck into a motorcycle driven by David Stidman causing Stidman's death.[1] McGuire made a U-turn and drove to a nearby Shell gas station a tenth of a mile from the accident scene. There, he called his mother and two law enforcement friends.[2] Police investigating the collision were also informed that McGuire was waiting at the gas station. One of the officers, Trooper Tomlin, who

1. Trooper Filmore testified that reports of the collision were received by around 12:40 am. The accident, he estimated, may have actually occurred up to five minutes prior to the report to the police—making the collision time roughly 12:35 am. Trial Tr. 74-75.

2. Other than passing information onward, the two law enforcement friends were not involved in the investigation. One friend was a deputy chief and the other was a narcotic officer.

responded to the collision scene went to the gas station to investigate. There, he encountered McGuire and his wife. He also encountered McGuire's mother—who had come to the gas station after McGuire called—standing outside of McGuire's truck. Trooper Wiles also came to the gas station from the crash scene shortly after Trooper Tomlin. Trooper Tomlin observed a piece of metal from the back fender of the motorcycle wrapped around the front of McGuire's truck. Trooper Tomlin also observed McGuire to have "red glassy eyes" and "an odor of alcohol coming from his person."[3] When he asked McGuire what happened, McGuire told him that he "hit something" while driving and that his wife, sitting in the passenger seat at the time, had told him he "hit a person." In order to continue the investigation and because both McGuire and his wife were showing signs of intoxication, McGuire's mother was asked to bring the truck to the scene of the collision while McGuire and his wife were transported there by patrol car.[4]

Continuing the investigation at the scene of the accident, police found gouges on the road and other evidence indicating that after McGuire's truck hit Stidman, the truck continued to drag the motorcycle for 829 feet

3. Trooper Filmore confirmed these observations of intoxication later at the scene of the accident. Trial Tr. 34.

4. While riding in the patrol car, both McGuire and his wife were detained "pending further investigation" but not under arrest. They were not handcuffed and the patrol car doors were left unlocked. Furthermore, McGuire rode in the front passenger seat to the crash site. Trial Tr. 152-53.

before coming to rest. Additionally, Stidman, himself, was thrown 214 feet from the point of impact and hit a guardrail. Concluding that McGuire was driving while intoxicated at the time of the collision leading to Stidman's death, Trooper Wiles arrested McGuire on suspicion of causing Stidman's death by reason of intoxicated operation of a motor vehicle and failure to stop and render aid, both felony offenses.

At a nearby hospital, McGuire's blood was drawn without a warrant or consent to determine his blood alcohol content. Somewhere between 90 minutes and 2.5 hours had passed from the time of the collision to the moment his blood was drawn. The State charged McGuire with felony murder by causing Stidman's death while driving intoxicated (enhanced to a first-degree felony by two prior out-of-state charges for driving while intoxicated), a second count of intoxication manslaughter with a vehicle, and failure to stop and render aid. The jury convicted him of felony murder and failure to stop and render aid. The felony murder conviction was reversed in light of *Missouri v. McNeely*[5] however, McGuire's conviction for failure to stop and render aid was affirmed by the First Court of Appeals.

On remand and before the second trial began, Appellee filed a new motion to suppress, this time to suppress the arrest. Specifically he argued that the "only exception to the warrant requirement which could possibly apply in

5. *McGuire v. State*, 493 S.W.3d 177 (Tex. App.—Houston[1st Dist.] 2016, pet. ref'd), *cert. denied*, 581 U.S. 1006, 137 S. Ct. 2188, 198 L. Ed. 2d 255 (2017); *Missouri v. McNeely*, 569 U.S. 141, 151, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

this case" was under 14.01(b) which requires an "offense committed in [the officer's] presence or within his view." Appellee, thus, requested suppression over the following items *after* his detention:

1. Photographs or video depictions of [Appellee].

2. Audio recordings of [Appellee].

3. Video recordings of [Appellee].

4. Statements of [Appellee].

5. Any other tangible items taken from [Appellee], his person or the vehicle he was allegedly operating not listed above;[6]

The State argued McGuire's arrest was lawful because probable cause existed, and he was found in a suspicious place under Tex. Code Crim. Proc. art. 14.03(a)(1). The State did not mention exigency at all in its written response. Furthermore, no new evidence was submitted to the court during the suppression hearing, nor did anybody testify. The trial court did not hear any testimony and simply reviewed the pleadings, the 2012 suppression-hearing transcript, and testimony from the 2016 trial.[7] The trial court ultimately granted the

6. (1 Corr. CR 14) ("Motion to Suppress Evidence"). We note that Appellee did not include his vehicle nor any evidence obtained prior to detention.

7. The transcripts for these hearings were missing from the original record forwarded to this Court. They were produced through a supplement.

suppression motion pertaining to the warrantless arrest based on those records.

With regard to which evidence was to be suppressed, the trial court clarified the boundaries during the suppression hearing. The court stated:

> THE COURT: Well, let's clarify. Items taken from the vehicle, I'm not going to grant suppression as to that . . . .[8]
>
> THE COURT: "Tangible items taken from the defendant," I'm striking that . . . . Any information they received from the defendant prior to that time is useable. He was being detained at that point in time . . . .[9]
>
> THE COURT: From the time that he was placed in the car at the Shell station to the time that he was placed under arrest at the site of the dead body, that comes in . . . .[10]

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8. (1 RR 35).

9. (1 RR 37). The trial court's copy of the motion to suppress shows that the judge crossed out the entire "Any other tangible items . . . ." provision, and amended all other provisions with the limitations of either "after arrest/shown body" or "after placed in PD vehicle after arrest." (1 Corr. CR 14).

10. (1 RR 58).

> THE COURT: [A]t that point in time where this officer says, "You're under arrest," . . . is suppressed; and everything that arose from that -- the conversations that occurred therefrom is suppressed.[11]

In short, the evidence to be suppressed did not include any physical evidence and was limited to what "arose" from his arrest. This would include such post-arrest evidence as McGuire's statements after arrest, dashcam video and audio recordings with McGuire in the police vehicle after arrest, and McGuire's booking photo.

This brings us to the present-day appeal by the State to this Court. Under the record brought before this Court, it is unclear what specific evidence Appellee sought to suppress. The record does not show whether such evidence would benefit or hurt either party's case.

However, with the suppression of the arrest and its fruits in place, the admissible inculpatory evidence includes the following:

- McGuire was operating the vehicle.
- McGuire made three phone calls (his mother and two acquaintances in law enforcement) indicating he hit "something."

---

11. (1 RR 60).

- McGuire's wife, a passenger at the time of the collision, told him he hit a person.

- McGuire stopped his vehicle at a Shell station approximately 0.1 miles from the crash site instead of stopping at the scene and rendering aid.

- Physical evidence of a piece of motorcycle stuck in the grill of McGuire's truck.

- McGuire states to Trooper Wiles, "My wife said I hit a person."

- McGuire cried, covered his face, crouched, and stated he was "sorry" multiple times when near the motorcycle at the crash scene.

- The motorcycle was dragged approximately 829 feet.

- McGuire didn't notice the piece of motorcycle in the grill of his truck. He "didn't seem to know where it came from."

- Trooper Wiles noticed a strong odor of alcohol on McGuire, bloodshot and glassy eyes, and a dazed look on his face.

- McGuire refused a field-sobriety test by Trooper Wiles.

Nevertheless, because *some* evidence is suppressed and assuming for the moment that it is indeed determinative

to the case, we now address whether suppression was warranted.[12]

Standard of Review for Motions to Suppress

An appellate court reviews a trial court's ruling on a motion to suppress for an abuse of discretion.[13] Almost complete deference is given to the court's determination of historical facts and its rulings on the application of law to those questions of fact.[14] The same deference is afforded to the trial court in deciding mixed questions of law and fact that are based on an assessment of credibility and demeanor.[15] For mixed questions of law and fact that do not involve an evaluation of credibility and demeanor, however, we conduct a de novo review.[16] If the trial court's ruling is correct on any theory of law applicable to the case and reasonably supported by the evidence, the ruling will be upheld.[17]

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12. On appellate review, it can be difficult to evaluate the weight or need of any specific item of evidence without at least some pointers as to how the party intends to rely on it or not.

13. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex. Crim. App. 1988).

Appendix B

Seizures under Texas Law

Federal and State constitutional provisions explicitly protects the right of the people to be free from "unreasonable seizures and searches." Generally, searches and seizures may only be conducted pursuant to a warrant unless a recognized exception to the warrant requirement applies. Warrants for seizures and searches will not issue "without probable cause." Probable cause exists, under the totality of the circumstances, if the evidence shows at the moment of arrest that "the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense."[18] "Probable cause to arrest must point like a beacon toward the specific person being arrested."[19]

In that vein, Texas law also requires statutory authority to arrest when the arrest is warrantless.[20] Texas Code of Criminal Procedure 14.03(a)(1) provides one such avenue of authority for warrantless arrests:

> Any peace officer may arrest, without warrant . . . persons found in suspicious places and under circumstances which reasonably

18. *Parker v. State*, 206 S.W.3d 593, 596-97 (Tex. Crim. App. 2006).

19. *Id.* at 597.

20. *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002).

> show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or are about to commit some offense against the laws; . . . .

We have historically recognized that an overly liberal construction of the authority to determine what is a "suspicious place" could give police the arbitrary and unlawful "power to pass summary judgment upon a human being, and incarcerate him in a dungeon, although innocent of any crime against law or society."[21] Thus, in order to maintain "the obvious legislative intent of Chapter 14, protection of individual rights and furtherance of legitimate law enforcement," this Court has recognized that the use of "persons found in suspicious places" under Article 14.03 should "authorize warrantless arrests in only limited situations."[22] In doing so, our case law construing this statutory authority has evolved often parallel to the requirements of the Fourth Amendment on the federal side.

Accordingly, we have said that "[t]he determination of whether a place is a 'suspicious place' is a highly fact-

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21. *Joske v. Irvine*, 43 S.W. 278, 280 (Tex. Civ. App. 1897), *rev'd on other grounds*, 91 Tex. 574, 44 S.W. 1059 (Tex. 1898) (construing the predecessor statute, Article 249 of the Code of Criminal Procedure of 1895, to the modern Article 14.03). *See also Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059 (Tex. 1898) ("We are therefore of opinion that the record shows that plaintiff's arrest was unlawful.").

22. *Johnson v. State*, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986).

specific analysis" because "few, if any, places are suspicious in and of themselves."[23] "Rather, additional facts available to an officer plus reasonable inferences from those facts in relation to a particular place may arouse justifiable suspicion."[24] Though several different factors "may be used to justify the determination of a place as suspicious," this Court has recognized at least one important factor common to most scenarios: "The time frame between the crime and the apprehension of a suspect in a suspicious place is short."[25] This Court and a number of the courts of appeals have consequently found suspects lawfully arrested in "suspicious places" where (1) the suspect was arrested at a crime scene or somewhere linked to it, (2) shortly after a crime had taken place, and (3) the totality of the facts known to the police officer objectively point to the suspect's guilt in the commission of a felony or other breach of the peace under 14.03(a)(1).[26]

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23. *Dyar v. State*, 125 S.W.3d 460, 468 (Tex. Crim. App. 2003); *Johnson*, 722 S.W.2d at 421.

24. *Johnson*, 722 at 421.

25. *Dyar*, 125 S.W.3d at 468.

26. *See Johnson*, 722 at 420-21 (detailing how Johnson, an apartment maintenance employee, was placed under warrantless arrest after police determined that (1) Johnson roughly matched the witness's description, (2) there was no sign of forced entry, (3) Johnson's set of master keys were found in the hallway in front of the door to the murder scene, (4) Johnson arrived on the scene minutes after police and offered an odd explanation for being there, and (5) blood was found on his pants); *Dyar*, 125 S.W.3d at 467 (detailing how Dyar was arrested for DWI after he was found by police still bleeding from his mouth minutes after wrecking his truck and walking on

Appendix B

Analysis

The appellate court below found suppression warranted because the State relied on but failed to fulfill the requirements of Tex. Code Crim. Proc. 14.03(a)(1). We note again there was no hearing or evidence received by Judge Elliott, he simply relied on the record from the prior hearings. Although the question of exigent circumstances was never argued in the suppression briefs and hearing, the court below relied on our opinion in *Swain v. State*[27] to require exigency as a required condition under the definition of "persons found in suspicious places" in Article 14.03(a)(1). Thus, under the court of appeals' interpretation, Article 14.03(a)(1) requires "(1) probable cause existed, (2) the person was found in a suspicious place, and (3) 'exigent circumstances call for immediate action or detention by police.'"[28] Opining that the State failed to provide evidence showing exigent circumstances (even though the question was never argued at the trial level),[29] the court of appeals affirmed the suppression of the arrest and evidence flowing from it.

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foot to his nearby home).

27. *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005).

28. *State v. McGuire*, 586 S.W.3d 451, 457 (Tex. App.—Houston [1st Dist.] 2019) (quoting *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005)).

29. The only arguments heard by the trial judge consisted of whether the gas station was a "suspicious place" since that was not the crime scene.

The State now asks this Court to disavow *Swain* and remove the exigency requirement under Article 14.03(a)(1)'s "suspicious places." Failing that, the State alternatively asserts that exigency exists under the facts of this case. Regardless of whether exigent circumstances are absolutely required under Article 14.03(a)(1), we find that there were exigent circumstances in this case to justify a warrantless arrest. If ever there was a case to be made for exigency, this case defines it. As a result, there is no need to disavow *Swain* at this time. Exigent circumstances to execute a warrantless arrest is supported throughout the record. Although there may be a case to made in the future with different facts that may not satisfy Article 14.03 (a)(1), those facts are not before us and there is no need to go down that road.[30] We are not in the business of issuing advisory opinions to unknown facts.

Probable Cause: Evidence Pointed to Appellee Like a Beacon

A review of the facts known to police show probable cause to arrest "pointed like a beacon toward[s]" Appellee.[31] Though he was at a gas station, Appellee was only a short distance from the crash site—only a tenth of a mile away and only a short time after the estimated time of the crash. There were motorcycle parts lodged in the grill of his truck that he could not explain. Evidence

30. *See e.g., Armstrong v. State*, No. 05-21-00333-CR, 2022 Tex. App. LEXIS 4941, 2022 WL 2816540 (Tex. App.—Dallas July 19, 2022, pet. filed) (not designated for publication).

31. *Parker*, 206 S.W.3d at 597.

at the crash site showed that Stidman, the victim, was hit while riding his motorcycle and was dragged roughly 829 feet. Stidman died at the scene. Appellee's wife who was riding in the passenger seat during the collision told Appellee that he had "hit a person." Furthermore, Appellee had made calls to his mother and two law enforcement friends and admitted that he "hit something." In addition to finding a cooler full of beer in Appellee's truck bed, police observed Appellee to have a strong odor of alcohol, bloodshot glassy eyes, and a dazed look on his face. Finally, Appellee refused to submit to standard field sobriety testing. These facts were sufficient to warrant an objectively prudent person to believe that Appellee had committed intoxication manslaughter if not felony murder. He had also failed to stop and render aid in a motor collision resulting in serious injury. Alternatively, police also had probable cause to believe that Appellee had unlawfully caused the death of another. Unlawfully causing the death of another, for the purposes of Article 14.03(a)(1), is at the very least a *breach of the peace*.[32] To the extent that the trial court found otherwise on either of these points was clearly erroneous.

Suspicious Place and Exigent Circumstances

The State argues on discretionary review that the court of appeals erred in affirming the trial court's

32. "Texas courts have defined and interpreted the term 'breach of the peace' to mean an act that threatens to disturb the tranquility enjoyed by the citizens." *Ste-Marie v. State*, 32 S.W.3d 446, 449 (Tex. App.—Houston[14th Dist.] 2000, no pet.); *see also Romo v. State*, 577 S.W.2d 251 (Tex. Crim. App. 1979) (finding DWI to be a breach of the peace under the Texas Penal Code).

suppression when the issue of exigency was not raised nor ruled on by the trial court. Because Appellee never raised the issue, nor put them on fair notice that it was contested, there was no reason for the State to present evidence or call witnesses to testify towards exigency. Thus, the State argues that they were unfairly deprived of an "adequate opportunity to develop a complete factual record" regarding exigency.[33] The State further argues that Article 14.03(a)(1) does not expressly contain an exigency requirement and that construing it to require exigency leads to absurd results. In response, Appellee argues that exigency actually was litigated in the trial court and that it is the fault of the State in choosing not to present further evidence of it.

We agree with the State in that they were not given fair notice of the exigency question which is not specifically mentioned in the statute. This unfairly deprived them of an adequate opportunity to develop a complete factual record. However, although the factual record regarding the question of exigency has not been *completely* developed, the existing factual record sufficiently establish that exigent circumstances exist here. As we previously noted, based on these facts, exigency existed to make a warrantless arrest, and there is no need to ignore it.

Exigent circumstances are circumstances that "call for immediate action or detention by police."[34] Accordingly, fact-specific scenarios may fulfill 14.03(a)(1)'s exigency

33. *State v. Esparza*, 413 S.W.3d 81, 90 (Tex. Crim. App. 2013).

34. *Swain*, 181 S.W.3d at 366.

requirement where it is overly impractical for police officers to obtain an arrest warrant while still furthering the goals of the public good under the totality of the circumstances.[35] Factors that may be considered include (1) whether the subject of probable cause is likely to leave the scene, (2) whether evidence of criminality is likely to be destroyed, degraded, or lost, and (3) whether the subject of probable cause poses a continuing and present danger to others.[36] Other considerations may multiply the magnitude

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35. *See Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (allowing exception to the Fourth Amendment warrant requirement when the "exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."); *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (allowing warrantless arrests inside a home if there are exigent circumstances).

Although it was in a different type of Fourth Amendment event (blood draws), the Supreme Court in *McNeely* discussed and approved warrantless police action in fact specific scenarios not too different from the instant case:

> We added that particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we found that it was appropriate for the police to act without a warrant.

Missouri v. McNeely, 569 U.S. 141, 151, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (internal citations and quotes omitted).

36. *Dyar v. State*, 125 S.W.3d 460, 471 (Tex. Crim. App. 2003) (Cochran, J., concur); *see Swain*, 181 S.W.3d at 366 ("Any 'place' may become suspicious [under Article 14.03(a)(1)] when a person

of the exigency such as how difficult or time-consuming it is to obtain a warrant in relation to the above factors.

The totality of the facts in this case, though underdeveloped towards this point, show Appellee was in a "suspicious place" and exigent circumstances existed.[37] Police were faced with investigating a roadway homicide likely induced by driving while intoxicated. Police were faced with the challenge of conducting at least a preliminary investigation at around 1:00 am in the dark of

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at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances *call for immediate action or detention by police.*" (emphasis added)).

37. We agree with Justice Keyes's dissent from the First Court of Appeals regarding what constitutes a suspicious place:

> 'Few places, if any, are inherently suspicious. The determination of whether a place is suspicious requires a highly fact specific analysis.' As the Court of Criminal Appeals has explained, under article 14.03(a)(1),
>
> > Any place may become suspicious when an individual at the location and the accompanying circumstances raise a reasonable belief that the individual committed a crime and exigent circumstances call for immediate action or detention by the police.

McGuire, 586 S.W.3d 451, 466 (Tex. App.—Houston [1st Dist.] 2019) (Keyes, J., dissent) (first quoting *Lewis v. State*, 412 S.W.3d 794, 802(Tex. App.—Amarillo 2013, no pet.); and then quoting *Swain*, 181 S.W.3d at 366) (internal citations omitted).

night on a poorly lit intersection. Their ability to preserve and recover as much physical evidence as possible was significantly diminished compared to during business hours and under broad daylight. As Trooper Tomlin testified, debris from the accident and other evidence, such as skid marks, trails of vehicle fluids, and roadway scratches, needed to be identified and recorded because they disappear over time. Furthermore, there were only four DPS troopers on duty in the entire county that night. And three of them, including Trooper Tomlin, were spread out over 829 feet of roadway stretching from the point of impact to the final resting place of the motorcycle. According to Trooper Tomlin, it took the three troopers "a couple of hours" by mostly flashlight to finish investigating the scene.[38] Though Appellee was cooperative to this point, there was no guarantee that he would not leave the scene at his earliest opportunity. And if he left in his vehicle, Appellee could have presented a danger to others.

In addition to the need to collect and preserve physical evidence at the scene, there was also an increasing need to preserve evidence of intoxication in Appellee's blood.[39] In addition to the natural attrition of the level of blood

38. According to Trooper Tomlin, a number of Fort Bend Sherriff's deputies were also at the scene on the night of the collision, but they were mostly occupied with directing traffic (on an intersection near State Highway 99) so the investigating team of law enforcement wouldn't be hit while investigating the scene.

39. In a blood draw suppression hearing leading up to the first trial, after both attorneys offered their knowledge of how late-night warrants are obtained in the county, Judge Higginbotham concluded the following:

alcohol content over time, any additional consumption of alcohol or other intoxicants would have detrimentally degraded the reliability of any later collected blood draw evidence. Because *McNeely* had not been decided by the Supreme Court, the officers investigating the scene could not have known a warrant was required on the date in question. Nevertheless, they had ample information and evidence to form probable cause to arrest Appellee. All of the information that the police possessed, *including the place in which he was found*, "pointed like a beacon" towards Appellee and shining an inculpatory light upon him.[40] At the minimum, there was probable cause to arrest him for failure to stop and render aid.

Blood was drawn somewhere between 2:00 and 3:00 am—roughly 90 minutes to more than two hours after the

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> I've heard the argument of counsel and gone over your pleadings and these cases [including *Missouri v. McNeely*] that have been presented here.
>
> I believe that in this case, as I know it, that the police probably acted in accordance with what the law was at that time, as far as the Transportation Code.
>
> Also, I think that there *may have been exigent circumstances*. I don't know how. Was there a — was there a case, supreme court case, it doesn't define exigent circumstances. I just know that it's — that it is not defined as trying to do something about the dissipation of alcohol. And the totality of what I've heard here, I'm going to deny your supplemental motion to suppress.

Mar. 7, 2014 Pretrial Tr. 73 (emphasis added).

40. *Parker*, 206 S.W.3d at 597.

collision. This delay was without any time taken to obtain a warrant. Assertions by the attorneys for the State and Appellee with personal knowledge suggest that obtaining a warrant Appellee's arrest would have added potentially hours of more delay (and was thereby very impractical).[41]

During pretrial hearing on March 7, 2014, the attorneys (both having some prior personal experience in obtaining warrants) detailed the unpredictability and difficulty of obtaining a warrant in the middle of the night in Fort Bend County. Around the time of trial, the steps to obtaining a warrant included the following. Depending on the night, an assistant district attorney may or may not have been on call to assist with getting a warrant. If no assistant district attorney was available, the officer would have had to prepare the warrant and affidavit themself and then contact a judge (from a list of judges and their phone numbers) to see if they were available to sign it. While there might have been a judge assigned to be "on call" for that night, according to the prosecutor, the "on call" judge was not always reliable or responsive. Trooper Tomlin testified that he was once unable to find a judge to sign off on a warrant in a prior instance in the middle of the night. The officer or on-call ADA would then drive to the judge's house—however far that might be—and get

41. *See McNeely*, 569 U.S. at 156 ("[E]xigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process."). We realize that *McNeely* only deals with the seizure of blood in a DWI investigation as opposed to the DWI arrest in this case. However, there are useful parallels in the determination of "exigency" that may be applicable here.

the warrant signed before returning to the scene for its execution. Furthermore, while some judges in Fort Bend County were willing to transmit warrants by facsimile, per the prosecutor, at least some were unable or unwilling to do so.[42] In summary, although there was no evidence regarding that specific night, the general added difficulty of getting a warrant at night combined with the type of crime and the need to preserve evidence are sufficient to demonstrate exigent circumstances under these specific facts.

Conclusion

Under the facts of this case, the court of appeals below erred in finding suppression was warranted under Article 14.03(a)(1). We reverse the court of appeals and the trial court's suppression of Appellee's arrest and all evidence arising from it, and remand the case back to the trial court.

Delivered: February 21, 2024

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42. *See id.* at 154-55 (finding natural blood-alcohol dissipation to no longer automatically qualifies as an exigency in a DWI scenario but must instead be evaluated on a case-by-case basis— after noting that search warrants can be obtained via electronic, telephonic, or radio communications but also acknowledging that electronic warrants may still be time-consuming and that "improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.").

APPENDIX C — CONCURRING OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS, DATED FEBRUARY 21, 2024

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

NO. PD-0984-19

THE STATE OF TEXAS,

Appellant

v.

SEAN MICHAEL MCGUIRE,

Appellee

ON STATE'S PETITION FOR DISCRETIONARY
REVIEW FROM THE FIRST COURT OF APPEALS
FORT BEND COUNTY

KEEL, J., filed a concurring opinion in which KELLER, P.J., and YEARY and SLAUGHTER, JJ., joined.

CONCURRING OPINION

We granted review to decide whether exigency is needed to justify a warrantless arrest under Article 14.03(a)(1). Neither its text nor our caselaw imposes an exigency requirement, and we should say so. Since the lead opinion hedges on the issue, I respectfully concur only in its judgment.

Appendix C

As pertinent here, Article 14.03(a)(1) authorizes the warrantless arrest of "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony" or other enumerated offense. Tex. Code Crim. P. art. 14.03(a)(1). It makes no mention of exigent circumstances.

Other statutes governing warrantless arrests not only mention exigent circumstances but require them. Article 14.05 prohibits entry into a residence to make a warrantless arrest absent "exigent circumstances" or consent. Tex. Code Crim. P. art. 14.05. Article 14.03(a)(2) specifies a particular exigency—"probable cause to believe there is danger of further bodily injury" to a person who has already been assaulted. Tex. Code Crim. P. art. 14.03(a)(2). Article 14.04 specifies another exigency—a reported felon about to escape such that there is no time to get a warrant. Tex. Code Crim. P. art. 14.04. But the Legislature has never imposed an exigency requirement on Article 14.03(a)(1)—a significant omission.

This Court has never imposed an exigency requirement on Article 14.03(a)(1), either. Rather, we have cited exigency as one circumstance in the totality that must be analyzed to assess an arrest's validity under the statute. In *Gallups v. State*, for example, police were justified in arresting the defendant at his house because he walked there just after abandoning his wrecked car, and there was an exigent need to test his blood-alcohol level. 151 S.W.3d 196, 201–02 (Crim. App. 2004). In *Swain v. State*, the defendant's arrest at his workplace was justified because he admitted breaking into the missing victim's house,

beating her, and leaving her in a remote location, and the police needed to prevent his flight and find the victim. 181 S.W.3d 359, 366–67 (Tex. Crim. App. 2005). Exigency was one circumstance in the totality that *Gallups* and *Swain* examined; it was not a particular requirement.

Dyar v. State declined an invitation to impose an exigency requirement onto Article 14.03(a)(1) and instead embraced the longstanding totality-of-the-circumstances analysis. 125 S.W.3d at 468 (Tex. Crim. App. 2003). *Dyar* observed that the Legislature had never amended Article 14.03(a)(1) in response to earlier cases applying a totality of the circumstances test, so we presumed that the Legislature intended the same construction to continue to apply. *Id.*

Dyar applied a bifurcated test: (1) probable cause of guilt and (2) the defendant's location in a suspicious place. *Id.* The same facts that demonstrated Dyar's guilt also showed that the hospital where he was arrested was a suspicious place. *Id.* at 467–68. He had been identified as the driver in a recent DUI and had admitted to drinking and driving. *Id.* at 468.

Answering the suspicious-place question is a "highly fact-specific analysis." *Id.* Several factors have been examined to answer the question. *Id. Dyar* identified one "important" and "constant" factor in determining the suspiciousness of a place of arrest: temporal proximity between the crime and the arrest. *Id.* at 468. Another factor is physical proximity. In *Johnson v. State*, the defendant was arrested on probable cause at the scene

of a murder within two hours of its commission; that was a suspicious place. 722 S.W.2d 417, 421 (Tex. Crim. App. 1986) (overruled on other grounds, *McKenna v. State* 780 S.W.2d 797 (Tex. Crim. App. 1989)).

In this case, the "suspicious place" requisite was fulfilled by probable cause to show Appellee's guilt of a felony and by temporal and physical proximity between the crime and his arrest. He was found minutes after a car crash at a gas station a few hundred feet from the crash site. A motorcyclist was dead, and motorcycle parts were stuck in the grill of Appellee's truck. Appellee showed signs of intoxication, he had beer in his truck, he admitted he hit something, and his passenger said he hit a person. His warrantless arrest was justified under Article 14.03(a)(1) notwithstanding any exigency, and the court of appeals erred in upholding the trial court's order suppressing evidence obtained as a result of Appellee's arrest.

Accordingly, I concur in the Court's decision to reverse the lower court's judgment.

Filed: February 21, 2024

APPENDIX D — OPINION OF THE COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON, DATED AUGUST 29, 2019

COURT OF APPEALS OF TEXAS,
FIRST DISTRICT, HOUSTON

NO. 01-18-00146-CR

THE STATE OF TEXAS,

Appellant,

v.

SEAN MICHAEL MCGUIRE,

Appellee.

August 29, 2019,
Opinion Issued

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 10-DCR-055898

OPINION

Sean Michael McGuire is charged with felony murder for the death of a motorcyclist McGuire struck while allegedly intoxicated. McGuire moved to suppress evidence obtained after his arrest, arguing that his warrantless arrest was unlawful. The State argued that Article 14.03(a)(1) of the Code of Criminal Procedure authorized

McGuire's warrantless arrest because McGuire was found in a suspicious place. TEX. CODE CRIM. PROC. art. 14.03(a)(1). The trial court granted McGuire's motion to suppress, and the State appealed. *See* TEX. CODE CRIM. PROC. art. 44.01(a)(5) (permitting State an interlocutory appeal of an order granting a criminal defendant's motion to suppress evidence).

Because the Court of Criminal Appeals has interpreted Article 14.03(a)(1) to require the State to show exigent circumstances[1] to arrest without a warrant under Article 14.03(a)(1) and the State did not, we affirm. *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005); *Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004); *Minassian v. State*, 490 S.W.3d 629, 637 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (describing *Swain* as

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1. Black's Law Dictionary defines exigent circumstances as follows:

> **Circumstance** . . .
>
> **-exigent circumstances**(1906) 1. A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside. 2. A situation in which a police officer must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists, and thus may do so without first obtaining a warrant. • Exigent circumstances may exist if (1) a person's life or safety is threatened, (2) a suspect's escape is imminent, or (3) evidence is about to be removed or destroyed.

Circumstance, Black's Law Dictionary (10th ed. 2014).

holding that "warrantless arrest under [Article] 14.03(a)(1) requires showing of exigent circumstances"); *cf. Bell v. State*, No. 02-17-00299-CR, 2019 Tex. App. LEXIS 5934, 2019 WL 3024481, at *2-3 (Tex. App.—Fort Worth July 11, 2019) (mem. op., not designated for publication) (noting *Swain* exigency requirement and numerous intermediate appellate court opinions applying *Swain* to require proof of exigency when State relies on Article 14.03(a)(1)'s suspicious-place exception).

Background

Late one evening, Sean Michael McGuire was driving home when his truck struck a motorcycle driven by David Stidman. McGuire made a U-turn and pulled into the parking area of a nearby Shell gas station. McGuire called his mother and two people he knew in law enforcement. After calling them, McGuire waited at the gas station.

Meanwhile, the police were investigating the discovery of a motorcycle and dead motorist. During their investigation, the police were told that McGuire was waiting at the Shell gas station. They went to the gas station. At least one officer who spoke with McGuire suspected he had been driving while intoxicated.

The police drove McGuire to the location of Stidman's body. There, McGuire was arrested. He was taken to a local hospital where a warrantless, nonconsensual blood draw was performed to determine his blood-alcohol content.

McGuire was charged with felony murder on the basis that he was driving while intoxicated, he had two prior

out-of-state DWIs, and those DWIs elevated this offense to a first-degree felony. *See* Tex. Penal Code §§ 19.02(b)(3) (felony murder), 49.09(b)(2) (enhancing DWI to felony).

McGuire moved to suppress evidence on the argument that his warrantless arrest and warrantless search were unlawful. Among his arguments, he contended that the warrantless blood draw was an unlawful search in violation of the Fourth Amendment. His motion to suppress was denied. He was convicted of murder and appealed. This Court reversed his conviction, holding that the warrantless, nonconsensual blood draw violated McGuire's Fourth Amendment right to be free from unreasonable searches as recognized in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). *See McGuire v. State*, 493 S.W.3d 177, 199 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *see also id.* at 202 (stating, "All remaining issues raised in McGuire's appeal of the murder conviction are moot."). The case was remanded and set for retrial in 2018.

In advance of retrial, McGuire filed another motion to suppress evidence.[2] He argued that his warrantless arrest

2. A ruling on a motion to suppress evidence is interlocutory and may be subject to reconsideration and revision on remand. *See Clement v. State*, 530 S.W.3d 154, 160 (Tex. App.—Eastland 2015) (stating that "a pretrial motion to suppress evidence is 'nothing more than a specialized objection to the admissibility of that evidence' that is interlocutory in nature . . . [and] may be the subject of reconsideration and revision as is any other ruling on the admissibility of evidence . . . [therefore,] the State will not be precluded from seeking a reconsideration of the suppression on a more fully developed record upon the remand of this case to the trial court."), *rev'd on other grounds*, PD-0681-15, 2016 WL 4938246

was unlawful and did not fit within any of the Chapter 14 exceptions to the warrant requirement. *See* TEX. CODE CRIM. PROC. art. 14.01-.06. In the State's written response and at the suppression hearing, the State argued that the arrest fell within the suspicious-place warrant exception under Article 14.03(a)(1), but the State did not note the exigency requirement, point to any evidence that might satisfy the exigency requirement, or argue that a per se exigency exists.

The trial court—with a different trial judge than the one who presided over the first trial—did not receive any new evidence at the 2018 suppression hearing. Instead, the court reviewed the 2012 suppression-hearing transcript, the 2016 trial testimony, and the parties' pleadings. After considering these materials and the parties' motion and response, the trial court granted McGuire's motion to suppress, and the State appealed.

(Tex. Crim. App. Sept. 14, 2016) (not designated for publication). This Court did not review the trial court's 2012 suppression ruling based on whether the warrantless *arrest* was legally permissible, only whether the warrantless *search* was permissible. *See McGuire*, 493 S.W.3d at 202. Thus, there was no bar to reconsideration of the warrantless-arrest suppression issue on remand at the 2018 suppression hearing; nor has law of the case been established on the warrantless arrest issue because this Court did not rule on that issue. *See State v. Swearingen*, 424 S.W.3d 32, 36 (Tex. Crim. App. 2014) ("The 'law of the case' doctrine provides that an *appellate court's* resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue.") (emphasis added).

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Standard of Review

Appellate courts review a trial court's ruling on a motion to suppress using a bifurcated standard of review. *State v. Martinez*, 570 S.W.3d 278, 281 (Tex. 2019). Under the bifurcated standard, the trial court is given almost complete deference in its determination of historical facts, especially if based on an assessment of demeanor and credibility, and the same deference is afforded the trial court for its rulings on application of law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of demeanor and credibility. *Id.* However, for mixed questions of law and fact that do not fall within that category, the reviewing court may conduct a de novo review. *Id.* Our review of questions of law is de novo. *Id.*

We will sustain the trial court's ruling if it is reasonably supported by the record and correct on any theory of law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003). This is so even if the trial judge gives the wrong reason for its decision. *Id.*; *State v. Ross*, 32 S.W.3d 853, 855-56 (Tex. Crim. App. 2000); *State v. Brabson*, 899 S.W.2d 741, 745-46 (Tex. App.—Dallas 1995), *aff'd*, 976 S.W.2d 182 (Tex. Crim. App. 1998) (stating that, in context of reviewing trial court order granting motion to suppress "we cannot limit our review of the [trial] court's ruling to the ground upon which it relied. We must review the record to determine if there is any valid basis upon which to affirm the county criminal court's ruling").

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Article 14.03(a)(1) and the Necessary Showing of Exigency

Warrantless arrests in Texas are authorized only in limited circumstances. *Swain*, 181 S.W.3d at 366. Once a defendant has established that an arrest has occurred and that no warrant was obtained, the burden shifts to the State to show that the arrest was within an exception to the warrant requirement. *Covarrubia v. State*, 902 S.W.2d 549, 553 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *Holland v. State*, 788 S.W.2d 112, 113 (Tex. App.—Dallas 1990, pet. ref'd). Most of the exceptions to the warrant requirement are found in Chapter 14 of the Code of Criminal Procedure. *See Swain*, 181 S.W.3d at 366; Tex. Code Crim. Proc. art. 14.01-.06 (delineating those circumstances in which warrantless arrests are permissible). The validity of a warrantless arrest can only be decided by the specific factual situation in each individual case. *Holland*, 788 S.W.2d at 113.

The exception relied on by the State in this appeal is found in Article 14.03(a)(1), which provides:

> Any peace officer may arrest, without warrant . . . persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony . . . breach of the peace, or [various other listed offenses] . . . or are about to commit some offense against the laws[.]

Tex. Code Crim. Proc. art. 14.03(a)(1).

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The Court of Criminal Appeals has held that, when relying on Article 14.03(a)(1), the State must establish that (1) probable cause existed, (2) the person was found in a suspicious place, and (3) "exigent circumstances call for immediate action or detention by police." *Swain*, 181 S.W.3d at 366 (concluding that exigent circumstances were established on evidence that person arrested had just admitted to leaving injured woman in secluded area after beating her during robbery, police perceived urgent need to find woman before she died from her injuries, and held additional concern that person who had admitted his involvement might flee); *Gallups*, 151 S.W.3d at 202; *cf. Dyar v. State*, 125 S.W.3d 460, 470-71 & n.13 (Cochran, J., concurring) (stating that "if there are no exigent circumstances that call for immediate action or detention by the police, article 14.03(a)(1) cannot be used to justify a warrantless arrest") (citing Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 Tex. Tech L. Rev. 931, 967-77, 980 (2000)).

At least five intermediate courts—including this one—have noted the State's burden to establish exigent circumstances when relying on Article 14.03(a)(1). *See, e.g.*, *Minassian v. State*, 490 S.W.3d 629, 637 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (describing *Swain* as holding that "warrantless arrest under Section 14.03(a)(1) requires showing of exigent circumstances" and concluding that risk of destruction of computer-data evidence on laptops established exigency); *Polly v. State*, 533 S.W.3d 439, 443 & n.4 (Tex. App.—San Antonio 2016, no pet.) (relying on *Swain* for proposition that exigency must be established for warrantless arrest under Article 14.03(a)

(1)); *see also Cook v. State*, 509 S.W.3d 591, 603-04 (Tex. App.—Fort Worth 2016, no pet.); *LeCourias v. State*, 341 S.W.3d 483, 489 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *State v. Morales*, No. 08-09-00137-CR, 2010 Tex. App. LEXIS 1679, 2010 WL 819126, at *2 (Tex. App.—El Paso Mar. 10, 2010, no pet.) (mem. op., not designated for publication).

There are several pre-2013 appellate court cases in which Texas intermediate appellate courts have held that the natural dissipation of alcohol in a suspect's blood provides an exigency under Article 14.03(a)(1) in that dissipation destroys evidence of a DWI offense. *See, e.g.*, *Gallups*, 151 S.W.3d at 202 (stating that "need to ascertain appellant's blood-alcohol level" was exigent circumstance); *Winter v. State*, 902 S.W.2d 571, 575-76 (Tex. App.—Houston [1st Dist.] 1995, no pet.); *Morales*, 2010 Tex. App. LEXIS 1679, 2010 WL 819126, at *2; *State v. Wrenn*, No. 05-08-01114-CR, 2009 Tex. App. LEXIS 5213, 2009 WL 1942183, at *3 (Tex. App.—Dallas July 8, 2009, no pet.) (mem. op., not designated for publication).

In 2013, the United States Supreme Court ruled that the dissipation of alcohol does not provide a per se exigency to relieve the State of the requirement of a search warrant when conducting an unconsented-to blood draw of a DWI suspect. *McNeely*, 569 U.S. at 155. Since *McNeely*, at least one intermediate appellate court has held that the dissipation of alcohol does not, without more, meet Article 14.03(a)(1)'s exigency requirement either. *State v. Donohoo*, No. 04-15-00291-CR, 2016 Tex. App. LEXIS 6558, 2016 WL 3442258, at *6 (Tex. App.—San Antonio June 22,

2016, no pet.) (mem. op., not designated for publication) (stating that "*McNeely* forecloses the State's position" that "exigent circumstances called for Donohoo's immediate arrest" on its singular argument that it needed to obtain his blood-alcohol level before the natural dissipation of alcohol); *see also Bell*, 2019 Tex. App. LEXIS 5934, 2019 WL 3024481, at *2 n.2 (citing *McNeely* in discussion of exigency justifying arrest); *but see Dansby v. State*, 530 S.W.3d 213, 222 (Tex. App.—Tyler 2017, pet. ref'd) (relying on *Gallups*, and without citation to *McNeely* or discussion of any case-specific facts influencing ability to timely obtain warrant, holding that "exigent circumstances—the need to ascertain Appellant's alcohol concentration—existed to justify Appellant's immediate arrest" under Article 14.03(a)(1)); *Lewis v. State*, 412 S.W.3d 794, 802 (Tex. App.—Amarillo 2013, no pet.) (without citing *McNeely* or discussing any case-specific facts influencing ability to timely obtain warrant, holding that officer "needed to take prompt action to ascertain appellant's blood-alcohol level" and exigency existed to support warrantless arrest under Article 14.03(a)(1)).

Here, the State does not argue that the dissipation of alcohol provided the necessary exigency, either per se or based on the particular facts of McGuire's arrest. In fact, the State's position is that no exigency requirement exists at all. At oral argument, the State explained that it reads *Minassian* to say that no exigency is required under Article 14.03(a)(1). But the State misreads the case's holding. This Court stated, in *Minassian*, that proof of exigency circumstances is not required "to pass constitutional muster" in the context of a warrantless felony arrest made

in a public place but that more had to be considered to review the lawfulness of the arrest at issue because Article 14.03(a)(1) additionally "requires exigent circumstances to make a warrantless arrest premised on suspicious activity in a suspicious place." 490 S.W.3d at 639 (citing *Swain*, 181 S.W.3d at 366). Proof of exigent circumstances is required when the State relies on Article 14.03(a)(1) to justify a warrantless arrest. *Id.*

The State had the burden at the 2018 suppression hearing to establish exigent circumstances to permit the warrantless arrest of McGuire, but it did not.

The State Made No Showing of Exigency; Therefore, the Trial Court Did Not Err in Granting Motion to Suppress

In its appellate brief, the State presents three arguments why the trial court erred in granting McGuire's suppression motion; however, the State fails to point to any evidence of exigent circumstances. This is consistent with the State's presentation of the issues to the trial court. Neither the State's response to McGuire's motion to suppress nor its arguments at the suppression hearing addressed exigency.

This failure of evidence provided a basis for the trial court to grant McGuire's motion to suppress. On appeal of the grant of a motion to suppress, "[w]e must review the record to determine if there is any valid basis upon which to affirm the [trial] court's ruling." *Brabson*, 899 S.W.2d at 745-46. Because the State did not meet its evidentiary burden to bring McGuire's arrest within the sole warrant

exception on which it relied, we must affirm the trial court's order granting the motion to suppress. The dissent's approach fails to hold the State to its evidentiary burden or follow this well-established standard of review.

Even if the State had sought to meet its burden to establish an exigency, there is no basis on which the trial court could have found a per se or case-specific exigency on this record. The State could not rely on McGuire's alleged intoxication to argue a per se exigency because, after *McNeely*, there is no per se exigency for dissipation of alcohol in a suspect's blood. 569 U.S. at 164; *see Donohoo*, 2016 Tex. App. LEXIS 6558, 2016 WL 3442258, at *6 (relying on *McNeely* to reject State's argument for warrantless arrest under Article 14.03(a)(1) based on dissipation of suspect's blood-alcohol level, given that officers had testified they never sought warrant); *see also Bell*, 2019 Tex. App. LEXIS 5934, 2019 WL 3024481, at *2 n.2 (in connection with holding that, under *Swain*, exigent circumstances must be shown, noting that the United States Supreme Court held, in *McNeely*, that "the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency but must be determined on a case-by-case basis on the totality of the circumstances.").

Neither do the case-specific facts establish an exigency to successfully challenge the suppression order. McGuire called his mother from the Shell gas station before he interacted with any police officers, and she drove to the gas station to wait with him. She was available to drive him, should he have been allowed to leave, which meant there was no danger of subsequent driving while intoxicated. *Cf. York v. State*, 342 S.W.3d 528, 536-37 (Tex. Crim. App.

2011) (evidence of defendant's running vehicle warranted reasonable belief that, if defendant were intoxicated, he would eventually endanger himself and others when he drove vehicle home). Moreover, McGuire waited at the gas station for law enforcement to arrive and agreed to ride with the officers to the location where Stidman's body was located. There was no evidence that, after the police engaged McGuire, they held any concern that McGuire would attempt to flee. *Cf. Villalobos v. State*, No. 14-16-00593-CR, 2018 Tex. App. LEXIS 3577, 2018 WL 2307740, at *6 (Tex. App.—Houston [14th Dist.] May 22, 2018, pet. ref'd) (mem. op., not designated for publication) (concluding that Article 14.03(a)(1) requirements were met on evidence driver "needed to be detained because he had fled scene of accident").

Without any evidence or argument that an exigency existed, we must conclude that the State failed to meet its burden to establish that McGuire's warrantless arrest was authorized under Article 14.03(a)(1), on which the State relied. *See Brabson*, 899 S.W.2d at 745-46; *cf. Buchanan v. State*, 175 S.W.3d 868, 876 (Tex. App.—Texarkana 2005) (concluding that State failed to establish exigent circumstances to support warrantless arrest under Article 14.03(a)(1) because there was no evidence suspect was going to escape or that urgency existed, and stating, "We cannot interpret Article 14.03(a)(1) to be so encompassing that it swallows the general rule that a valid arrest should be based on an arrest warrant."), *rev'd on waiver grounds*, 207 S.W.3d 772 (Tex. Crim. App. 2006).

Accordingly, we conclude that the trial court did not err in granting McGuire's motion to suppress. *See Laney*,

117 S.W.3d at 857 (stating that ruling on motion to suppress must be upheld if legally correct even if trial court did not present same basis in its ruling). In light of our holding, we do not reach any other issues raised in the State's brief.

Response to Dissent

The dissent addresses three issues that require a response: whether Article 14.03 requires a showing of exigency, whose burden it is to make that showing, and whether certain facts or circumstances satisfy that burden under a per se or fact-specific analysis.

A. Article 14.03 requires a showing of exigency

The dissent presents the current state of law on exigency in the context of a warrantless arrest as though a turn of phrase has been frivolously used and then given unintended weight. *Dissenting Op.* at *10 (after determining that "courts have implied an exigency requirement from a sentence in" *Swain v. State*, openly doubting whether Texas law actually does "require exigent circumstances in all cases under article 14.03(a)(1)"). But there can be no question that Texas law requires a showing of exigency when relying on this warrant exception. The Court of Criminal Appeals has expressly stated—twice—that a showing of exigency is part of the proof necessary under Article 14.03(a)(1). *See Gallups*, 151 S.W.3d at 202; *Swain*, 181 S.W.3d at 366-67. Both opinions show the deliberative basis for the statement of law, citing to a 2003 concurrence in another Court of Criminal Appeals opinion, *Dyar*, 125 S.W.3d at 468-71 (Cochran, J., concurring).

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The *Dyar* concurrence discussed the historical context of Article 14.03(a)(1) and the ill fit between the terms of the 150-year-old statute and modern Fourth Amendment search-and-seizure law. *Id.* The provision now found in Article 14.03, when implemented, sanctioned the arrest of "suspicious people" who "might soon commit" breaches of the peace such as "drunks in the bar" who "had not yet breached the peace" but seemed like they might. *Id.* at 469. Officials relied on the law to "arrest, escort out of town, or generally hassle those who were not welcome." *Id.* at 470. The concurrence noted that application of the statute in such a manner "would not pass constitutional muster today" and would, instead, be considered "constitutionally offensive." *Id.* at 469-70.

The *Dyar* concurrence stated that courts might best harmonize the "original intent of the pre-Civil War statute" and "current constitutional" norms and protections by using "the organizational principle of exigent circumstances" to analyze when the requirements of Article 14.03 are satisfied. *Id.* at 470 (explaining that an exigency-based analysis would "make some sense out of the 'suspicious places' language"); *see id.* at 470 n.13 (quoting Gerald S. Reamey's *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 Tex. Tech L.Rev. 931, 980 (2000)).[3]

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3. An excerpt of the law review quote reads as follows:

> Necessity is the guiding principle in interpreting warrant exceptions. Therefore, not every crime scene qualifies as a suspicious place excusing a warrant. The correct question in crime scene cases is not whether an offense was committed at the place where the

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The *Dyar* concurrence explained how an exigency framework would guide the Article 14.03 analysis while adhering to Fourth Amendment jurisprudence:

> [If] police have probable cause to believe that person "X" has committed a felony or breach of the peace and he is found in "Y" location under "suspicious circumstances" and there is no time to obtain a warrant because: 1) the person will not otherwise remain at "Y" location; 2) the evidence of the crime will otherwise disappear; or 3) the person poses a continuing present threat to others, then police may arrest "X" without a warrant. On the other hand, if there are no exigent circumstances that call for immediate action or detention by the police, article 14.03(a)(1) cannot be used to justify a warrantless arrest . . . . [T]his construction best adheres to the legitimate historical purpose and scope of the statute . . [and] also complies with Fourth Amendment jurisprudence.

Id. at 471.

> suspect is found, but whether some reason exists not to obtain prior judicial approval for the arrest. A certain level of exigency usually accompanies the bringing together of a suspect, criminal evidence (which may be evanescent), and probable cause in the place where the offense occurred.

Dyar, 125 S.W.3d at 470 n.13 (Cochran, J., concurring) (quoting Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 Tex. Tech L.Rev. 931, 980 (2000)).

The concurrence's framework was adopted by a majority of the Court of Criminal Appeals one year later in *Gallups*. 151 S.W.3d at 202 (citing the *Dyar* concurrence and requiring a showing that arrestee was in suspicious place and that exigent circumstances existed to justify immediate arrest under Article 14.03(a)(1)). The following year, the Court again expressly stated that Article 14.03(a)(1) requires a showing that exigent circumstances existed. *Swain*, 181 S.W.3d at 366-67 (majority opinion adopted by seven judges with two others concurring, citing *Dyar* concurrence and requiring showing of exigency). In light of this trio of Court of Criminal Appeals cases, there can be no doubt that binding precedent requires a showing of exigency when the State is relying on Article 14.03(a)(1). *See id.*; *Gallups*, 151 S.W.3d at 202.

The dissent remains doubtful, citing post-*Swain* cases that do not include an exigency analysis. *See Dissent Op.* at *10-11 & n.3. Four of those cases are readily distinguishable in that none involved the State arguing the Article 14.03(a)(1) exception in response to a motion to suppress. For example, in *Griffin v. State*, No. 03-15-00398-CR, 2017 Tex. App. LEXIS 4589, 2017 WL 2229869 (Tex. App.—Austin May 19, 2017, pet. ref'd) (mem. op., not designated for publication), the appellate issue was a claim of ineffective assistance of counsel based on a failure to ever move to suppress evidence. 2017 Tex. App. LEXIS 4589, [WL] at *5. The appellate court affirmed on that issue with alternative holdings: first, there was a strategic reason for counsel to not seek exclusion of the evidence, and, second, the evidence was not subject to exclusion because the arrestee had just assaulted a public official and was acting belligerently and

aggressively to the arresting officer, thereby permitting a warrantless arrest under Article 14.03(a)(1). 2017 Tex. App. LEXIS 4589, [WL] at *6. True, the ineffective-assistance-of-counsel opinion did not discuss the exigency requirement. But, the opinion amply described the arrestee's agitated and aggressive state, which would have warranted a belief by the officer that an arrest was necessary to prevent physical harm, and the opinion cited approvingly other cases that did discuss the exigency requirement. *See id.* (citing *Dyar*, *Swain*, and *Cook v. State*, 509 S.W.3d 591, 604 (Tex. App.—Fort Worth 2016, no pet.)); *see also Dyar*, 125 S.W.3d at 471 (Cochran, J., concurring) (discussing what would constitute exigency in context of Article 14.03(a)(1)). Neither *Griffin* nor any other case cited in the dissenting opinion calls into question the Court of Criminal Appeals's direct statement of law that evidence of exigency is required under Article 14.03(a)(1).

B. The State has the burden to show an exigency

It is the State's burden, when arresting without a warrant, to prove that its actions fell within one of the statutory warrantless-arrest exceptions. *See Fry v. State*, 639 S.W.2d 463, 467 (Tex. Crim. App. 1982); *cf. Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007) (in warrantless-search context, stating "the warrant requirement is not lightly set aside, and the State shoulders the burden to prove that an exception to the warrant requirement applies"). It is not the Court's role to scour the record for exigent or quasi-exigent circumstances. *See Fry*, 639 S.W.2d at 467 (rejecting argument that testimony supported finding of exigency for warrantless

arrest because testimony was "ambiguous at best" and, therefore, did not meet State's burden). When the State argues only one warrant exception, yet fails to meet the evidentiary burden to establish that exception, and the trial court grants the motion to suppress, this Court is bound to affirm the trial court's grant of a motion to suppress. *See Brabson*, 899 S.W.2d at 745-46 ("We must review the record to determine if there is any valid basis upon which to affirm the [trial] court's ruling."); *Donohoo*, 2016 Tex. App. LEXIS 6558, 2016 WL 3442258, at *6 (affirming trial court order granting motion to suppress because State failed to present evidence of exigency).

C. Facts and circumstances identified in the dissent do not satisfy the State's burden under a per se or fact-specific analysis

Without holding the State to its evidentiary burden, the dissent looks to the record and identifies three facts that, in the dissent's view, would suffice to show an exigency: (1) McGuire having "shown his willingness to flee," (2) a need to preserve evidence in the form of the motorcycle bumper lodged in McGuire's truck, and (3) McGuire's suspected intoxication. Even if a review of the record for exigency were permitted without the State making any showing in support of its burden, none of the three arguments meets the threshold.

Fist, evidence that McGuire might have fled the scene if not arrested is ambiguous at best, and ambiguity in this context is resolved against the State. *Fry*, 639 S.W.2d at 467. Yes, this Court has held that legally sufficient evidence

existed to support the jury's determination that McGuire failed to comply with the technical requirements of the stop-and-render-aid statute when he left the scene of impact and drove to the gas station. *See McGuire v. State*, 493 S.W.3d 177, 204-07 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *cert. denied* 137 S. Ct. 2188, 198 L. Ed. 2d 255 (2017) (noting McGuire did not get out of his truck to determine whether an injured person might be near the known spot of impact or call emergency services; he, instead, went to a gas station and waited for police to come to him). But that evidence cannot reasonably be argued to suggest that McGuire was likely to flee from police. He went directly to a gas station, called police personnel, waited for police to come to him, and called his mother to bear witness to the entire episode. Once the police arrived, he voluntarily answered questions and left with them. Speculation that McGuire might have called his mother and the police to his location only to flee once they arrived does not show exigency. Moreover, had the State chosen to make this argument, itself, its most likely vehicle would have been Article 14.04, not 14.03, because Article 14.04 permits the warrantless arrest of suspected felons who are "about to escape." *See* Tex. Code Crim. Proc. art. 14.04.

Second, the police had more options than choosing to arrest McGuire or to allow the possible destruction of evidence on his truck: the State could have seized the truck. *See Dismukes v. State*, 919 S.W.2d 887, 893-94 (Tex. App.—Beaumont 1996, pet. ref'd) (with proper showing, including existence of probable cause, police may seize vehicle without warrant and hold the vehicle "for whatever period is necessary to obtain a warrant for the search," detached from any arrest).

Third, suspected intoxication and a related need to determine a suspect's blood-alcohol content no longer provide a per se exigency. *McNeely*, 569 U.S. at 141; *see McGuire*, 493 S.W.3d at 199. The dissent argues that *McNeely*'s no-per-se-exigency holding is limited to invasive searches to obtain a suspect's blood and does not apply to arrests. This position must be rejected in light of the rationale provided in *McNeely*, the broader protections provided by the Texas warrantless-arrest statute beyond federal constitutional protections, and the perverse results that would follow under the dissent's construction.

The dissent posits that the need to expeditiously draw a suspect's blood to determine its blood-alcohol content could supply a per se exigency to arrest a person without approaching the judiciary for an arrest warrant, even though, under *McNeely*, the police would not have automatic legal authority to then draw the suspect's blood without approaching that same judicial actor for a search warrant (or establishing case-specific exigency). If an articulated need does not automatically excuse the State from approaching the judiciary to obtain a search warrant, as *McNeely* holds, it cannot follow that the same need would automatically excuse the State from approaching the judiciary for an arrest warrant, given that the State would be required to approach the judiciary anyway, in the interim as it held the suspect in custody.

The State should not be permitted to invoke a particular assertion of exigency to invariably allow a predicate step to a desired law-enforcement activity when the United States Supreme Court has explicitly prohibited that same

exigency from per se authorizing the desired activity. *Cf. State v. Villarreal*, 475 S.W.3d 784, 808 (Tex. Crim. App. 2014) (rejecting State's argument that dissipation of alcohol can provide per se exigency for search incident to arrest when it cannot supply per se exigency for search, itself, under *McNeely*).

The incongruence of recognizing a per se exigency for a predicate step when it cannot authorize the actual police activity that is the focus of the encounter cannot be explained away under a theory that the sanctity of one's freedom from searches and from arrests are markedly different in a constitutional sense. *See Dissent Op.* at *16-17. The requirement of a search warrant and the requirement of an arrest warrant do not derive from distinct areas of law with different standards or concepts of exigency—they both derive from the Fourth Amendment. As the United States Supreme Court has affirmed, the principles in the Fourth Amendment "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886); *see Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990) ("In order for a warrantless arrest or search to be justified, the State must show the existence of probable cause at the time the arrest or search was made and the existence of circumstances which made the procuring of a warrant impracticable."). If dissipating blood-alcohol levels are not considered a per se exigency in the search context, they are not a per se exigency to justify a warrantless arrest for the purpose of conducting a search. To treat arrests differently than searches in this context would allow the government to

subvert *McNeely*. It also would obviate the extra protection the Article 14.03(a)(1) exigent-circumstances requirement affords the public against unreasonable governmental intrusion beyond Fourth Amendment protections.

Conclusion

We affirm the trial court's order granting McGuire's motion to suppress.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Higley, and Landau.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

APPENDIX E — DISSENTING OPINION OF THE COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON, DATED AUGUST 29, 2019

IN THE COURT OF APPEALS OF TEXAS
FIRST DISTRICT, HOUSTON

NO. 01-18-00146-CR

THE STATE OF TEXAS,

Appellant,

v.

SEAN MICHAEL MCGUIRE,

Appellee.

August 29, 2019, Opinion Issued

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 10-DCR-055898

DISSENTING OPINION

I respectfully dissent. I would hold that the trial court abused its discretion in granting Sean McGuire's motion to suppress the evidence obtained as a result of his warrantless arrest, effectively declaring his arrest illegal.

Based solely on review of the cold reporter's record from an evidentiary suppression hearing held two years

earlier, the trial court, on remand, reached the opposite conclusion of the original trial judge who had presided over the hearing. The trial court selectively cited facts from that record, disregarding important contradictory facts, to draw the incorrect legal conclusions that the officers lacked probable cause and that the suspicious place exception to the warrant requirement did not apply. And the majority opinion affirms by incorrectly presuming that the United States Supreme Court's holding in *Missouri v. McNeely* extends beyond warrantless searches to draw blood into the distinct domain of warrantless arrests. *See* 569 U.S. 141, 145, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). In so doing, it ignores this Court's own binding precedent holding that the need to preserve evidence constitutes an exigent circumstance under the suspicious place exception to the warrant requirement.

Suspicious Place Exception to Warrant Requirement

Warrantless arrests are authorized only in limited circumstances outlined primarily in Chapter 14 of the Texas Code of Criminal Procedure. *Swain v. State*, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005). Here, the State relies on the "suspicious place" exception, codified in article 14.03(a)(1), authorizing the warrantless arrest of an individual found in a suspicious place under circumstances reasonably showing he committed a felony or a breach of the peace. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1).[1]

1. McGuire was originally charged with the felony of intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08(b) (stating that offense of intoxication manslaughter is second-degree felony). He was later charged with felony murder, *see id.* § 19.02(b)

The Court of Criminal Appeals has held that "the test under [a]rticle 14.03(a)(1) is a totality of the circumstances test. First, probable cause that the defendant committed a crime must be found and second, the defendant must be found in a 'suspicious place.'" *Dyar v. State*, 125 S.W.3d 460, 468 (Tex. Crim. App. 2003); *Lewis v. State*, 412 S.W.3d 794, 801 (Tex. App.—Amarillo 2013, no pet.). I would hold that the State met this test and established that McGuire's arrest was justifiable under the suspicious place exception to the warrant requirement.

A. Probable Cause

Probable cause for a warrantless arrest exists when the arresting officer possesses reasonably trustworthy information sufficient to warrant a reasonable belief that an offense has been or is being committed. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009).

The record establishes the following:

At approximately 12:45 a.m. on August 2, 2010, Trooper Tomlin reported to the scene of a fatality crash, which he was told by dispatch involved a motorcycle that

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(3), and failure to stop and render aid, *see* TEX. TRANSP. CODE ANN. § 550.021 (stating that failure to stop and render aid is felony offense). In a previous opinion, this Court affirmed his conviction for failure to stop and render aid, vacated his conviction for felony murder because of the admission of an illegal blood draw, and remanded for further proceedings. *See McGuire v. State*, 493 S.W.3d 177, 199, 208 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *cert. denied*, 137 S. Ct. 2188, 198 L. Ed. 2d 255 (2017).

had been hit and dragged 800 feet, "from Brazos Town Center to the intersection of 2977."

Around the same time, McGuire called his mother and two police acquaintances, who in turn called law enforcement to report that McGuire had hit something in the road and was waiting at a nearby Shell station for law enforcement to arrive.

At the scene of the accident, Trooper Tomlin saw the complainant's body on the side of the road. Tomlin was then informed that the driver of the vehicle that had hit the complainant's motorcycle was across the highway at a Shell gas station.

Trooper Tomlin was the first to arrive at the Shell station, at approximately 12:50. Minutes later, Trooper Wiles, who had heard over the police radio that there had been a fatal accident and that the suspected driver was at the Shell station, joined him there, where the two troopers encountered McGuire.

McGuire stated that he had been driving his truck, that he had hit something, and that his wife, who was in the truck with him, told him that he had hit a person.

Trooper Wiles observed that McGuire's truck had "a piece of metal stuck inside the grille with some motor oil on it" that "appeared to be the rear fender of the motorcycle," but he "didn't seem to know where it came from."

Appendix E

Due to "[a] strong order of alcoholic beverage that [Trooper Wiles] smelled [on McGuire's] person and breath," his bloodshot, glassy eyes, and the "slight dazed look on his face," Wiles believed McGuire was intoxicated. Wiles asked McGuire if he was willing to perform a field sobriety test, and McGuire refused. Trooper Wiles then drove McGuire to the scene of the accident. Wiles testified, and video of the crime scene showed, that when McGuire saw the motorcycle, "he covered his face and started supposedly crying and said that he was sorry."

I would hold that this information was sufficient to warrant a reasonable belief that McGuire had committed a crime.[2] *See, e.g.*, *Dyar*, 125 S.W.3d at 468 (holding arresting officer had probable cause to believe appellant had committed DWI; officer found appellant at hospital after having been informed that driver in one-car accident was taken to hospital, appellant had slurred speech, red glassy eyes, and strong smell of alcohol, and appellant admitted to drinking and driving); *Lewis*, 412 S.W.3d at 801-02 (holding arresting officer had probable cause to believe appellant had committed DWI based in part on appellant's flight from scene of accident, officer's detection of odor of alcohol emanating from appellant, appellant's highly emotional state, and appellant's admission that she "had too much to drink"); *see also Coronado v. State*, No. 01-99-00912-CR, 2000 Tex. App. LEXIS 3777, 2000 WL 730682, at *2-3 (Tex. App.—Houston [1st Dist.] June 8, 2000, pet. ref'd) (not designated for publication) (holding officer had probable cause to arrest appellant after he

2. The majority opinion does not address probable cause.

received information from other officers that appellant was driver of one of vehicles in fatality accident and officer noticed appellant had strong odor of alcohol, slurred speech, and glassy eyes).

B. Suspicious Place

I would further hold that the State proved that the Shell station where Troopers Tomlin and Wiles first encountered McGuire was a suspicious place and that the trial court erred in reaching the opposite conclusion because that conclusion was not supported by the facts and it failed to consider the totality of the circumstances.

Relevant to the question whether McGuire was found at a suspicious place, the trial court found that Troopers Tomlin and Wiles testified that there was nothing suspicious about the location where they encountered McGuire and that McGuire was not acting in a suspicious manner. These findings are wholly inadequate to support the legal conclusion that the Shell station was not a suspicious place under the circumstances known to the troopers at that time. *Cf. Villalobos v. State*, No. 14-16-00593-CR, 2018 Tex. App. LEXIS 3577, 2018 WL 2307740, at *6 (Tex. App.—Houston [14th Dist.] May 22, 2018, pet. ref'd) (not designated for publication) (rejecting argument that warrantless arrest was illegal because officer testified that it was not suspicious for defendant to stay near his damaged vehicle after accident). It appears the trial court took the troopers' testimony as a legal conclusion, and in so doing, did not follow the well-established law that the suspicious-place inquiry requires more than evaluating

whether a particular place, on its own and without context, is suspicious.

"Few places, if any, are inherently suspicious. The determination of whether a place is suspicious requires a highly fact-specific analysis." *Lewis*, 412 S.W.3d at 802. As the Court of Criminal Appeals has explained, under article 14.03(a)(1),

> Any place may become suspicious when an individual at the location and the accompanying circumstances raise a reasonable belief that the individual committed a crime and exigent circumstances call for immediate action or detention by the police.

Swain, 181 S.W.3d at 366 (citations omitted).

Here, the trial court did not make any fact-specific findings beyond the officers' testimony that the Shell station, in and of itself, was not a suspicious place and that McGuire was not acting suspiciously when they encountered him there. In concluding that "[t]here is no evidence that the place where [McGuire] was arrested was a suspicious place pursuant to Texas Code of Criminal Procedure Article 14.03(a)(1)," the trial court made no findings with respect to "the accompanying circumstances," which here clearly raised a reasonable belief that McGuire had committed a crime. *Id.*

In determining whether to characterize a place as suspicious, the Court of Criminal Appeals has stated that

the "only . . . factor [that] seems to be constant throughout the case law" is that "[t]he time frame between the crime and the apprehension of a suspect in a suspicious place is short." *Dyar*, 125 S.W.3d at 468. Here, McGuire was found at the Shell station only minutes after the crash occurred. But this fact pales in significance in comparison to other circumstances that surrounded McGuire's presence at the Shell station, including the facts that he called police acquaintances to report that he had hit something in the road just across from the Shell station, where he then waited for law enforcement to arrive; upon his arrival at the scene of the accident, Trooper Tomlin observed the complainant's dead body on the side of the road; at the Shell station, Trooper Wiles observed "a piece of metal stuck inside the grille [of McGuire's truck] with some motor oil on it" that "appeared to be the rear fender of the motorcycle"; and McGuire, who showed signs of intoxication, stated to the troopers that he believed he had hit something and that his wife told him it was a person.

On this record, I would hold that the trial court erred in concluding that the Shell station was not a suspicious place under article 14.03(a)(1). *See, e.g.*, *Villalobos*, 2018 Tex. App. LEXIS 3577, 2018 WL 2307740, at *6 ("[T]he area where appellant was found was a suspicious place because the police reasonably could have believed, based on the surrounding circumstances [including facts that appellant was found shortly after accident having fled scene, his vehicle was missing wheel that matched model of wheel and other debris found at accident site, he displayed signs of intoxication, and he admitted he had been involved in accident after leaving bar], that appellant drove while

intoxicated and was involved in a recent accident nearby and needed to be detained because he had fled the scene of that accident."); *Polly v. State*, 533 S.W.3d 439, 443 (Tex. App.—San Antonio 2016, no pet.) (holding scene of hit-and-run accident was suspicious place where one hour after accident appellant returned to scene and officer could have reasonably believed appellant committed offense of driving while intoxicated).

Turning to the focus of the majority opinion—exigent circumstances—I do not agree that a strict showing of exigency is always necessary, particularly in hit-and-run cases, where the suspect has shown his willingness to flee with evidence of not only his intoxication but also of the crash (such as the bumper of the complainant's motorcycle embedded in the grille of McGuire's truck). *Cf. Cribley v. State*, No. 04-04-00047-CR, 2005 Tex. App. LEXIS 6078, 2005 WL 1812585, at *2 (Tex. App.—San Antonio Aug. 3, 2005, no pet.) (mem. op., not designated for publication) (holding, without mention of exigency, that appellant's home where she went shortly after fleeing scene of accident was suspicious place).

The statutory language of article 14.03(a)(1) does not mention exigency. It states only that a warrant is not necessary to arrest

> persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section

> 49.02, Penal Code, or threaten, or are about to commit some offense against the laws[.]

See TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1).

Nevertheless, some courts have implied an exigency requirement from a sentence in the Court of Criminal Appeals' opinion in *Swain*: "Any 'place' may become suspicious when a person at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances call for immediate action or detention by police." *See* 181 S.W.3d at 366. I do not read this to require exigent circumstances in all cases under article 14.03(a)(1). While exigency does ordinarily play a prominent role in the analysis, it is but one of innumerable circumstances that may present for consideration in assessing the totality of the circumstances.

Notably, many post-*Swain* cases have addressed the suspicious place exception without ever mentioning exigency, including at least two from this Court. *See, e.g.*, *Rodriguez-Rubio v. State*, No. 01-17-00463-CR, 2018 Tex. App. LEXIS 9479, 2018 WL 6061306, at *4 (Tex. App.—Houston [1st Dist.] Nov. 20, 2018, no pet.) (mem. op., not designated for publication) ("Although an apartment complex is not an inherently suspicious place, the fact that the GPS locator in the stolen cell phone showed that the phone and appellant, who matched the witnesses' description, were in the same location, rendered this apartment complex a 'suspicious place.' The 'pinging' of the stolen cell phone at the apartment complex tied appellant

to the crime scene."); *Contreras v. State*, No. 01-08-00424-CR, 2009 Tex. App. LEXIS 6284, 2009 WL 2461483, at *3 (Tex. App.—Houston [1st Dist.] Aug. 13, 2009, pet. ref'd) (mem. op., not designated for publication) (holding that appellant, who was found at scene of crime searching for something under bushes and cars, was found in suspicious place where police were aware that robbery and shooting suspects had lost firearm in course of committing crime).[3]

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3. *See also, e.g.*, *Gonzalez v. State*, No. 08-14-00175-CR, 2017 Tex. App. LEXIS 5199, 2017 WL 2464690, at *6 (Tex. App.—El Paso June 7, 2017, no pet.) (not designated for publication) (holding that appellant's location near ditch where his truck had landed tail-up after accident was suspicious place where appellant showed signs of intoxication); *Griffin v. State*, No. 03-15-00398-CR, 2017 Tex. App. LEXIS 4589, 2017 WL 2229869, at *6 (Tex. App.—Austin May 19, 2017, pet. ref'd) (mem. op., not designated for publication) (stating that warrantless arrest for assault of public servant was justified under suspicious place exception based on: (1) short distance between scene of assault and appellant's residence; (2) short amount of time between report of assault and appellant's apprehension at his residence; (3) appellant's signs of intoxication, refusal to cooperate, and belligerent behavior; (4) complainant's statements to officers describing assault and identifying appellant as assailant; and (5) physical evidence tending to corroborate complainant's account); *Patel v. State*, No. 08-13-00311-CR, 2015 Tex. App. LEXIS 10933, 2015 WL 6437413, at *5 (Tex. App.—El Paso Oct. 23, 2015, no pet.) (not designated for publication) (holding that, under totality of circumstances, location where appellant, who showed signs of intoxication, was found near single-car accident in which his vehicle left road, traveled thirty yards down embankment, and landed in ditch was suspicious place); *Gary v. State*, No. 13-12-00266-CR, 2013 Tex. App. LEXIS 1135, 2013 WL 485793, at *4 (Tex. App.—Corpus Christi—Edinburg Feb. 7, 2013, pet. ref'd) (mem. op., not designated for publication) (holding that appellant's car in parking lot of pub was suspicious place where

In this connection, I disagree with the majority's conclusion that the State forfeited its argument that the circumstances in this case were exigent. The State asserted in the trial court and on appeal that McGuire's warrantless arrest was justified under article 14.03(a)(1), which, again, makes no mention of an exigency requirement in providing that a peace officer may make a warrantless arrest of a person found in a suspicious place. At no stage of this case did McGuire argue that the

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officer observed him repeatedly come and go from his car over short period of time because regular patron would have no reason to do so); *Owen v. State*, No. 13-10-00417-CR, 2011 Tex. App. LEXIS 9016, 2011 WL 5515548, at *5 (Tex. App.—Corpus Christi—Edinburg Nov. 10, 2011, pet. ref'd) (mem. op., not designated for publication) (holding that truck was suspicious place because it was parked in otherwise-vacant high school stadium parking lot in middle of night in January in close proximity to scene of burglary, man meeting appellant's description had recently committed separate burglary, and officer apprehended appellant thirty minutes after being dispatched to scene); *Perez v. State*, No. 10-09-00022-CR, 2010 Tex. App. LEXIS 6984, 2010 WL 3342009, at *2-3 (Tex. App.—Waco Aug. 25, 2010, no pet.) (mem. op., not designated for publication) (holding that residence where appellant, who admitted to police he had been drinking and was involved in traffic accident, was found asleep was suspicious place); *State v. Drewy*, No. 03-08-00169-CR, 2008 Tex. App. LEXIS 8140, 2008 WL 4682441, at *4 (Tex. App.—Austin Oct. 23, 2008, no pet.) (mem. op., not designated for publication) (holding that appellant, who showed signs of intoxication and was combative, was in suspicious place as he stood near his disabled vehicle); *Hollis v. State*, 219 S.W.3d 446, 460 (Tex. App.—Austin 2007, no pet.) (holding that dance hall where appellant was found was suspicious place because it emanated strong odor of ether characteristic of "meth lab," was located in secluded area, and had no legitimate commercial or residential purposes).

State failed to prove exigent circumstances—indeed the phrase does not appear in his motion to suppress or in the transcript of the hearing on that motion, nor did he raise the issue on appeal.[4] Further, the State acknowledges that exigent circumstances may figure into the 14.03(a)(1) equation, and correctly notes that courts "sometimes use the term 'exigent circumstances' and sometimes not," and that warrantless arrests under article 14.03(a)(1) "on very similar facts to the facts in this case have been routinely upheld by courts all over Texas."

In my opinion, it would be a gross distortion of the Rules of Appellate Procedure to affirm the trial court's suppression of evidence obtained from a warrantless arrest that the record shows to have been justified under article 14.03(a)(1), for the State's purported failure to preserve argument in the trial court on, or to adequately address on appeal, a so-called element of the statute that is absent from its express terms, and that McGuire never brought to the trial court's attention. *See State v. Allen*, 53 S.W.3d 731, 733 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (concluding theories not presented to trial court are not "applicable to the case" and thus do not fall under traditional rule that reviewing court should affirm if trial court's decision is correct on any theory of law applicable to case); *cf. Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015) (concluding, under Texas Rule of Appellate Procedure 33.1(a), that appellant failed to

4. McGuire did not argue that the State was required to establish exigent circumstances to justify his warrantless arrest under the suspicious place exception until this Court requested supplemental briefing on the subject.

preserve complaints because "isolated statements globally asserting that a blood draw was conducted without a warrant" were not "enough to apprise the trial court that it must consider whether there were exigent circumstances to permit the warrantless search").

Assuming, nevertheless, that there is an exigency requirement built into the suspicious place exception to justify a warrantless arrest and that the requirement applies in this case, I would hold, under Court of Criminal Appeals precedent, that the need to preserve evidence of McGuire's blood alcohol level constituted exigent circumstances, as did the more general need to preserve evidence of the crash. *See Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004) (holding appellant's warrantless arrest for DWI met exigency requirement of suspicious place exception because "the circumstances surrounding appellant's warrantless home arrest raised a reasonable belief that appellant had committed a breach of the peace and that exigent circumstances (the need to ascertain appellant's blood-alcohol level) existed to justify appellant's immediate arrest"); *see also, e.g.*, *Banda v. State*, 317 S.W.3d 903, 912 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that exigency requirement for warrantless arrest under suspicious place exception was met where police could reasonably believe it was necessary to take prompt action to ascertain appellant's blood-alcohol level); *see also State v. Wrenn*, No. 05-08-01114-CR, 2009 Tex. App. LEXIS 5213, 2009 WL 1942183, at *3 (Tex. App.—Dallas July 8, 2009, no pet.) (mem. op., not designated for publication) (holding that necessity of preserving evidence of DWI suspect's blood alcohol level constitutes exigency (citing *Gallups*, 151 S.W.3d at 202)).

Appendix E

In holding that the need to preserve evidence of McGuire's blood alcohol level did not constitute exigent circumstances, the majority relies on the United States Supreme Court's opinion in *McNeely*. *McNeely* held that the natural metabolization of alcohol in the bloodstream does not present an exigency justifying a warrantless blood draw when there is time—as there was here—to obtain a search warrant. *See* 569 U.S. at 145, 152. In relying on *McNeely*, the majority overlooks an important distinction: *McNeely* addressed the exigency required for a warrantless *blood draw*, not a warrantless *arrest*. The only authority the majority cites to support its expansion of *McNeely* into new territory is the unpublished case *State v. Donohoo*, in which the San Antonio Court of Appeals assumed without discussion that *McNeely*'s holding regarding warrantless blood draws extends to warrantless arrests. *See* No. 04-15-00291-CR, 2016 Tex. App. LEXIS 6558, 2016 WL 3442258, at *6 (Tex. App.—San Antonio June 22, 2016, no pet.).

As noted in the majority opinion, other courts of appeals have reached the opposite conclusion in published cases, holding, in keeping with *Gallups* and subsequent Texas cases, that the exigency requirement for a warrantless arrest under the suspicious place exception is met by the need to preserve evidence of a suspect's blood alcohol level. *See Dansby v. State*, 530 S.W.3d 213, 222 (Tex. App.—Tyler 2017, pet. ref'd) (holding that "exigent circumstances—the need to ascertain Appellant's alcohol concentration—existed to justify Appellant's immediate arrest" under article 14.03(a)(1)); *Lewis*, 412 S.W.3d at 802 (holding that officer's need "to take prompt action

to ascertain appellant's blood-alcohol level" satisfied exigency requirement for warrantless arrest under Article 14.03(a)(1)).

Minimizing the holdings in these cases, the majority points out that they do not mention *McNeely*. I reply that there is good reason for the omission—*McNeely* is a blood draw case; *Dansby*, *Lewis*, and the case before us are all arrest cases. The distinction is critical. As the Court of Criminal Appeals has explained, "a search [such as a blood draw] affects a person's privacy interests, whereas a seizure [such as an arrest] only affects a person's possessory interests and is generally less intrusive than a search." *Sanchez v. State*, 365 S.W.3d 681, 686 (Tex. Crim. App. 2012). This distinction is perhaps even more pronounced when the seizure compels a "physical intrusion beneath [a person]'s skin and into his veins." *See McNeely*, 569 U.S. at 148. "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985)).

Both *Lewis* and *Dansby* (and at least one other post-*McNeely* case)[5] implicitly recognize the crucial distinction between a warrantless blood draw and a warrantless arrest—and consequently *McNeely*'s inapplicability to the exigency requirement for a warrantless arrest—and continue to regard the need to preserve the time-

5. *See also Polly v. State*, 533 S.W.3d 439, 443 (Tex. App.—San Antonio 2016, no pet.) (upholding warrantless arrest under article 14.03(a)(1) in part because circumstances called for immediate action by police to ascertain appellant's blood alcohol level).

sensitive evidence of a suspect's blood alcohol level as a valid exigency justifying a warrantless arrest. *See Gallups*, 151 S.W.3d at 202. And these cases are consistent with the long-standing broader principle that the need to preserve any kind of evidence of a crime can be an exigency justifying a warrantless arrest. For example, in *Minassian v. State*, this Court held that that the possibility of the "immediate erasure of any evidence of wrongdoing provides the necessary exigency for an immediate arrest." *See* 490 S.W.3d 629, 639 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Coyne v. State*, 485 S.W.2d 917, 919 (Tex. Crim. App. 1972)).

Here, the need to preserve evidence of McGuire's intoxication before its natural dissipation was not the only exigency presented: there was also an urgent need to preserve other evidence. This includes evidence of the accident—including the fender of the complainant's motorcycle lodged in the grille of McGuire's truck—the need for which was made immediate by the knowledge that McGuire had already fled the scene once, when he continued to drive instead of stopping after having crashed his truck into the complainant's motorcycle. The possibility that McGuire might again flee, taking with him evidence of the collision in addition to the blood evidence of his intoxication, established further exigence. *See Swain*, 181 S.W.3d at 366-67 (holding that appellant who admitted to beating victim and leaving her at remote location was found at suspicious place, where "[g]iven appellant's nervous behavior and his admission that he had been involved in a crime, it was reasonable to believe that appellant would not remain at the residential

treatment home if the officers left to obtain a warrant"); *Minassian*, 490 S.W.3d at 639 (holding that possibility that suspect would escape and destroy evidence contained on laptop computers constituted exigent circumstances under suspicious place exception); *cf. Villalobos*, 2018 Tex. App. LEXIS 3577, 2018 WL 2307740, at *6 (holding that appellant's warrantless arrest was justified under suspicious place exception where appellant was found near scene of accident and "needed to be detained because he had fled the scene of that accident"); *Cribley*, 2005 Tex. App. LEXIS 6078, 2005 WL 1812585, at *2 (holding that warrantless arrest of suspected hit-and-run driver was justified under suspicious place exception where police found her at home shortly after she had fled scene). And this concern would have been heightened by McGuire's emotional reaction to seeing the destroyed motorcycle.

In any event, the totality of the circumstances presented in this case establishes exigence even under *McNeely*, which noted that the need to preserve evidence of a suspect's blood alcohol level is but one factor to consider in assessing the totality of the circumstances. *See* 569 U.S. at 165 ("[T]he metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required."); *id.* at 153 ("We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test."); *see also Weems v. State*, 493 S.W.3d 574, 580-81 (Tex. Crim. App. 2016) (holding that *McNeely* does not require courts "to turn a

blind eye to alcohol's evanescence and the body's natural dissipation of alcohol in [their] calculus of determining whether exigency existed"; courts still must consider "alcohol's natural dissipation over time (and the attendant evidence destruction) the antagonizing factor central to law enforcement's decision whether to seek a warrant or proceed with a warrantless seizure").

Indeed, the Court of Criminal Appeals has cautioned against an approach that would reduce findings of exigency "to an exceedingly and inappropriately small set of facts" and thus "defeat a claim of exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances review *McNeely* requires." *Cole v. State*, 490 S.W.3d 918, 926 (Tex. Crim. App. 2016) (holding that availability of other officers on scene to obtain warrant is relevant but not sole consideration in exigency analysis for warrantless blood draw). In addition to immediacy, the United States Supreme Court has recognized that a totality of the circumstances analysis of exigency may include consideration of "the gravity of the underlying offense for which the arrest is being made." *See Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); *see also State v. Villarreal*, 475 S.W.3d 784, 857 (Tex. Crim. App. 2014) (Yeary, J., dissenting) (noting, in dissenting to denial of State's motion for rehearing, that "as the gravity of the offense increases, so too does the need to preserve, not just some evidence of intoxication, but the very best evidence that may reasonably be obtained"). McGuire stands accused of committing the grave offense of intoxication manslaughter. Clearly, the consequences of losing evidence of such a serious crime

make it "all the more imperative that the best evidence of intoxication not be lost in the time it usually takes to secure a warrant." *Villarreal*, 475 S.W.3d at 843.

Thus, even though I disagree with the majority's conclusions that *McNeely* applies to warrantless arrests and that section 14.03(a)(1) requires an exigency finding, I would hold that the State's evidence established exigency beyond the need to preserve evidence of McGuire's blood alcohol level, based on the totality of circumstances, including the undisputed fact that McGuire left the scene of the crash and the need to preserve evidence of his truck's collision with the complainant's motorcycle. *See, e.g.*, *Cole*, 490 S.W.3d at 927 ("[L]aw enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded. We therefore conclude that exigent circumstances justified [appellant]'s warrantless blood draw."); *see also State v. Keller*, No. 05-15-00919-CR, 2016 Tex. App. LEXIS 8796, 2016 WL 4261068, at *5 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op., not designated for publication) ("Evaluating the totality of the circumstances here, we conclude the warrantless blood draw was constitutionally permissible under exigency principles . . . [L]aw enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a potentially fatal accident and the necessity of securing the site and protecting the public. We therefore conclude

that the warrantless blood draw did not violate the Fourth Amendment and the trial court erred in concluding a violation occurred.").

On this record, the totality of the circumstances show that McGuire's warrantless arrest was justified under the suspicious place exception because the troopers needed to preserve evidence both of the level of alcohol in McGuire's blood, regardless of the separate search warrant required to draw blood, and of the state of McGuire's vehicle, with a portion of the complainant's motorcycle lodged in it, shortly after the accident.

Conclusion

I would hold that because the State proved that McGuire's warrantless arrest was justified under the Code of Criminal Procedure article 14.03(a)(1), the trial court abused its discretion in granting the motion to suppress the evidence obtained as a result of the arrest.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Landau.

Keyes, J., dissenting.

Publish. TEX. R. APP. P. 47.2(b).