APPENDICES

1. Petitioner's Motion to Suppress in Trial Court
2. Petitioner's Brief in Support of Motion to Suppress
3. Trial Court Order Granting the Motion to Suppress
4. Amended Trial Court Order Granting the Motion to Suppress
5. Texas Supreme Court Order Transferring the State's Appeal
6. Petitioner/Appellee's Brief, 8th Crt. App. 08-23-00303-CR
7. 8th Crt. App. 08-23-00303-CR Judgment
8. 8th Crt. App. 08-23-00303-CR Opinion
9. 8th Crt. App. 08-23-00303-CR Substituted Judgement
10. 8th Crt. App. 08-23-00303-CR Petitioner/Appellee Motion for En Banc Rehearing
11. 8th Crt. App. 08-23-00303-CR Motion for Rehearing Denied
12. 8th Crt, App. 08-23-00303-CR Petitioner/Appellee 2d Motion for Rehearing
13. 8th Crt. App, 08-23-00303-CR Order Denying and Opinion on 2d Motion for Rehearing
14. Tex. Crt. Crim. App. PD-0087-25 Petitioner's Petition for Discretionary Review with the Texas Court of Criminal Appeals.

15. Tex. Crt. Crim. App. PD-0087-25 Court's Denial of Petitioner's Petition for Discretionary Review

16. U.S. Const. Amendments V, VI, and XIV

17. Tex. Code of Crim. Pro., Art. 38.22, Secs. 6 and 7, and Art. 38.23a

APPENDIX 1

Filed: 8/10/2023 9:39 AM
Rachel Vela,
District Clerk
Duval County, Texas
Ruby Espinosa

CAUSE NO.20-CRD-45

STATE OF TEXAS	§	**IN THE 229TH DISTRICT COURT**
	§	
	§	**OF**
V	§	
	§	**DUVAL COUNTY, TEXAS**
	§	
REYNALDO PEÑA	§	

DEFENDANT'S MOTION TO SUPPRESS ELECTRONIC RECORDING, BOTH VIDEO AND AUDIO, OF POLYGRAPH EXAMINATION OF THE DEFENDANT

1. Reynaldo Peña is charged in this case with aggravated sexual assault of a child under the age of six years. The offense is alleged to have occurred on or about the 8th day of August, 2016.

2. On Thursday July 25, 2019, Special Agent [redacted] with the Texas Department of Public Safety conducted a polygraph examination of Defendant Reynaldo Peña. The interrogation lasted three hours and fifty-three minutes. Agent [redacted] recorded the polygraph examination, or arranged for it to be recorded electronically, in an audio and video digital format. Immediately after the agent concluded the interrogation, law enforcement arrested Mr. Peña

3. The Defendant moves here that the Court disallow the entire recording of the polygraph examination from being presented to a jury. Alternatively, the Defendant moves the Court to disallow presentation to a jury any statement made by the Defendant that the State asserts is an inculpatory admission of any wrongdoing.

4. Any statements made during the polygraph examination, as well as any evidence or testimony developed as a result of the polygraph examination were tainted by the unlawfully improper interrogation of the Defendant herein, in violation of the Defendant's constitutional

rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Art. I, §10 and §19 of the Texas Constitution; and Tex. Code Crim. Pro. Arts. 1.05, 38.22 and 38.23.

5. At the time of the administration of the polygraph examination, the actions of Special Agent [redacted] rendered it coercive and involuntary. The agent's argumentative and accusatory conduct, prolonged and aggressively repetitive for over three hours, was so egregious that any statement obtained thereby was unlikely to have been the product of essentially free and unconstrained choice by the Defendant. The agent also repeatedly assured the Defendant that if he admitted to some wrongdoing, it would be viewed favorably and cause authorities to deal more leniently with him. The badgering and cajoling by the agent was the kind treatment likely to influence a defendant to speak untruthfully.

6. The results of polygraph examinations have been inadmissible in criminal cases in Texas for many years.

Therefore, the Defendant requests that the Court set this Motion to be heard. Upon hearing and considering the presentation from the State and the Defendant, the Court should grant this Motion to Suppress and rule inadmissible at trial either the entire above-described recording or any excerpts that the State asserts are an inculpatory admission of wrongdoing.

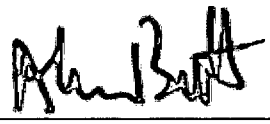
Respectfully submitted,

Abner Burnett
SBOT# 03425770
Email: lawyerburnett@gmail.com
205 W. Gardenia Avenue
McAllen, TX 78501
Attorney for Reynaldo Peña

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Motion to Suppress was served upon the attorney for the State of Texas, as follows: eFile.

DONE on August 10, 2023.



Attorney for Defendant

Automated Certificate of eService

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

Abner Burnett on behalf of Abner Burnett
Bar No. 3425770
lawyerburnett@gmail.com
Envelope ID: 78389040
Filing Code Description: Motion
Filing Description: 20-CRD-45 Def Mtn for Hrg on Outcry Witnesses 38.072
Status as of 8/10/2023 10:34 AM CST

Associated Case Party: STATE OF TEXAS

Name	BarNumber	Email	TimestampSubmitted	Status
Gocha AllenRamirez		gocha.ramirez@da.co.starr.tx.us	8/10/2023 9:39:55 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Barbara M.Ramirez		barbara.ramirez@co.duval.tx.us	8/10/2023 9:39:55 AM	SENT
Evelyn Garcia		egarcia@co.starr.tx.us	8/10/2023 9:39:55 AM	SENT
Rumaldo Solis		rumaldo.solis@co.duval.tx.us	8/10/2023 9:39:55 AM	SENT
Mari Chapa		m.chapa@co.duval.tx.us	8/10/2023 9:39:55 AM	ERROR

Associated Case Party: REYNALDOALBERTOPENA

Name	BarNumber	Email	TimestampSubmitted	Status
Abner Burnett		lawyerburnett@gmail.com	8/10/2023 9:39:55 AM	SENT

APPENDIX 2

CAUSE NO.20-CRD-45

STATE OF TEXAS	§	**IN THE 229TH DISTRICT COURT**
	§	
	§	**OF**
V	§	
	§	**DUVAL COUNTY, TEXAS**
	§	
REYNALDO PEÑA	§	

DEFENDANT'S BRIEF IN SUPPORT HIS MOTION TO SUPPRESS ELECTRONIC RECORDING, BOTH VIDEO AND AUDIO, OF POLYGRAPH EXAMINATION OF THE DEFENDANT

SUMMARY OF THE FACTS

I. The Defendant, Reynaldo Peña, sat for a polygraph examination conducted by Special Agent [redacted] Texas Department of Public Safety on July 25, 2019. The session lasted for 3 hours and 53 minutes. The actual examination ended after 2 hours and 42 minutes. Special Agent [redacted] then interrogated Mr. Peña for more than an hour, accusing him of committing the offense charged, arguing with him about his answers, and reassuring him that people in power would understand the situation and know that he was a good guy if he confessed. He even said that Mr. Peña could get probation if he confessed, despite knowing that probation was not possible for a defendant charged with what the State had charged Mr. Peña with. The Special Agent used interrogation techniques of coercive insistence and seductive assurance to gain the inculpatory statement made by Reynaldo Peña. The agent was acting as a law enforcement officer of the State. It was coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its

maker. Additionally, the repeated assurances added up to likely influence Mr. Peña to speak untruthfully.

II. While the interrogation was not custodial in the beginning, it became custodial at the end of the polygraph test as the interrogation moved into what the polygraph examiner called the post-test interview. Special Agent [redacted] knew he had probable cause to arrest Mr. Peña at that moment, but he did not tell Mr. Peña. Special Agent [redacted] never said anything to Mr. Peña about being free to leave after the actual polygraph test concluded.

SUMMARY OF THE LAW

III. The results of a polygraph test are never admissible for any purpose at trial except where the right afforded by the Confrontation Clause of the Sixth Amendment, United States Constitution overrides the usual rules of evidence.

IV. A non-custodial interrogation can become a custodial interrogation if the law enforcement agent conducting the interrogation has probable cause to arrest the subject of the interrogation and does not then tell that person he or she is free to leave.

V. A custodial interrogation is inadmissible unless conducted according to CCP 38.22 or if it violates CCP 38.23.

VI. A statement made during interrogation, custodial or otherwise, is inadmissible if not voluntary.

A. Whether a statement is true or false is not a criterion considered when determining voluntariness.

B. A statement is deemed involuntary if made under circumstances of police behavior of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice.

C. A statement is deemed involuntary if made under circumstances of law enforcement assurance of such an influential nature that it would cause a defendant to speak untruthfully.

APPLICATION OF THE LAW TO THE FACTS

VII. General Rule on Admissibility of Evidence Regarding Administration of a Polygraph Exam - Both the results and also evidence that a polygraph test has been administered are inadmissible at trial for any purpose, *Tennard v. State*, 802 S.W.2d 678 (Tex.Crim.App. 1990), regardless of whether the State or the Defendant wishes to offer the evidence, *Placker v. State*, 171 Tex.Crim. 406, 350 S.W.2d 546 (Tex.Crim.App. 1961); *Luna v. State,* No. 04-01-00540-CR, 2002 WL 2008091, (Tex. App.—San Antonio Sept. 4, 2002, no pet.) "With regard to the polygraph test, polygraph evidence is not admissible in Texas for any purpose in a criminal proceeding." *Luna supra*, at *4, citing *Nehery v. State*, 692 S.W.2d 686, 700 (Tex.Crim.App.1985); *Easley v. State*, 986 S.W.2d 264, 268. In *Luna*. the trial court refused to permit the defendant to impeach his brother with the polygraph test results.

VIII. Statements Made by Reynaldo Peña During "Post-test Interview"

A. When he was asked by the State to describe what a polygraph examination was, Agent [redacted] included what he called the post-test interview. The only allegedly inculpatory

statement made by Mr. Peña during the polygraph examination occurred during the "post-test" interview. The State may argue that it should be allowed at trial to elicit testimony from Special Agent [redacted] regarding the alleged confession if the State does not bring up the context within which the statement was made. There are precedent case opinions that suggest this could be done if all references to the polygraph examination are redacted from the evidence. *Wright v. State*, 154 S.W.3d 235 (Tex.App. Texarkana - 2005) pet. ref'd; citing *Hoppes v. State*, 725 S.W.2d 532 (Tex.App. Houston, 1st Dist. - 1987). Allowing this would certainly serve the purposes of the State in its prosecution but would just as certainly violate Mr. Peña's right to fully cross-examine Agent [redacted]

B. The Confrontation Clause in the Sixth Amendment to the United States Constitution establishes the Defendant's right to conduct a broad and robust cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), *Alford v. U.S.*, 282 U.S. 687 (1931). A trial court has discretion to limit the scope of cross-examination to prevent such things as harassment, confusion of the issues, or the injection of cumulative or collateral evidence, *Van Arsdall*, supra, at 689. However, cross-examination is by nature "exploratory and there is no general requirement that the defendant indicate the purpose of his inquiry. [cite omitted] Indeed, the defendant should be granted a wide latitude even though he is unable to state what facts he expects to prove through his cross-examination. [cite omitted]", *Carroll v. State*, 916 S.W.2d 494 (Tex.Crim.App. 1996) The strength and scope of the constitutional right to cross-examination may control to allow cross examination on a matter that a state rule of evidence would exclude, *Henley v. State*, 493 S.W.3d 77, at 95 (Tex.Crim.App. 2016), citing *Lopez v. State*, 18 S.W.3d 220, at 225 (Tex.Crim.App. 2000)

C. The cases cited above, *Wright* and *Hoppes*, are distinguishable from the case at hand. In *Wright*, the prosecutor referred more than once in his opening statement to the Defendant being offered a polygraph test. The judge overruled the Defendant's objection, *supra*, at 238. The prosecutor elicited testimony from a witness that a polygraph had been administered. The judge again overruled the Defendant's objection because the polygraph results had not been disclosed, *supra*. The Court of Appeals reversed and remanded the case, holding not only should results not be disclosed at trial, but evidence also that a polygraph was even administered should be excluded, *supra*, 238-240.

In setting out its reasoning in dicta, the court in *Wright* cited the opinion in *Hoppes*. In that trial a statement derived from a polygraph examination was disclosed and offered for impeachment purposes without any information included that would disclose that the statement came from a polygraph examination, *Hoppes*, supra at 536.

In this case, presumably the State will offer statements made during the polygraph examination as an alleged confession to the charge. The offer will likely be made through the testimony of Special Agent [redacted] The Defendant challenges that the statement was given voluntarily. Therefore, it should be inadmissible both because it occurs during a polygraph examination and because it was not given voluntarily.

To establish that the statements were given under circumstances that raise a question as to whether they were given voluntarily, the Defendant must address comprehensively the circumstances surrounding the making of the statements. The Defendant must have broad leeway to cross-examine Special Agent [redacted]. Neither *Wright* nor *Hoppes* involves an analogous situation. Otherwise, Reynaldo Peña is denied Due Process under the Fifth and Fourteenth

Amendments to the United States Constitution, and the Rights afforded by the Sixth Amendment Confrontation Clause.

In the case at hand, if this Court allows the State to offer testimony or other evidence of Reynaldo Peña's statements made during any part of the administration of the polygraph examination, then isn't the Court obliged to allow the Defendant to fully cover the context in which the statements were given, including reference to excerpts of the electronic recording or introduction of the recording in its entirety? At that point, isn't the correctness of Special Agent's behavior when conducting the polygraph at issue? Isn't the validity of polygraph science at issue, at least as to its propensity to produce false confessions? Isn't a full-blown litigation of these issues, including expert testimony from a defense witness, required if Reynaldo Peña is to receive a fair trial?

IX. Transition from Noncustodial to Custodial and the Voluntariness of an Alleged Confession

A. Reynaldo Peña does not dispute that he agreed to take a polygraph test and came to take the test of his own accord. He does not dispute that he was shown and signed a waiver of rights and consent to undergo the polygraph examination. What circumstances transform a non-custodial interrogation into a custodial interrogation?

"A person is in custody if, under the totality of the circumstances, a reasonable person would believe his freedom of movement was restrained to the degree associated with a formal arrest." *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994); *Dowthitt v. State,* 931 S.W.2d 244, 254–55 (Tex.Crim.App.1996); *Houston v. State,* 185 S.W.3d 917, 920 (Tex.App.-Austin 2006, pet. ref'd). "The 'reasonable person' test presupposes an

innocent person." *Florida v. Bostick,* 501 U.S. 429, 438, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (emphasis in original); *Dowthitt,* 931 S.W.2d at 254. **Moreover, the initial determination of custody depends on the objective circumstances of the interrogation, not the subjective views of the police or the person being questioned** [emphasis added]. *Stansbury,* 511 U.S. at 323, 114 S.Ct. 1526; *Dowthitt,* 931 S.W.2d at 254; *Houston,* 185 S.W.3d at 920. "**An interrogation becomes custodial if police have probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave**" [emphasis added], *State v. Vasquez*, 305 S.W.3d 289, 294 (Tex.App. Corpus Christi - 2009)

B. Special Agent [redacted] admitted while testifying at the hearing on the Defendant's Motion to Suppress that he had been trained on the issue of probable cause and understood that probable cause exists where a corroborated outcry from a child regarding sexual assault is coupled with a failed polygraph examination. He also admitted that by the time he had finished conducting the actual test question and answer portion of the examination, he was convinced that Mr. Peña was being deceptive. Agent [redacted] refused upon further questioning to admit that he had probable cause at that moment to arrest Mr. Peña. Given his training, one may reasonably presume that he knew that he did. In the recording of the polygraph examination, his first question as he transitions into what he called the "post-test" interview is "Are you a predator?" He asks this question at three hours, one minute, and fifty-two seconds into the session, with an hour yet to go of Agent [redacted] interrogating Mr. Peña before Mr. Peña is arrested.

C. This is where the interview turns from a noncustodial interview into a custodial interrogation. From this point on, Agent [redacted] never tells Mr. Peña he is free to leave. The agent knows he has probable cause to arrest Mr. Peña, regardless of whether he does arrest him. His manner with Mr. Peña changes dramatically. At three hours, two minutes, and thirty seconds he

follows the previous question with, "Because if you're not, then we need to explain that." At three hours, four minutes, and thirty seconds Mr. Peña says, "I didn't do nothing". Special Agent [redacted] begins arguing with him.

D. Mr. Peña continues to deny any wrongdoing, at three hours, eighteen minutes, and forty seconds he says, "It didn't happen." Seven seconds later, he says it again, "It didn't happen." After three hours and nineteen minutes of the session, including 20 minutes of Agent [redacted] accusing him, arguing with him, and cajoling him, Reynaldo Peña is still adamant. He says, "That's okay, I mean I'll take the blame . . . [some Spanish] but I didn't do nothing."

At three hours, twenty-three minutes and thirty-six seconds Reynaldo denies it again. "It didn't happen" Agent [redacted] responds vehemently, "It did happen. I know it did!"

During the nearly twenty-five minutes back and forth between Reynaldo Peña and Special Agent [redacted] the agent is also complimenting him and promising that people in power will take it easy on him if he just comes clean.

3hr:03min:35sec – [redacted] "In a way it's good. In a way it's not so good" "It shows you are a compassionate person."

3hr:05min:00sec – [redacted] "I understand where you're coming from?" "The way it was described, this is not a bad thing."

3hr:16min:13sec – [redacted] "You're a good guy"

Special Agent [redacted] also starts blaming the mother of the child and Mr. Peña's ex-wife.

3hr:07min:16sec – [redacted] "Her mom is the responsible for all this because she's not taking care of her daughters." [redacted] goes on to say that what happened is excusable. Girls are exposed these days to a lot more things. Pena's ex-wife is putting him in a predicament. The ex-wife is another one to blame.

The agent has taken the interrogation way past anything resembling question and answer to determine veracity. Finally, he dangles the real enticement at three hours, 11 minutes, and fifty-four seconds. If Peña admits he made one mistake one time and points out that it didn't happen again, "With a person like that, maybe probation." At that point Special Agent [redacted] knows he is telling a complete lie. In his testimony at trial, he said that he knew what the range of punishment was for the offense they were talking about, and he knew that probation was not within that range. Special Agent [redacted] also admitted that what he was trying to do during the "post-test" interview was get Reynaldo Peña to say he had committed the offense. As this Court observed, [redacted] would not directly answer the question, but his evasive responses were clear in their implications.

E. A statement is involuntary if made under circumstances of police behavior of such a nature that the statement obtained thereby is unlikely to have been the product of an essentially free and unconstrained choice, *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App. - 1995) The statement is involuntary also if made under circumstances of law enforcement assurance of such an influential nature that it would cause a defendant to speak untruthfully, *Martinez v. State*, 127 S.W.3d 792, 795 (Tex.Crim.App. - 2004) The behavior of Special Agent [redacted] at least achieved the level of overreaching and questionable enticing of Reynaldo Peña. The proper procedure might have been to separate the polygraph exam from the post-test interview, disclosure to Peña that polygraph results indicated deceptive answers, but announce that he is free to go. Or arrest him. Then, re-Mirandize him.

Prayer for Relief

Therefore, this Court should exclude the entire electronic recording. Nor should the Court allow any evidence, including the drawing mentioned in the hearing on Motion to Suppress or any

other evidence deriving from the polygraph episode. Nor should the Court allow Special Agent [redacted] or any other witness to testify regarding any portion of the polygraph examination or any evidence deriving from the polygraph examination.

In the alternative, the Court should announce that the right provided by the Confrontation Clause overrides the evidentiary rules regarding admissibility of evidence of a polygraph examination having been administered, allow full and robust cross-examination of Special Agent [redacted] and allow the Defendant time and means to obtain a polygraph expert to contest or at least explain the methods used by Special Agent [redacted] in the administration of the polygraph examination at issue.

Respectfully submitted,

Abner Burnett
SBOT# 03425770
Email: lawyerburnett@gmail.com
205 W. Gardenia Avenue
McAllen, TX 78501
Attorney for Reynaldo Peña

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Brief was served upon the attorney for the State of Texas, as follows: eFile.

DONE on September 6, 2023.

Abner Burnett

Automated Certificate of eService

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

Abner Burnett on behalf of Abner Burnett
Bar No. 3425770
lawyerburnett@gmail.com
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Filing Code Description: No Fee Documents
Filing Description: 20-CRD-45 Def Brief Mtn to Suppress Statement-Polygraph 9.6.23
Status as of 9/6/2023 3:01 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Gema Lopez	24071108	gema.lopez@pdo.hctx.net	9/6/2023 8:52:57 AM	SENT
Barbara M.Ramirez		barbara.ramirez@co.duval.tx.us	9/6/2023 8:52:57 AM	SENT
RUMALDO SOLIS		rumaldo.solis@co.duval.tx.us	9/6/2023 8:52:57 AM	SENT
Abner Burnett		lawyerburnett@gmail.com	9/6/2023 8:52:57 AM	SENT
Marisela Chapa		marichapa@co.duval.tx.us	9/6/2023 8:52:57 AM	SENT

APPENDIX 3

FILED 3:00 O'CLOCK P M

SEP 19 2023

RACHEL S. VEDA, CLERK
DISTRICT CLERK, DUVAL COUNTY, TEXAS
DEPUTY

CAUSE NO.20-CRD-45

STATE OF TEXAS	§	**IN THE 229TH DISTRICT COURT**
	§	
	§	**OF**
V	§	
	§	**DUVAL COUNTY, TEXAS**
	§	
REYNALDO PEÑA	§	

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS ELECTRONIC RECORDING, BOTH VIDEO AND AUDIO, OF POLYGRAPH EXAMINATION OF THE DEFENDANT

After having heard from both parties and considered this Motion, the Court Grants the Motion to Suppress and rules inadmissible at trial the entire above-described audio and video recording of the polygraph examination, including but not limited to any excerpts that the State asserts are an inculpatory admission of wrongdoing.

Signed on the 19 day of September, 2023.

PRESIDING JUDGE

APPENDIX 4

FILED 2:55 O'CLOCK P M

CAUSE NO.20-CRD-45

SEP 25 2023

RACHEL S. VELA, CLERK
DISTRICT CLERK, DUVAL COUNTY, TEXAS
By: [illegible] Deputy

STATE OF TEXAS	§	IN THE 229TH DISTRICT COURT
	§	
	§	OF
V	§	
	§	DUVAL COUNTY, TEXAS
	§	
REYNALDO PEÑA	§	

AMENDED ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS ELECTRONIC RECORDING, BOTH VIDEO AND AUDIO, OF POLYGRAPH EXAMINATION OF THE DEFENDANT

After having heard from both parties and considered this Motion and submitted Briefs, the Court Grants the Motion to Suppress and rules inadmissible at trial the entire above-described audio and video recording of the polygraph examination, including but not limited to any excerpts that the State asserts are an inculpatory admission of wrongdoing. This includes any evidence deriving from the polygraph examination episode. It includes testimony from Special Agent [redacted] or any other witness regarding any portion of the polygraph examination or any evidence deriving from the polygraph examination.

Signed on the 25th day of September, 2023.

PRESIDING JUDGE

APPENDIX 5

Supreme Court of Texas

Misc. Docket No. 23-9079

Transfer of Cases from Courts of Appeals

ORDERED:

I.

Except as otherwise provided by this Order, the first 20 cases filed in the Court of Appeals for the Fourth Court of Appeals District, San Antonio, Texas, on or after September 5, 2023, are transferred to the Court of Appeals for the Sixth Court of Appeals District, Texarkana, Texas, and the next 50 cases filed in the Court of Appeals for the Fourth Court of Appeals District are transferred to the Court of Appeals for the Eighth Court of Appeals District, El Paso, Texas, and the next 50 cases filed in the Court of Appeals for the Fourth Court of Appeals District are transferred to the Court of Appeals for the Thirteenth Court of Appeals District, Corpus Christi, Texas.

II.

Except as otherwise provided by this Order, the first 10 cases filed in the Court of Appeals for the Tenth Court of Appeals District, Waco, Texas, on or after September 7, 2023, are transferred to the Court of Appeals for the Seventh Court of Appeals District, Amarillo, Texas, and the next 25 cases filed in the Court of Appeals for the Tenth Court of Appeals District are transferred to the Court of Appeals for the Fourteenth Court of Appeals District, Houston.

III.

Except as otherwise provided by this Order, the first 25 cases filed in the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, on or after September 12, 2023, are transferred to the Court of Appeals for the First Court of Appeals District, Houston, Texas.

IV.

Except as otherwise provided by this Order, the first 50 cases filed in the Court of Appeals for the Third Court of Appeals District, Austin, Texas, on or after September 5, 2023, are transferred to the Court of Appeals for the Seventh Court of Appeals District, Amarillo, Texas.

V.

For purposes of determining the effective date of transfers pursuant to this order, "filed" in a court of appeals means the receipt of notice of appeal by the court of appeals.

In effectuating this Order, companion cases shall either all be transferred, or shall all be retained by the Court in which filed, as determined by the Chief Justice of the transferring Court, provided that cases which are companions to any case filed before the respective operative dates of transfer specified above, shall be retained by the Court in which originally filed. Cases which are companions to a case transferred to another court under a prior order shall also be transferred to the same court. Companion cases are appeals that arise out of the same trial-court proceeding and are not otherwise excluded from transfer under the following paragraph.

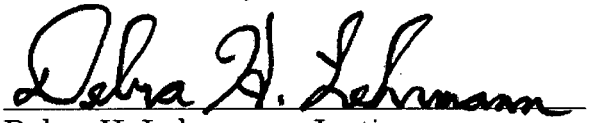
It is specifically provided that the cases ordered transferred by this Order shall, in each instance, not include original proceedings; appeals from trial courts and pretrial courts in multidistrict litigation pursuant to Rule 13.9(b) of the Rules of Judicial Administration; appeals in cases involving termination of parental rights; cases that will fall within the jurisdiction of the Fifteenth Court of Appeals effective 9/1/2024; and those cases that, in the opinion of the Chief Justice of the transferring court, contain extraordinary circumstances or circumstances indicating that emergency action may be required.

The transferring Court of Appeals will make the necessary orders for transfer of the cases as directed hereby and will cause the Clerk of that Court to transfer the appellate record in each case, and certify all orders made, to the court of appeals to which the cases are transferred. When a block of cases is transferred, the transferring court will implement the transfer of the case files in groups not less than once a month, or after all the requisite number of cases have been filed. Upon completion of the transfer of the requisite number of cases ordered transferred, the transferring Court shall submit a list of the cases transferred, identified by style and number, to the State Office of Court Administration, and shall immediately notify the parties or their attorneys in the cases transferred of the transfer and the court to which transferred.

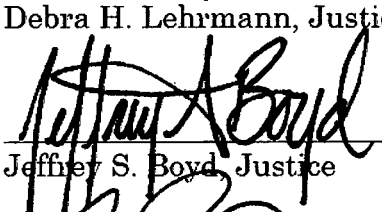
The provisions of Misc. Docket Order No. 06-9136 shall apply except Sections 1.02 and 1.03 of that order, which are superseded by the above.

SO ORDERED this 26th day of September, 2023.

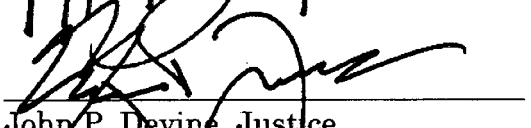
Nathan L. Hecht, Chief Justice



Debra H. Lehrmann, Justice



Jeffrey S. Boyd, Justice



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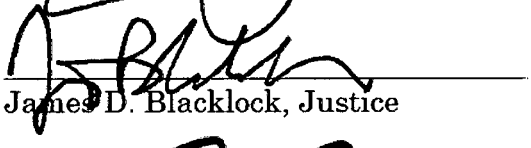

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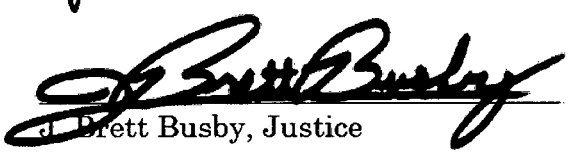
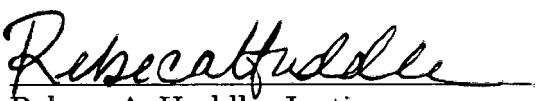


J. Brett Busby, Justice

Jane N. Bland, Justice



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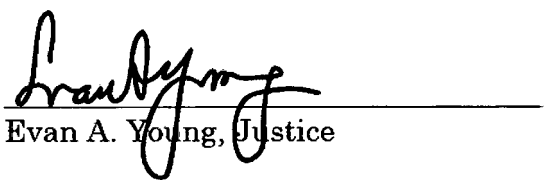

Evan A. Young, Justice

APPENDIX 6

08-23-00303-CR

ACCEPTED
08-23-00303-CR
EIGHTH COURT OF APPEALS
EL PASO, TEXAS
7/29/2024 7:46 PM
ELIZABETH G. FLORES
CLERK

CAUSE NO. 08-23-00303-CR

IN THE COURT OF APPEALS

FOR THE EIGHTH JUDICIAL DISTRICT OF TEXAS

AT EL PASO, TEXAS

THE STATE OF TEXAS

V.

REYNALDO ALBERTO PEÑA

APPELLEE'S BRIEF

Respectfully submitted,

JOHN GOODMAN II,
Attorney for Defendant
State Bar No. 24134581

Anglican Legal Aid & Reconciliation
221 E. 12th Street
Mission, TX 78572
(956) 377-0195
director@alartx.org

ABNER BURNETT
Attorney of Record
State Bar No. 03425770

205 W. Gardenia Avenue
McAllen, TX 78501
lawyerburnett@gmail.com

APPELLEE REQUESTS ORAL ARGUMENT

IDENTITY OF INTERESTED PARTIES

Appellant's identification of interested parties is correct except that it labels John Goodman II as counsel for the Appellant rather than Appellee counsel, and it does not include Abner Burnett, previous lead counsel for appellee, as an attorney of record. John Goodman II was designated lead counsel on May 2, 2024. Mr. Burnett is still assisting in this case as second-chair counsel of record for Appellee. Pursuant to Tex. R. App. P. 38.2(a)(1)(A), counsel for Appellee hereby corrects these two mistakes on Appellant's list of parties and counsel.

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STATUTES

STATEMENT OF THE CASE

The trial court granted Appellee's motion to suppress video and audio recordings of a polygraph examination administered to him and his statements made therein. Appellee presented the trial court with Fifth, Sixth, and Fourteenth Amendment arguments as to why the evidence should be excluded. The Sixth Amendment argument also involves evidentiary rules.

The trial court's order of suppression "includes any evidence deriving from the polygraph examination episode. It includes testimony from Special Agent [redacted] or any other witness regarding any portion of the polygraph examination or any evidence deriving from the polygraph examination." (*See* Trial Court's Amended Order Granting Defendant's Motion to Suppress.) The State of Texas has appealed the trial court's ruling.

ISSUES PRESENTED

1. The Sixth Amendment Confrontation Clause affords the accused the right to a robust cross-examination of one's accuser. However, Texas law bars the admission of polygraph evidence—even that such a test was administered—for any reason, due to its unreliability and unfairly prejudicial nature. When a trial court finds law enforcement acted such that the accused cannot challenge the voluntariness of inculpatory statements made during a polygraph test without cross-examining the agent who administered the test, does the trial court abuse its discretion by excluding such a statement so to preserve the Sixth Amendment rights of the accused and to ensure the reliability of evidence presented to the jury?

2. The Fifth Amendment protects defendants from making self-incriminating statements that are involuntary due to improper police actions, even in some circumstances in which the accused has waived his *Miranda* rights. Where a trial court has properly considered the totality of the circumstances surrounding the voluntariness of a statement, and had the opportunity to observe the demeanor of a witness and ascertain his credibility, shouldn't appellate courts defer to a trial court's exclusion of statements where the Fifth Amendment issue is a mixed question of law and fact concerning the manner in which law enforcement administered a polygraph examination?

STATEMENT OF FACTS

Reynaldo Peña endured nearly four hours of questioning by Agent [redacted] in the backroom of a sheriff's office (RR Vol. 1, Pg. 21, Ln. 20 – Pg. 22, Ln. 1). Polygraph devices were attached to him for most of that time—his feet carefully positioned on sensors (RR Vol. 1, Pg. 44, Ln. 1-5), and the agent instructing him to remain still during five sets of questioning. (RR Vol. 1, Pg. 66, Ln. 4-7.) The agent was alone with Mr. Peña for nearly all of this time. (RR Vol. 1, Pg. 22, Ln. 2-5.)

For the first 15 minutes of the recorded portion of the encounter, the agent grooms Mr. Peña with chit-chat about where their paths had crossed and whom they

both knew. He reassures Mr. Peña that he is "going to do everything possible to help [him] pass this test." (Recorded Statement, 0:15:14) He promises not to try to trick him. (0:15:54) He swears he does not work for anyone—merely "the truth." (0:17:00) Since "nobody comes in here . . . that lies," the agent has "no reason not to believe anything" Mr. Peña will tell him. (0:17:35). The agent tells Mr. Peña the process will last 2 to 3 hours. (0:18:30) The agent reads a *Miranda* waiver. (0:23:10) He engages Mr. Peña in more small talk. Ten minutes later (half an hour into the encounter), Mr. Peña signs the waiver. (0:33:08) After more small talk, the agent asks why we are here. (0:45:16)

After the first hour, the agent asks what Mr. Peña would do if "judge and jury" in a similar case, and Mr. Peña says he would give probation if it was the first time. (1:02:05) The agent asks Mr. Peña to discuss his first sexual experience. (1:04:20) The agent explains the test and hooks up the equipment. (1:08:30) He completes a test run. (1:33:50)

More than an hour after Mr. Peña signed the waiver, the agent finally begins his *first* polygraph examination. (1:39:00) He engages Mr. Peña in a discussion about the taste and smell of vaginas, "especially a virgin vagina." (1:44:20) Nearly two hours into the encounter, the first round of testing is complete, but the agent says Mr. Peña moved his hand. (1:59:00) A second round commences (2:03:00). Round

three commences. (2:14:25) Round four commences. (2:24:40) Round five commences. (2:36:25)

The agent does not begin his interrogation until three hours have elapsed—18 minutes after the fifth round of polygraph testing was complete. (3:00:45) "Are you a predator?" he begins. (3:01:52) Contrary to the agent's testimony before the trial court (RR Vol. 1, Pg. 49, Ln. 9-10; Pg. 52, Ln. 5-9), he never mentions results; never mentions if Mr. Peña passed the test. But, if Mr. Peña is not a predator, then "we need to explain that." (3:02:30) "In a way, it's good. In a way, it's not so good . . . it shows you are a compassionate person." (3:03:35) The agent begins reading the girl's statement. Mr. Peña insists he did nothing, but the agent keeps going. (3:04:30) "I understand where you're coming from . . . the way it is described, this is not a bad thing." (3:05:00) He mischaracterizes, at least twice, Mr. Peña's previous statement with "like you said earlier." (3:09:59) "If you don't explain something, they're gonna think . . . ." (3:06:42) The agent says it is excusable; the mother is at fault; girls are exposed these days to a lot more things; that Mr. Peña's ex-wife put him in this predicament. Mr. Peña insists he wouldn't change a little girl. (3:08:40) The agent imagines other scenarios—*not even if the girl wanted him to check something out?* (3:09:10) Even though she was "put in [his] custody by force?" (3:10:40) Really, this is something that is not that serious; according to the agent, if Mr. Peña is at fault for anything, it is taking up the investigators' time when they have more serious

things to pursue like [graphic descriptions of vaginal, anal, and oral sex with little girls]. (3:10:58)

In any case, the agent continues, the main thing is the family just wants to see him to take responsibility—to say, "I know . . . it was wrong . . . it's not gonna happen again. It *didn't* happen again. One mistake, one time . . . and a person like that, maybe probation . . . classes, counseling . . . something like that." (3:11:40) "I think you'll come out pretty good," he reassures him. (3:12:15) "You're the one that's caught between a rock and a hard place." (3:13:48) The girl's mother is not a responsible parent. (3:14:37) Curiosity is not a deal breaker. (3:16:09) You're a good guy. (3:16:13) There's more responsibility to be divided . . . would you agree?" (3:17:44) "Are you gonna take responsibility for your actions?" (3:18:35) If he will only cooperate, "probation might be in his future." (RR Vol. 1, Pg. 70, Ln. 22).

After Mr. Peña denies that anything unsavory occurred, the agent pivots back to arguing. "You have to explain it," he admonishes Mr. Peña, lest things become worse for him. (3:19:38). The agent refers to the vagina as a cookie. "If you don't explain it, you're gonna look bad." (3:21:38) The agent describes a scenario Mr. Peña never discussed, yet says it is *Mr. Peña* who has been "too descriptive." (3:22:45) "So tell me." (3:23:22) Mr. Peña denies everything again, and the agent argues with him more. "All the kids were there and they saw." (3:24:05)

Contrary to his testimony before the trial court (RR Vol. 1, Pg. 52, Ln. 5-9), the agent never explained the purpose of a "fourth phase" as result analysis. Neither did the agent re-*Mirandize* Mr. Peña after completing the five rounds of polygraph testing but before beginning to interrogate him. The agent did not arrest him once probable cause existed. Instead, the agent took it upon himself to try to "help [Mr. Peña] to be honest and tell the truth." (RR Vol. 1, Pg. 89, Ln. 6-7.) This entailed approximately one hour of accusing, arguing, and interrogating Mr. Peña—and this, after nearly three hours and five rounds of polygraph examination.

The trial court heard the agent's admission: his goal in conducting the "post-test interview" was trying to get Reynaldo Peña to make an admission that would confirm the agent's pre-existing belief that Mr. Peña was guilty. (RR Vol. 1, Pg. 89, Ln. 6-19.) Three and a half hours into the encounter, the agent finally succeeded.

SUMMARY OF THE ARGUMENT

Admission at trial of polygraph evidence and Appellee's statements made therein would violate Appellee's Fifth, Sixth, and Fourteenth Amendment rights. In his brief submitted to the trial court, Appellee detailed both a Fifth Amendment involuntariness issue and the constraint on his Sixth Amendment Confrontation Clause rights that admission would impinge. The State has only responded to the Fifth Amendment issue, and even then, by discussing a legal test that is not dispositive of the issue.

A. Based on a totality of the circumstances inquiry, Appellee's self-incriminating statements were involuntary.

Although Mr. Peña signed a *Miranda* rights waiver, he did so concerning the polygraph examination itself, and even then, only after a fair degree of grooming. The agent's actual interrogation did not commence for another three hours, after he had completed five rounds of polygraph testing on Mr. Peña. Described by the agent in his court testimony as a results explanation phase, this "fourth phase" of testing was actually more than an hour of Agent [redacted] accusing, arguing, and giving false hope of probation to Mr. Peña . . . if he would only confess to the agent's pre-conceived idea of Mr. Peña's guilt. During most of the nearly four-hour encounter, Mr. Peña was hooked up to polygraph equipment and instructed to remain still.

One need not make a positive promise to unduly influence another by hope or fear. This is why Tex. Code Crim. Proc. Art. 38.21 concerns whether a statement was "freely and voluntarily made without compulsion *or persuasion*," without respect to whether such persuasion necessarily involved a promise that fits a three-prong test. The mildest suggestion of hope can be powerful when it is set in relief by the presence of fear. Thus, the Supreme Court has reasoned that fear need not be fear of a government agent—and can even include fear of prison violence—for the government to prey upon it and use it in a coercive manner.

The fear that Mr. Peña and others in such circumstances face will exist so long as there is a common understanding of what happens to convicted child predators in

prison. Even if it were not true, people commonly believe it to be true—especially in Duval County, Texas. Does this mean society should not put sex offenders in prison? No. But it *does* mean this: if police actors milk this rational fear by accusing someone of being a predator and then dangle before them the false hope of probation—if only they will talk—then the veracity of the resulting statement is unreliable, and it is likely to be the result of a constrained choice. This is before even considering the social dynamics of being in the backroom of a sheriff's office, alone with an investigator asking you questions about your first sexual encounter and orating to you regarding sex acts with minors in graphic detail.

The finding of facts relevant to coercion—the circumstances of interrogation, any use of tricks and ruses, the length of time, et cetera—is the proper function of the trial court, which had the advantage of having the agent before it and assessing his credibility and demeanor. In this case, a trial court finding that the statements were involuntary is not so "wholly lacking support in evidence" as to merit an appellate court revisiting the issue and reversing the trial court.

B. Where Texas courts have ruled consistently that polygraph evidence is inadmissible at trial due to its unreliability and overly prejudicial nature, this rule would make the admission of Appellee's statements a violation of his Sixth Amendment Confrontation Clause rights by preventing him from comprehensively cross-examining the law enforcement agent with respect to the propriety of the manner in which the agent conducted the polygraph test.

The State seeks to admit a statement made by the Appellee during a polygraph test. The Appellee, Reynaldo Peña, has a Due Process Constitutional right to challenge the voluntariness of the statement, and a procedural right in Texas to present evidence and submit a question to the jury as to voluntariness. *See* Tex. Code Crim. Proc. Art. 38.22 Sections 6-7.

The results and evidence that a polygraph test has been administered are both inadmissible at trial for any purpose, even if the Defendant wishes to offer the evidence. Yet, there is no way that Mr. Peña could challenge the conditions under which he made his inculpatory statements *without* addressing the nearly four hours of polygraph test. This is an evidentiary conundrum, because the Sixth Amendment Confrontation Clause establishes the Defendant's right to conduct a broad and robust cross-examination.

The admission of evidence is a matter within the discretion of the trial court, and the State has not argued that the trial court abused its discretion in suppressing the encounter. The trial court acted with reference to proper guiding rules and principles when it considered the evidentiary conundrum that the agent created by

causing Mr. Peña's statements to be so connected with the polygraph examination that Mr. Peña would be unable to fully exercise his Sixth Amendment Confrontation Clause rights without reference to evidence deemed inadmissible due to being scientifically unreliable and overly prejudicial.

As there were no exigent circumstances, the experienced agent should have conducted the encounter in a manner that would not place the courts in this judicial bind—to say the least of Mr. Peña's constitutional rights.

STANDARDS OF REVIEW

A. Review Standard for Trial Court Rulings on Admission of Evidence

The admission of evidence is a matter within the discretion of the trial court. *Wright v. State*, 154 S.W.3d 235, 237 (Tex. App.—Texarkana 2005) (concerning admission of polygraph evidence) (citing *Avila v. State*, 18 S.W.3d 736, 739 (Tex. App.—San Antonio 2000, no pet.)). Accordingly, a trial court's admission of such evidence is reviewed under an abuse of discretion standard. *See Montgomery v. State*, 810 S.W.2d 372, 379-80 (Tex. Crim. App. 1990). A trial court abuses its discretion when it acts without reference to proper guiding rules or principles, and therefore acts arbitrarily and unreasonably. *See In re B.N.F.*, 120 S.W.3d 873, 877 (Tex. App.—Fort Worth 2003, no pet.).

B. Review Standard for Fifth Amendment Voluntariness Inquiry

Federal caselaw. The finding of facts surrounding the issue of coercion—the circumstances of interrogation, any use of tricks and ruses, the length of time, et cetera—is the proper function of the trial court which had the advantage of having the witnesses before it. *See Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). "This means that all testimonial conflict is settled by the judgment of the state courts." *Culombe*, 367 U.S. at 603. The Supreme Court will not be "bound by findings wholly lacking support in evidence." *Id.* When a mixed question of law and fact is more fact specific, such as in weighing evidence or making credibility decisions, the decision of the trial judge should be reviewed with deference. *U.S. Bank Nat. Ass'n v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 967 (2018).

The requirement that *Miranda* warnings be given does not dispense with the voluntariness inquiry. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). Using a coerced confession against a defendant in a criminal trial is a constitutional error that cannot be categorized as harmless. *Chapman v. California*, 386 U.S. 18, 26 (1967). While de novo review may be proper if required to protect the federal constitutional rights of the accused, *Culombe*, 367 U.S. at 605, "Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate . . . that the state court's determination should control." *Id.* The "risk that a coerced confession is unreliable, coupled with the profound

impact that it has upon the jury, requires a reviewing court to exercise extreme caution before determining that the confession's admission was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 280 (1991).

State caselaw. The Court of Criminal Appeals will not turn a blind eye to recorded confessions if they present evidence contradicting law enforcement testimony. *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000). However, the Court of Criminal Appeals does not consider its evaluation of videotape evidence to involve evaluations of witness credibility and demeanor. *Carmouche*, 10 S.W.3d at 332. When reviewing a trial court's ruling on a motion to suppress, the Court of Criminal Appeals affords the trial judge "almost total deference to determinations of historical facts, especially when those determinations involve assessment of witness credibility and demeanor. *See Masterson v. State*, 155 S.W.3d 167, 170 (Tex. Crim. App. 2005). If an appellate court *does* review the voluntariness of a statement, it "must examine the totality of the circumstances surrounding the acquisition of the statement to determine whether it was given voluntarily." *Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997).

ARGUMENTS

I. <u>The State has articulated no standard of review, has not argued that the trial court abused its discretion in suppressing the evidence for reasons concerning Mr. Peña's Sixth Amendment claim, and has not demonstrated why this Court should reverse a trial court finding of involuntariness that is based on the proper totality of the circumstances inquiry.</u>

The State has not articulated a standard of review it believes this Court should adopt in reviewing the trial court's granting of Mr. Peña's motion to suppress. Mr. Peña, in his Brief in Support of Suppression filed with the trial court, articulated two bases for the trial court to suppress the statements. First, there is the voluntariness issue. Second, there is the inability of Mr. Peña to conduct a thorough cross-examination of the law enforcement officer who administered the polygraph test without running afoul of the prohibition against polygraph evidence. In its appellant's brief, the State zeroes in on the voluntariness issue and ignores the evidentiary issue.

On the voluntariness of a statement, *de novo* review is an arguable standard of review if required to protect the federal constitutional rights of the accused. *See Culombe*, 367 U.S. at 605. However, even in addressing the voluntariness issue, the State does so in a way that obfuscates the proper legal test and mischaracterizes the holdings of two cases it cites from the Court of Criminal Appeals (see below). Meanwhile, in ignoring the Sixth Amendment / polygraph-evidentiary basis for

suppression, the State fails to articulate how the trial court would have abused its discretion in granting suppression on that basis.

II. The State has not demonstrated how the trial court would have abused its discretion by granting suppression for evidentiary reasons based on Mr. Peña's Sixth Amendment Confrontation Clause rights.

Standard of review for admitting or excluding evidence. The admission of evidence is a matter within the discretion of the trial court. *Wright*, 154 S.W.3d at 237 (concerning admission of polygraph evidence) (citing *Avila*, 18 S.W.3d at 739). Accordingly, a trial court's admission of such evidence is reviewed under an abuse of discretion standard. *See Montgomery*, 810 S.W.2d at 379-80. A trial court abuses its discretion when it acts without reference to proper guiding rules or principles, and therefore acts arbitrarily and unreasonably. *See In re B.N.F.*, 120 S.W.3d at 877.

Rules concerning polygraph evidence. The results and evidence that a polygraph test has been administered are both inadmissible at trial for any purpose. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990). This is true regardless of whether the State or the Defendant wishes to offer the evidence. *Placker v. State*, 350 S.W.2d 546 (Tex. Crim. App. 1961); *Luna v. State*, No. 04-01-00540-CR, 2002 WL 2008091 (Tex. App.—San Antonio, Sept. 4, 2002, no pet.). "With regard to the polygraph test, polygraph evidence is not admissible in Texas for any purpose in a criminal proceeding." *Luna*, *supra*, at *4 (citing *Nehery v. State*, 692 S.W.2d 686, 700 (Tex. Crim. App. 1985)); *Easley v. State*, 986 S.W.2d 264, 268 (Tex. Crim. App.

1998). In *Luna*, the trial court refused to permit the defendant to impeach his brother with the polygraph test results.

Rules concerning the Confrontation Clause. The Sixth Amendment Confrontation Clause establishes the Defendant's right to conduct a broad and robust cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Alford v. United States*, 282 U.S. 687 (1931). A trial court has discretion to limit the scope of cross-examination to prevent such things as harassment, confusion of the issues, or the injection of cumulative or collateral evidence. *Van Arsdall, supra*, at 689. However, cross-examination is by nature "exploratory and there is no general requirement that the defendant indicate the purpose of his inquiry. Indeed, the defendant should be granted a wide latitude even though he is unable to state what facts he expects to prove through his cross-examination." *Carroll v. State*, 916 S.W.2d 494 (Tex. Crim. App. 1996) (citations omitted). The strength and scope of the constitutional right to cross-examination may control to allow cross-examination on a matter that a state rule of evidence would exclude, *Henley v. State*, 493 S.W.3d 77, 95 (Tex. Crim. App. 2016) (citing *Lopez v. State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000).

The trial court did not abuse its discretion if it excluded the evidence on an evidentiary basis. The trial court could see that, were the State permitted to proffer the agent's testimony or other evidence of Reynaldo Peña's statements made during

any part of the administration of the polygraph examination, then the Court also would be obliged to allow the Defendant to fully cover the context in which the statements were given, including reference to excerpts of the electronic recording or introduction of the recording in its entirety. Pandora's Box would be opened—questions concerning the correctness of the agent's behavior while conducting a polygraph examination and the validity of polygraph science, at least as to its propensity to produce false confessions. A full blown litigation of these issues, including expert testimony from a defense witness, would be required if Reynaldo Peña is to receive a fair trial. More importantly, as it concerns Reynaldo Peña's constitutional rights, he would face the impossible choice between giving up a right to a robust confrontation of his accuser or waiving his right (presuming that it is even legally permissible) not to have a jury hear the highly prejudicial and unreliable evidence that a polygraph examination was administered.

When he was asked by the State to describe what a polygraph examination was, Agent [redacted] included what he called the "post-test interview" as a fourth part (RR Vol. 1, Pg. 11, Ln. 8-11.) The only allegedly inculpatory statement made by Mr. Peña during the polygraph examination occurred during this "post-test interview." The State may argue it should be allowed at trial to elicit testimony from the agent regarding the alleged confession so long as the State does not mention the context of the statement. Indeed, caselaw suggests this could be done if all references to the

polygraph examination are redacted from evidence. *See Wright v. State*, 154 S.W.3d 235 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Hoppes v. State*, 725 S.W.2d 532 (Tex. App.—Houston [1st Dist.] 1987).). This would certainly serve the purposes of the State in its prosecution, but would just as certainly violate Mr. Peña's right to fully cross-examine Agent [redacted]

The above-cited cases are distinguishable from the case at hand. In *Wright*, the prosecutor referred more than once in his opening statement to the defendant being offered a polygraph test, and the judge overruled the defendant's objection. *Supra*, at 238. The prosecutor elicited testimony from a witness that a polygraph had been administered. *Id.* The judge again overruled the defendant's objection because the polygraph results had not been disclosed. *Id.* The Court of Appeals remanded the case, holding not only that results should not be disclosed at trial, but that evidence that a polygraph was even administered should be excluded. *Id.* at 238-240.

In setting out its reasoning in dicta, the court in *Wright* cited the opinion in *Hoppes*. But, *Hoppes* is also distinguishable because, in that trial, a statement derived from a polygraph examination was disclosed and offered for impeachment purposes without any information included that would disclose that the statement came from a polygraph examination. *Hoppes*, supra at 536. Here, evidence of the polygraph examination would be vital—if not contrary to the rules of evidence due to its unreliable and highly prejudicial nature—in order that a jury be able to fully

appreciate the circumstances under which Mr. Peña made the inculpatory statements at issue.

In this case, presumably the State will offer statements made during the polygraph examination as an alleged confession to the charge. The statements likely would be proffered through the testimony of the agent. The defendant would challenge that the statement was given involuntarily. However, to establish that the statements were given under circumstances that raise a question as to whether they were given voluntarily, Mr. Peña would have to be able to address comprehensively the circumstances surrounding the making of the statements. He would have to be afforded broad leeway to cross-examine the agent, which would require the jury to hear that a polygraph examination had taken place. Neither *Wright* nor *Hoppes* involves an analogous situation. Otherwise, Reynaldo Peña would be denied his Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and his Sixth Amendment Confrontation Clause rights.

It did not have to be this way. It is uncontested that the agent has nearly 40 years of law enforcement experience—several of which he had been administering polygraph examinations. There were no exigent circumstances. Agent [redacted] could have separated the polygraph exam from the post-test interrogation. He could have disclosed to Mr. Peña that polygraph results indicated deceptive answers but announced that Mr. Peña was free to go. He could have arrested Mr. Peña, or had

him arrested, and then re-*Mirandized* him. Instead, law enforcement used the totality of his experience to apply pressure to Mr. Peña to exact whatever statement the agent felt would corroborate his pre-conceived notion of the truth.

Because the Exclusionary Rule is designed to deter law enforcement from violating the Constitution, the trial court acted well within its discretion if it suppressed the statement not only on the basis of involuntary self-incrimination, but also, due to the Sixth Amendment and evidentiary issues presented due to the actions of law enforcement. During an especially testy exchange, in which the agent was evasive and the trial court had to instruct him to answer counsel's question, the agent claimed that he was merely there to conduct a polygraph examination for the actual investigators on the case (*see* RR Vol. 1, Pg. 79, Ln. 5-10). Nevertheless, the trial court was able to see on the recording how the agent took matters into his own hands to get what he wanted out of Mr. Peña. In so doing, the agent not only created an unnecessary evidentiary conundrum; he restricted the ability of Mr. Peña to fully exercise his Sixth Amendment rights at trial—unless the trial court's ruling is affirmed.

III. The State has not demonstrated how a trial court finding of involuntariness based on the proper totality of the circumstances inquiry would be "wholly lacking support in evidence."

A statement is involuntary if made under circumstances of police behavior of such a nature that the statement obtained thereby is unlikely to have been the product

of an essentially free and unconstrained choice. *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). The statement is involuntary also if made under circumstances of law enforcement assurance of such an influential nature that it would cause a defendant to speak untruthfully. *Martinez v. State*, 127 S.W.3d 792, 795 (Tex. Crim. App. 2004). The finding of facts surrounding the issue of coercion—the circumstances of interrogation, any use of tricks and ruses, the length of time, et cetera—is the proper function of the trial court which had the advantage of having the witnesses before it. *See Culombe*, 367 U.S. at 602. The Court of Criminal Appeals does not consider appellate evaluation of videotape evidence to involve evaluations of witness credibility and demeanor. *Carmouche*, 10 S.W.3d at 332. When reviewing a trial court's ruling on a motion to suppress, the Court of Criminal Appeals affords the trial court "almost total deference to determinations of historical facts, especially when those determinations involve assessment of witness credibility and demeanor. *See Masterson*, 155 S.W.3d at 170. Federal review is not "bound by findings wholly lacking support in evidence." *See Culombe*, 367 U.S. at 603. When a mixed question of law and fact is more fact specific, such as in weighing evidence or making credibility decisions, the decision of the trial judge should be reviewed with deference. *U.S. Bank Nat. Ass'n*, 138 S.Ct. at 967.

A. Contrary to the State's insistence on the application of an improper three-prong promise test, the trial court's ruling is consistent with an application of the proper totality of the circumstances inquiry.

In the rules section of its appellant's brief, the State cites the proper totality of the circumstances test for involuntariness. (Appellant's Brief, pg. 7.) However, the State promptly pivots to an improper three-prong promise test and dwells on it for the duration of its brief. In advocating for the wrong test, the State fails to articulate why it believes that the trial court would have been wrong in an application of the totality of circumstances inquiry—that is, how it might be that such a ruling from the trial court was "wholly lacking support in evidence." *See Culombe*, 367 U.S. at 603.

If the district court excluded the statements because it found they were involuntary, then the Court must have applied the correct "totality of the circumstances" test. This is apparent because the trial court could not have found the statements to have been made involuntarily had it applied the irrelevant, three-prong promise test on which the State hangs its hat. Indeed, this distinction is at issue in the very first case cited by the State in its brief. *See Creager v. State*, 952 S.W.2d at 852. The *Creager* Court acknowledged that the three-prong promise test, sourced from a secondary legal treatise, was "undoubtedly the rule to resolve a claim that a statement was involuntary *simply* because it was induced by an improper promise."

Id. at 856 (emphasis added). However, there, as here, the defendant's claim "includes more circumstances than the making of a promise." *Id.*

> The totality of the circumstances should be considered, as we have said. Article 38.21 of the Code of Criminal Procedure requires that the statement have been "freely and voluntarily made without compulsion or persuasion." Even without the statute, the courts of this state have held that statements must not have been "obtained by the influence of hope or fear, applied by a third person to the prisoner's mind." *Creager*, 952 S.W.2d at 856 (citing *Cain v. State,* 18 Tex. 387, 390 (Tex.1857)).

It would appear that, here, the trial court applied the same form of reasoning taken up by the Court of Criminal Appeals in the above-cited cases—that a positive promise is but *one* way to influence by hope or fear. It is by no means the *only* way. Here, the agent nonetheless was able to apply the influence of "hope and fear" to Mr. Peña in such a way as to cast doubt on whether it was "the product of an essentially free and unconstrained choice." *Alvarado v. State*, 912 S.W.2d at 211.

Repeated reassurances—including, but not limited to, the possibility of probation—were, in the context of all other facts heard by the trial court, and in view of the agent's demeanor while testifying in the trial court, "of such an influential nature that it would cause a defendant to speak untruthfully." *Martinez*, 127 S.W.3d at 795. Yet, the State also cites this case for the proposition that this court ought to apply the incorrect three-prong promise analysis. In doing so, the State neglects to inform this Court that the *Martinez* Court did not take up that defendant's federal constitutional claim that his statements were involuntary. *Id.* at 794. Indeed, the

Court of Criminal Appeals *deferred to the trial court's ruling on Martinez's involuntariness claim. See Id.*

Even on the state law claim under Art. 38.21, the *Martinez* holding does not stand for the proposition that the State advocates. Confining its analysis to that defendant's state law claim, the *Martinez* Court never held that a positive promise was the *only* way to violate the dictates of Art. 38.21. As the Court noted, the statute concerns whether a statement was "freely and voluntarily made without compulsion *or persuasion.*" Tex. Code Crim. Proc. Art. 38.21 (emphasis added). That dictate is inherently agnostic with respect to whether a positive promise was made. Put another way, all squares are rectangles; not all rectangles are squares. Or, proverbially, there is more than one way to skin an Art. 38.21 cat than by merely making a promise that rises to the level of the incorrect three-prong test. For this reason, the *Martinez* Court did not abrogate its previous holding in *Creager* that the correct voluntariness test was a totality of the circumstances inquiry.

Martinez would be relevant to an Art. 38.21 claim in two situations. First, it would be relevant were some court to have considered—improperly, as the intermediate appellate court did in *Martinez*—whether a defendant's statement were true or false. *See Martinez*, 127 S.W.3d at 794. Second, *Martinez* would be relevant were some defendant to base a state law claim under Art. 38.21 *solely* on the premise that a positive promise induced a confession. Martinez had testified that he perceived

a detective's statement to be a promise, and that his perception of the statement as such is what induced him to admit guilt. *Id.* at 794 (citing the intermediate court's slip opinion, omitted here). Unlike the case at bar, this appears to have been the sole basis of Martinez's Art. 38.21 claim—at least as one can read out of *Martinez*. That is why the *Martinez* Court noted that "no positive promise was ever made" in that case. *Id.* at 795. Reading *Martinez* this why is required in order to harmonize the Court's holdings in *Creager* and *Martinez*—a harmonization consistent, also, with the fact that the same Judge Womack who signed onto the Court's *Martinez* opinion is he who *authored* the Court's *en banc* opinion in *Creager*.

The Supreme Court, like the Court of Criminal Appeals, also has held that a totality of the circumstances analysis is the proper inquiry for voluntariness. *Fulminante*. 499 U.S. 279 (1991)). In fact, the *Fulminante* Court inserted a parenthetical expression into its opinion to underscore that totality of the circumstance analysis has abrogated the Court's previous emphasis on "promises, however slight." *Id.* at 285 (distinguishing its holding here from its abrogated standard announced in *Bram v. United States*, 168 U.S. 532 (1897).). Indeed, had the Supreme Court applied the State's three-prong test for promises, the outcome would have been different, because the agent's promise in *Fulminante* would not have met such a test. There, the agent was not one in authority, and the Supreme Court gives no consideration as to whether the *Fulminante* informant's promise was sanctioned

by the relevant authorities for whom the fellow inmate was working. Nevertheless, the promise was "extremely coercive" because the confession "was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." *Fulminante*, 499 U.S. at 286 (citing the Arizona Supreme Court at 161 Ariz. 237, 778 P.2d 602 (1988) at 262.).

B. That Mr. Peña signed a *Miranda* waiver is not determinative of voluntariness; it is one factor among many that the trial court may consider in its totality of the circumstances inquiry.

The State also clouds the proper inquiry for voluntariness by noting, as though it were determinative, that Mr. Pena was properly advised of his rights prior to speaking to law enforcement. As in *Creager*, this case "does not involve statutory or constitutional warnings before the interrogation" because there is "no question that the [defendant] was given proper warnings before the interrogation. The issue is the significance of the interrogator's remarks *during* the interrogation which might have led the appellant to believe that a confession would help him." *Creager* at 855 (emphasis added).

Sequence matters. The agent did not tell Mr. Pena that probation might be in his future immediately following the reading of Mr. Pena's *Miranda* rights. Rather, the agent "applied training and experience he had gathered over the years to the situation before him." (State's Brief at 8.) Much earlier in the encounter, Mr. Peña, responding to the agent's question about what Mr. Peña believed would be a just

outcome, suggested that probation might be the right outcome for a one-time offense. With surgical precision, the agent parroted this possibility back to Mr. Peña at just the right time—despite the agent knowing that option would not be possible.

Additionally, the trial court could note from the defendant's brief in support of suppression—or the court's own review of the recording—that the actual polygraph examination ended after 2 hours and 42 minutes. That is why Mr. Peña was there—to take a polygraph examination, not to be interrogated. With more than two hours having passed since the agent read Mr. Peña his *Miranda* rights and Mr. Peña consented to the polygraph examination, the agent now had probable cause to arrest Mr. Peña or turn him over to be arrested. Instead, the agent began his own interrogation lasting for more than an hour.

On all facts presented to the trial court, the court did not buy the agent's contention that he was merely "trying to help [Mr. Pena] to be honest and tell the truth." (RR Vol. 1, Pg. 89, Ln. 6-7.) The trial court understood that the issue is not whether Mr. Pena's resulting statement was true or false, but whether the conduct of law enforcement would be likely to influence some defendant in Mr. Pena's situation to speak untruthfully or involuntarily. In sum, the Special Agent used interrogation techniques of coercive insistence and seductive assurance to gain an inculpatory statement from Reynaldo Peña.

C. If this Court conducts de novo review of whether the agent applied hope and fear to overbear Mr. Peña's will, any assessment of whether it was of such a character as would entice a man to speak untruthfully should consider the common understanding that prisons are dangerous places for those accused of sex crimes against children.

In a totality of the circumstances analysis, fear of violence on the part of the defendant is a valid factor for consideration. *See Arizona v. Fulminante*, 499 U.S. 279 (1991). The violence feared need not be violence from a government agent in order to contribute to voluntariness. *See Payne v. Arkansas*, 356 U.S. 560, 564-65 (1958) (holding a confession coerced after an interrogating officer promised protection for the accused from an angry mob outside the jailhouse door); *see also Fulminante*, 499 U.S. at 282-83 and 286-87 (reasoning through the defendant's fear of violence from fellow inmates and finding coercion despite the defendant not knowing that his "friend" was actually a government agent).

In *Fulminante*, the Supreme Court noted that, as part of the Arizona Supreme Court's totality of the circumstance analysis, the Arizona Court had considered that "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates." *Id.* In the present case, Mr. Pena is alleged not to have murdered a child, but to have harmed a child sexually. If any allegation other than child murder is likely to spur prison violence against an inmate, it is child sexual assault. The *Fulminante* Court noted that fear motivated Fulminante's self-incriminating statement. *Id.* at 279. This is despite Fulminante's stipulation at his

suppression hearing that he had "[a]t no time . . . indicate[d] he was in fear of other inmates, nor did he ever seek . . . protection." *Id.* at 304. Fulminante merely believed that a fellow inmate could protect him from the violence of other inmates in exchange for giving him a proper story. *Id.*

The laws of this land do not prohibit judges from applying their experience when it comes to mixed questions of law and fact. Indeed, there is perhaps no legal question to which a judge's understanding of the human condition is more relevant than in applying a totality of the circumstances analysis to the voluntariness inquiry. The general attitude of community members is relevant to a totality of the circumstance inquiry to the extent that a trial judge—situated closest to local defendants, law enforcement, and even jurors—can intuit how a typical defendant might feel in a scenario. The trial judge can use this as a starting point. As he hears additional evidence about a particular case, he may consider how the defendant before him would be more or less susceptible to fear and false hope than another defendant or one facing different charges. While the trial court judge's understanding of the people in his community is necessarily a matter outside of the official record—generally, there is a common understanding across Texas that prisons are dangerous places for those convicted of child sex crimes. As such, even a glimmer of false hope of probation could persuade the accused to incriminate himself to lessen the risk.

This brief has already detailed the words and actions of Special Agent [redacted] in his interrogation of Mr. Peña during the last hour of the encounter. As the agent tried to characterize the encounter before the district court, he said he was merely "trying to get [Mr. Pena] to minimize, so he can overcome the fear and embarrassment of the consequences of admitting to his actions." (RR Vol. 1, Pg. 88, Ln. 20-22). Based on many factors—including the agent's demeanor in court—the trial court should be free to conclude that the agent's goal in conducting the "post-test interview" was trying to get Reynaldo Peña to make an admission that would confirm the agent's pre-existing belief that Mr. Peña was guilty, whether the truth made him guilty or not. (*See* RR Vol. 1, Pg. 89, Ln. 6-19.) During the interrogation, the agent's insistence on Mr. Peña's guilt was such that any rational person in Mr. Peña's situation would reasonably fear that arrest is imminent, and that the State would move to try a case against him. Given this understanding and the rational fear of prison violence against those convicted of child sex crimes, it stands that State agent reassurances—*it is not a big deal so long as Mr. Peña admits that he's guilty; if he does not, they will think he is a monster; probation might be in his future; et cetera*—are of a kind such that a reasonable person in Mr. Peña's circumstances would have considered making a false statement due to "the influence of hope or fear." *See Creager*, 952 S.W.2d at 856.

PRAYER

Wherefore, premises considered, Appellee Reynaldo Peña prays this Honorable Court affirm the ruling of the District Court on the suppression issue. Alternatively, should this Court reverse and remand the trial court's ruling, then Appellee would pray this Court announce that the Sixth Amendment Confrontation Clause right overrides the evidentiary rules regarding admissibility of evidence of a polygraph examination having been administered, and then, on remand, order that the trial court allow full and robust cross-examination of Special Agent [redacted] and allow Mr. Peña, recognized by the trial court to be indigent, the time and means to obtain a polygraph expert to controvert the propriety of the methods used by the agent in his administration of the polygraph examination at issue.

Respectfully submitted,

JOHN GOODMAN II,
Attorney for Defendant
State Bar No. 24134581

Anglican Legal Aid & Reconciliation
221 E. 12th Street
Mission, TX 78572
(956) 377-0195
director@alartx.org

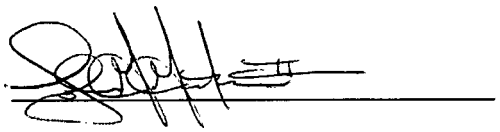
ABNER BURNETT
Attorney of Record
State Bar No. 03425770

205 W. Gardenia Avenue
McAllen, TX 78501
lawyerburnett@gmail.com

CERTIFICATE OF SERVICE

I, John Goodman II, Attorney for Appellee, do herein certify that on July 29, 2024, the foregoing motion was served on the State via e-filing.

Signed,

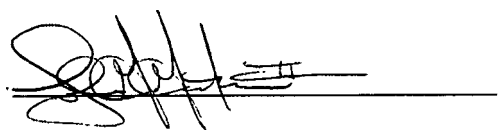


JOHN GOODMAN II,
Attorney for Appellee
State Bar No. 24134581

CERTIFICATE OF COMPLIANCE

This is to certify this document contains 7,076 words, not including those words excluded in such count under Tex. R. App. P. 9.4(i)(1).

Signed,



JOHN GOODMAN II,
Attorney for Appellee
State Bar No. 24134581

APPENDIX 7

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS, Appellant, v. REYNALDO ALBERTO PENA Appellee.	§ § § § § §	No. 08-23-00303-CR Appeal from the 229th Judicial District Court of Duval County, Texas (TC# 20-CRD-45)

JUDGMENT

The Court has considered this cause on the record and concludes there was error in the judgment. We affirm the trial court's order granting Pena's motion to suppress insofar as it orders the suppression of any evidence relating to the polygraph examination and its results. We reverse the trial court's order insofar as it (1) suppresses the recorded portion of the post-polygraph interview that contains no reference to the examination or its results and (2) suppresses the inculpatory statements Pena made during that portion of the interview.

IT IS SO ORDERED THIS 27TH DAY OF SEPTEMBER 2024.

LISA J. SOTO, Justice

Before Rodriguez, C.J., Palafox, Soto, JJ.

APPENDIX 8

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS, Appellant, v. REYNALDO ALBERTO PENA Appellee.	§ § § § § §	No. 08-23-00303-CR Appeal from the 229th Judicial District Court of Duval County, Texas (TC# 20-CRD-45)

MEMORANDUM OPINION

Appellee Reynaldo Alberto Pena was indicted on one count of aggravated sexual assault of a child under the age of six. Prior to his indictment, Pena voluntarily submitted to a polygraph examination and a post-polygraph interview, which were recorded in a single session. Pena moved to suppress the entire recording as well as any evidence of the inculpatory statements he made during the post-polygraph interview, claiming their admission would violate his Sixth Amendment right to confront witnesses, as he would be unable to fully cross-examine the polygraph agent regarding the context in which the statements were made. Alternatively, he contended the trial court should suppress his inculpatory statements because they resulted from the polygraph agent's

alleged promise that he would be treated more "leniently" if he confessed to the assault. The trial court granted the motion and suppressed the entire recording without stating its reasons. This appeal followed.[1]

For the reasons below, we affirm the trial court's decision insofar as it suppresses evidence of the polygraph examination and its results, but we reverse to the extent it suppresses the remainder of the interview and the inculpatory statements Pena made during the interview.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The polygraph examination

The child-victim reported to her mother that Pena, who at the time was married to the mother's aunt, had licked her vagina while he was baby-sitting the child and her siblings. Pena thereafter voluntarily agreed to submit to a polygraph examination at the Jim Hogg County Sheriff's Office. Pena arrived at the office of his own accord and met with a Texas Department of Public Safety (DPS) special agent, [redacted]

Prior to the examination, Agent [redacted] read Pena his *Miranda* rights, and Pena stated that he understood his rights. He signed a "waiver of rights" affirming that he was "knowingly, intelligently, and voluntarily" waiving his *Miranda* rights as listed on the document. Pena also signed a document indicating he voluntarily agreed to the polygraph examination.

[1] This case was transferred from the Fourth Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* Tex. Gov't Code Ann. § 73.001. We decide the case in accordance with the precedent of the transferor court to the extent it conflicts with our own. Tex. R. App. P. 41.3.

The examination lasted approximately two hours and 42 minutes. During the examination, Agent [redacted] asked Pena several baseline questions as well as two questions related to the offense: (1) whether he had sexual contact with a minor; and (2) whether he licked a child's vagina. Agent [redacted] repeated the examination five times, asking the same or similar baseline questions each time. Each time, Pena denied he had engaged in any such conduct.

B. The post-polygraph interview

Following the examination, Agent [redacted] took a break of approximately 20 minutes. After the break, Agent [redacted] indicated that he had reviewed the "data" and asked Pena if he was a "predator" or a "monster" from whom we must "protect" our children. Pena responded in the negative and stated he had never been in trouble before. Agent [redacted] informed Pena that during the examination the question of whether he had licked a child's vagina "affected" him the most. Agent [redacted] told Pena that this was "the one" thing he needed to "explain" so that people would not think he was "that type of person," i.e., a "predator." But Pena continued to deny having engaged in any such conduct.

Thereafter, Agent [redacted] made no further reference to the polygraph examination. Instead, he focused on the child-victim's allegation that Pena had licked her vagina while they were in the bedroom. Agent [redacted] pointed out that the child-victim indicated that Pena stopped when she asked him to, which the agent opined made her statement both "good and bad," as it demonstrated he did not "force" himself on her in other ways and showed that he had "compassion." Agent [redacted] repeatedly told Pena he did not believe Pena was a predator, but rather a "good guy" who made a "mistake" and stopped when he realized it was wrong.[2]

[2] Agent [redacted] also told Pena he believed the child's mother was to blame for not taking care of her daughters and for

Agent [redacted] then encouraged Pena to acknowledge his "mistake," suggesting that if he did, the "decision-makers" would view him as "sincere" and as a "human being" who simply made a mistake as we all do, rather than a "monster." At one point, Agent [redacted] suggested that a person who took responsibility for his actions could possibly receive "probation."

Agent [redacted] told Pena he believed the situation could have been much "worse," detailing cases in which individuals had committed much more serious sex offenses. He stated that Pena's case was not like those, as the allegation in his case was a "simple lick" and "nothing serious." However, Agent [redacted] repeatedly told Pena that he needed to explain his conduct, take responsibility for it, and apologize to the child, or else he would "look bad" and would risk being viewed as "the type we need to put away" or "lock[] up."

C. The confession

After repeatedly being encouraged to apologize, Pena said he was "sorry." When Agent [redacted] asked why, Pena stated that "nothing happened." However, when Agent [redacted] insisted that he "knew" something happened because the child's sisters had seen him go into the bedroom with her, Pena responded, "I just licked…that's it." Then, Pena explained that the child had walked into the room by herself, laid down on the bed, lifted up her dress, pulled down her panties, and asked him to lick her. Pena stated that he pulled her panties up and pulled them to the side, then licked the child in the middle of her vagina, but stopped when she asked him to. At Agent [redacted] request, Pena marked the area where he had licked the child on a plastic replica, and he signed and dated it July 25, 2019. When asked why he licked her, Pena asserted that the child was "teasing" him, but

"forcing" him to watch them. He further blamed the mother's aunt (Pena's now ex-wife) for leaving him alone with the children, assuring Pena that he was only "human," that "curiosity got the best of [him]," and that he got "lost in the heat of the moment."

he realized he "screwed up." When Agent [redacted] asked why he did not tell him about the incident sooner, Pena explained he was "embarrassed" and thought that what he had done was "worse."

Agent [redacted] then called an investigator into the room, and Pena repeated the same sequence of events to him, indicating that he licked her once but did "nothing else." The investigator placed Pena under arrest. Pena was indicted on one count of aggravated sexual assault based on the allegation that he penetrated the child's vagina with his mouth.

D. Pena's motion to suppress

Pena filed what he labeled as: "Defendant's Motion to Suppress Electronic Recording, Both Video and Audio, of Polygraph Examination of the Defendant." In his motion and supplemental briefing, he sought to suppress the entire recording, to include the approximately two-hour-and-42-minute polygraph examination as well as the one-hour-and-ten-minute post-polygraph interview. Alternatively, he sought to suppress "any statement made by the Defendant that the State asserts is an inculpatory admission of any wrongdoing."

Pena's argument appeared to be two-fold. First, he argued his confession was "involuntary," as Agent [redacted] used "coercive insistence and seductive assurance" during and after the polygraph examination to obtain his confession, in part by suggesting he might receive probation if he were to confess. Second, he argued that because his confession came on the heels of the polygraph examination, and because evidence of a polygraph examination is inadmissible at trial, his Sixth Amendment right to cross-examine Agent [redacted] about the context in which his confession arose would be violated if his inculpatory statements were admitted at trial.

The State, in turn, acknowledged that evidence of a polygraph examination is not admissible at trial and assured the court it had "no intention of offering any statements or questions

that arose during the polygraph portion of the defendant's interview nor make any reference to the polygraph examination." However, the State asserted it was entitled to offer Pena's statements during the post-polygraph portion of his interview, subject to redacting any reference to the polygraph examination itself or the results thereof. The State also maintained that Agent [redacted] did not engage in any coercive tactics or make Pena any improper promises.

E. The hearing

At the hearing on the motion, Agent [redacted] testified that Pena voluntarily appeared for the polygraph and waived his *Miranda* rights both orally and in writing. Agent [redacted] testified that Pena never asked to terminate the interview and did not ask for an attorney.

Agent [redacted] explained that following a polygraph examination, he typically tells an examinee what questions "affected" him or what caused him to "not pass the test." He then asks the examinee to explain why a particular question may have affected him and typically continues to ask the examinee for an explanation until the examinee wants to leave or requests an attorney.

During the post-polygraph phase of his interview with Pena, Agent [redacted] explained, he was trying to get him to "be honest and tell the truth," in part by trying to get him "to minimize his [conduct] so he [could] overcome the fear and embarrassment of admitting to his . . . actions." According to Agent [redacted] he did not make any promise that Pena would get probation or any other favorable treatment if he confessed; he was just "throw[ing] options out there that are available for everybody" and letting Pena know "some possibilities" if he did or did not confess.

F. The trial court's order

The trial court granted Pena's motion to suppress. In its amended "Order Granting Defendant's Motion To Suppress Electronic Recording, Both Video And Audio, Of Polygraph Examination Of The Defendant," the trial court ruled:

> After having heard from both parties and considered this Motion and submitted Briefs, the Court Grants the Motion to Suppress and rules inadmissible at trial the entire above-described audio and video recording of the polygraph examination, including but not limited to any excerpts that the State asserts are an inculpatory admission of wrongdoing. This includes any evidence deriving from the polygraph examination episode. It includes testimony from Special Agent [redacted] or any other witness regarding any portion of the polygraph examination or any evidence deriving from the polygraph examination.

The State appealed.[3]

II. PARTIES' ARGUMENTS

The State first notes that the trial court did not provide the basis for its ruling and assumes the trial court's decision was based on Pena's argument that his confession resulted from Agent [redacted] improper promise of a benefit, i.e., that he could receive probation if he confessed. And the State argues the record does not support a conclusion that Agent [redacted] made an improper promise that would render Pena's inculpatory statements involuntary.

Pena counters that the trial court could have reasonably concluded his statement was coerced due to Agent [redacted] "promise" of probation. Pena further points out that he raised a second issue in the trial court, which the State did not address in its appellate briefing, regarding whether his Sixth Amendment rights would be violated by admitting his inculpatory statements due to his inability to fully cross-examine Agent [redacted] regarding the context in which the

[3] The State asserts that it requested findings of fact and conclusions of law, which the trial court failed to issue, but its request is not in the clerk's record. No findings of fact or conclusions of law appear in the record.

statements were made given the inadmissibility of evidence relating to polygraph examinations. And Pena contends this could have properly formed the basis for the trial court's decision to grant his motion to suppress.

III. INADMISSIBILITY OF POLYGRAPH EXAMINATIONS AND RESULTS

As a preliminary matter, the parties appear to agree that the portion of the recording in which the polygraph examination was conducted, as well any portion of the recording in which either Agent [redacted] or Pena referred to the examination or its results, would not be admissible in evidence. We agree.

The Court of Criminal Appeals has repeatedly recognized that due to the inherent unreliability of polygraph examinations, any evidence of the existence and results of a polygraph examination is inadmissible over proper objection. *See Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012); *see also Ross v. State*, 133 S.W.3d 618, 625 (Tex. Crim. App. 2004) (reaffirming the court's prior holdings that "polygraph evidence is inadmissible for all purposes"). We therefore agree with the trial court's decision to suppress the portion of the recording in which the examination itself is being conducted—ending at two hours and 42 minutes.

In addition, we recognize that during the initial portion of the post-polygraph interview, beginning at three hours and two minutes into the recording, Agent [redacted] informed Pena that he had been "affected" by certain questions during the examination then asked Pena to "explain" his reaction to those questions. Accordingly, we conclude that this portion of the recording, and any other portion of the recording in which the polygraph examination is either directly or indirectly mentioned, is also inadmissible. We therefore affirm the trial court's judgment insofar as it suppresses these inadmissible portions of the recording.

We next address the State's argument that the trial court acted improperly when it suppressed the remaining portion of the recording, as well as any evidence pertaining to the inculpatory statements Pena made during the interview.

IV. STANDARD OF REVIEW

We review a trial court's suppression ruling under a bifurcated standard of review. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). When there are findings of fact, we afford them "almost total deference if they are reasonably supported by the record." *Id.* But when, as here, there are no factual findings, "we assume that the court made implicit findings that support its ruling, provided that those implied findings are supported by the record." *Ex Parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013). Although we defer to the trial court's express or implied factual findings, we review questions of law and the application of the law to the facts de novo. *Sims*, 569 S.W.3d at 640.

V. PENA'S SIXTH AMENDMENT ARGUMENT

We first examine whether the trial court could have properly based its decision to suppress the post-polygraph interview portion of the recording, as well as the inculpatory statements Pena made during the interview, based on Pena's argument that their admission would violate his Sixth Amendment right to confront witnesses. We conclude, as a matter of law, that Pena's Sixth Amendment rights would not be violated under these circumstances.

A. Applicable law

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." *Woodall v. State*, 336 S.W.3d 634, 641 (Tex. Crim. App. 2011) (citing U.S. Const. amend.

VI). "This constitutional guarantee applies to both federal and state criminal prosecutions." *Id.* (citing U.S. Const. amend. XIV; *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). "The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony." *Coronado v. State*, 351 S.W.3d 315, 326 (Tex. Crim. App. 2011) (quoting Black's Law Dictionary 433 (9th ed. 2009)). Thus, "[t]he cross-examiner may discredit the witness's direct testimony in several different ways, depending upon the witness, the questioner, and the specific situation as it unfolds in the hearing." *Id.*

However, the right is not unlimited, and it does not include "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010); s*ee also Woodall*, 336 S.W.3d at 643 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (per curiam)). Thus, a trial court may impose restrictions on cross-examination based on such criteria as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Johnson v. State*, 490 S.W.3d 895, 910 (Tex. Crim. App. 2016) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

B. Analysis

Pena contends that because his confession came during his post-polygraph interview, his Sixth Amendment right to confront witnesses would be violated if his attorney could not cross-examine Agent [redacted] regarding the "context" in which his confession arose. In particular, Pena contends that to protect his rights, his attorney should be able to question Agent [redacted] about his

polygraph techniques to ensure they were proper and about the "validity of polygraph science, at least as to its propensity to produce false confessions." But, Pena notes, because evidence of polygraph examinations is inadmissible, he would be barred from doing so. Pena refers to this as an "evidentiary conundrum" Agent [redacted] created by not conducting the polygraph examination separately from the post-polygraph interview. However, we find no "evidentiary conundrum" or Sixth Amendment violation in admitting Pena's post-polygraph confession under these circumstances.

Although evidence of a polygraph examination and its results are not admissible at trial, the use of polygraphs as a means of interrogation does not violate an accused's constitutional rights or render a subsequent confession inadmissible. *See Hazlett v. State*, No. 05-16-00495-CR, 2018 WL 1373949, at *2 (Tex. App.—Dallas Mar. 19, 2018, pet. ref'd) (mem. op., not designated for publication). To the contrary, confessions made during a post-polygraph interview are not deemed inadmissible simply because the examination itself would not be admissible. *McCorkle v. State*, No. 14-22-00512-CR, 2023 WL 6561068, at *3 (Tex. App.—Houston [14th Dist.] Oct. 10, 2023, no pet.) (mem. op., not designated for publication) ("Appellant has not provided any authority on point, nor after reasonable research have we found any, to supporting [sic] his contention that the inadmissibility of the polygraph test taints, or implicates the inadmissibility of, his confession given after the exam.") (citing *Collins v. State*, 352 S.W.2d 841, 845 (Tex. Crim. App. 1961) ("The fact that appellant was given a lie detector test prior to making the confession did not render the same inadmissible.")).

Pena appears to acknowledge that other courts have held that when a defendant has made a confession on the heels of polygraph examination, the proper course of action is—when

possible—to redact any reference to the polygraph examination or its results when admitting evidence of the confession. *See Holt v. State*, No. 05-14-00914-CR, 2016 WL 3018793, at *22 (Tex. App.—Dallas May 18, 2016, pet. ref'd) (mem. op., not designated for publication).

Here, we find no impediment to redacting evidence of the polygraph examination and its results from Pena's post-polygraph confession. As set forth above, during the post-polygraph interview, Agent [redacted] initially made a series of references to the polygraph examination and its results, informing Pena that he appeared to be "affected" by one of the questions he asked during the examination. However, Agent [redacted] later questioning centered solely on the child-victim's statement and his urging Pena to apologize to the child and take responsibility for his conduct. By our estimation, Pena's first inculpatory statement was not made until over 20 minutes after Agent [redacted] last reference to the polygraph examination, thereby allowing a redacted portion of the recording to be played for the jury without the jury hearing any evidence of the examination. We encourage the parties to thoroughly review the recording to ensure that no such reference is contained in any redacted version of the recording that may be played for the jury.

We further conclude that admitting a redacted portion of the recording without reference to the polygraph examination or its results would not violate Pena's Sixth Amendment rights. Although Pena believes he has a Sixth Amendment right to question Agent [redacted] regarding the methods he used to conduct the examination, we see no relevance to such a line of questioning under these circumstances. Pena's inculpatory statements not only came well after Agent [redacted] last reference to the polygraph examination, but more importantly, they did not arise, either directly or indirectly, from any questions Agent [redacted] asked him about the examination. Instead, Pena made his inculpatory statements in direct response to Agent [redacted] statement that he "knew" Pena

committed the offense based on the child-victim's statements, rather than on any knowledge he obtained from the polygraph examination.

Accordingly, we cannot say that Pena's Sixth Amendment rights would be violated by his inability to question Agent [redacted] about his polygraph examination methods. *See Foster v. State*, 180 S.W.3d 248, 251 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.) (concluding that defendant's Sixth Amendment rights were not violated where the question he sought to ask the witness was not only irrelevant but likely to cause confusion of the issues). We therefore conclude that the trial court could not have granted Pena's motion to suppress based on his Sixth Amendment argument.

VI. ALLEGED PROMISE OF A BENEFIT

We next consider whether the trial court could have properly granted Pena's motion to suppress based on his argument that his confession was involuntary as the result of Agent [redacted] alleged "promise" of probation if he confessed to the offense. We conclude that it could not have.

A. Applicable law

Article 38.21 of the Code of Criminal Procedure provides that an accused's statement "may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." Tex. Code Crim. Proc. Ann. art. 38.21. To meet constitutional standards, a confession must be both voluntary and taken in compliance with *Miranda*.[4] *Moss v. State*, 75 S.W.3d 132, 139 (Tex. App.—San Antonio 2002,

[4] Although Pena points out that Agent [redacted] only read him his *Miranda* rights before the polygraph examination and did not read them again before beginning his post-polygraph interview, he does not argue on appeal that his confession was given in violation of *Miranda*. Instead, he correctly points out that being properly Mirandized does not resolve the question of whether his confession was voluntarily made.

pet ref'd). In assessing the voluntariness of a statement, we consider the totality of the circumstances under which the statement was made, and ultimately whether the appellant's will was overborne. *See Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997) (en banc). "A statement is not voluntary if there was 'official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.'" *Moss*, 75 S.W.3d at 139 (quoting *Matter of V.M.D.*, 974 S.W.2d 332, 346 (Tex. App.—San Antonio 1998, pet. denied)).

For a promise to render a confession involuntary, the Court of Criminal Appeals has adopted a three part-test, requiring evidence that (1) the promise was "positive"; (2) it was "made or sanctioned by someone in authority"; and (3) it was "of such an influential nature that it would cause a defendant to speak untruthfully." *Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App. 2004); *Lopez v. State*, 610 S.W.3d 487, 498 (Tex. Crim. App. 2020) (recognizing same). As the San Antonio Court of Appeals has explained, "[t]o determine whether a promise is likely to influence the defendant to speak untruthfully, we look to whether the circumstances of the promise made the defendant inclined to admit a crime she had not committed." *Cameron v. State*, 630 S.W.3d 579, 593 n.3 (Tex. App.—San Antonio 2021, no pet.) (citing *Harty v. State*, 229 S.W.3d 849, 856 (Tex. App.—Texarkana 2007, pet. ref'd)). The "promise at issue must be of an exceptional character before it will invalidate an otherwise voluntary confession." *Id.* (citing *Espinosa v. State*, 899 S.W.2d 359, 364 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Guerrero v. State*, No. 04-08-00249-CR, 2009 WL 2525434, at *8 (Tex. App.—San Antonio Aug. 19, 2009, pet. ref'd) (mem. op., not designated for publication)).

B. Analysis

Applying this three-part test, we conclude, as a matter of law, that Pena did not establish that his confession was involuntary.

The record reflects that Agent [redacted] did not hold himself out as a person who was "in authority" or in a position to make a promise of a benefit. To the contrary, throughout the interview, Agent [redacted] told Pena that he was not the investigator assigned to his case and that it would be up to the investigator and the other "decision-makers" to determine how his case would be handled.

Even if we were to assume that Agent [redacted] was a person "in authority" to make a promise of leniency, we disagree with Pena's argument that Agent [redacted] made any "positive" statements of such an influential nature so as to cause him to confess to a crime that he did not commit or to speak untruthfully. Pena's argument rests exclusively on a passage in which Agent [redacted] informed Pena that the investigator assigned to his case would want to know he takes "responsibility for [his] actions," he knows what he did was "wrong," it was "one mistake, one time," and was "not [going] to happen again" and did not "happen again." Agent [redacted] then stated, it was "one mistake, one time [and] a person like that . . . maybe probation . . . classes, counseling . . . something like that . . [.] " And he further told Pena that if he says he is sorry and apologizes to the child and her family, "that's what [the investigator] needs to know, and I think you'll come out pretty good," as the "decisionmakers" will view you as a "human being . . . not a predator."

We do not find that this passage—or any other passage in the recording—constituted an improper promise that would have overborne Pena's will such that it caused him to confess to a crime that he did not commit. "A confession is not rendered inadmissible because it is made after an accused has been told by the officer taking the confession that it would be best to tell the truth . . ." or "it would be best for him to go ahead and make a statement," or "it would be better to get

his business straight." *Dykes v. State*, 657 S.W.2d 796, 797 (Tex. Crim. App. 1983) (en banc); *see also Johnson v. State*, 68 S.W.3d 644, 654 (Tex. Crim. App. 2002) (providing that officer's representation that an accused's cooperation would be conveyed to the trial court was not a promise inducing a confession); *Drake v. State*, 123 S.W.3d 596, 603 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (concluding that an officer's general, non-specific statement that an appellant "could help herself" if she confessed did not render appellant's statement involuntary). Stated otherwise, such statements suggesting that a person may be treated more favorably if he confessed are not considered to be so influential that they would cause a person's will to be "overborne" to such an extent that he would involuntarily confess to a crime he did not commit. *See Allen v. State*, No. 14-14-00708-CR, 2016 WL 269900, at *3–4 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016, no pet.) (mem. op., not designated for publication) (interviewer's suggestion that he would be treated more favorably if he provided an "explanation" for his conduct and that interviewer would speak with the "investigators" about his case did not rise to the level of a "promise" that would have rendered the defendant's statements involuntary); *Herrera v. State*, 194 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

At most, Agent [redacted] statement was simply a statement of fact that a confession can sometimes result in leniency, but we do not view it as a promise. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (en banc) (noting that interviewer's statement that a confession could result in leniency was a statement of fact and not a promise of leniency in exchange for a confession); *Mason v. State*, 116 S.W.3d 248, 261 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (officer's statements that defendant's situation would "go better" for him if he gave a confession did not amount to a promise).

Appellant, however, seeks to analogize his situation to the facts in *Arizona v. Fulminante*, 499 U.S. 279 (1991) in which the United States Supreme Court agreed with a state court's finding that there was sufficient evidence upon which to find that a defendant's confession had been coerced by a law enforcement agent's promise of protection. In that case, the defendant was facing possible charges for raping and murdering his eleven-year-old stepdaughter but was in prison on an unrelated offense. *Fulminante*, 499 U.S. at 282. An undercover law enforcement agent in the prison told him that his fellow inmates were threatening to harm him due to what he had done to his stepdaughter, and he promised to "protect" the defendant if he confessed to the crime. *Id.* at 282–83. The Court found that the defendant's resulting confession was involuntary because the defendant faced a "credible threat of physical violence" if he did not confess, and the agent's promise of protection therefore caused the defendant's "will [to be] overborne in such a way as to render his confession the product of coercion." *Id.* at 287–88.

Pena contends his case is similar, arguing it is well-known that Texas prisons are dangerous places for those convicted of sexual crimes against children, and therefore, "even a glimmer of false hope of probation could persuade the accused to incriminate himself to lessen the risk." Unlike the situation in *Fulminante*, however, there is nothing in the record before us to suggest that Pena faced a "credible threat of violence" if he did not confess or that Agent [redacted] offered to protect him from any such threat. To the contrary, Agent [redacted] made it clear that he was not able to provide Pena with any direct help and that it would be up to the investigator or other decisionmakers to decide his fate.

Accordingly, we conclude that the trial court erred to the extent it found that Pena's inculpatory statements were "coerced" due to Agent [redacted] improper promise of probation or other benefit.

VII. CONCLUSION

The trial court's judgment is affirmed in part and reversed in part. We affirm the trial court's order granting Pena's motion to suppress insofar as it orders the suppression of any evidence relating to the polygraph examination and its results. But we reverse the trial court's order insofar as it (1) suppresses the recorded portion of the post-polygraph interview that contains no reference to the examination or its results and (2) suppresses the inculpatory statements Pena made during that portion of the interview.[5]

LISA J. SOTO, Justice

September 27, 2024

Before Alley, C.J., Palafox, Soto, JJ.

(Do Not Publish)

[5] This opinion should not be read as prohibiting Pena from challenging the admissibility of the post-polygraph interview or his inculpatory statements on other grounds in the trial court. Its holding only pertains to the two grounds addressed in the opinion.

APPENDIX 9

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS, Appellant, v. REYNALDO ALBERTO PENA Appellee.	§ § § § § §	No. 08-23-00303-CR Appeal from the 229th Judicial District Court of Duval County, Texas (TC# 20-CRD-45)

SUBSTITUTED JUDGMENT

The Court has considered this cause on the record and concludes there was error in the judgment. We affirm the trial court's order granting Pena's motion to suppress insofar as it orders the suppression of any evidence relating to the polygraph examination and its results. We reverse the trial court's order insofar as it (1) suppresses the recorded portion of the post-polygraph interview that contains no reference to the examination or its results and (2) suppresses the inculpatory statements Pena made during that portion of the interview.

IT IS SO ORDERED THIS 4TH DAY OF DECEMBER 2024.

LISA J. SOTO, Justice

Before Rodriguez, C.J., Palafox, Soto, JJ.

APPENDIX 10

CAUSE NO. 08-23-00303-CR

IN THE COURT OF APPEALS

FOR THE EIGHTH JUDICIAL DISTRICT OF TEXAS

AT EL PASO, TEXAS

THE STATE OF TEXAS

V.

REYNALDO ALBERTO PEÑA

MOTION FOR EN BANC RECONSIDERATION

To the Honorable Court of Appeals:

Appellee files this Motion for En Banc Reconsideration under Tex. R. App. P. 49.7. In support of this motion, Appellee shows the following:

1. The Eighth District Court of Appeals issued a memorandum opinion on September 27, 2024, in which the trial court's judgment was affirmed in part and reversed in part. Therefore, the Motion for En Banc Reconsideration is due no later than Friday, October 11, 2024.

2. The grounds for reconsideration are as follows:

I. In the memorandum opinion, this Court makes a passing reference to totality of the circumstances analysis but applies a three-prong test after misstating Appellee's argument as based on a positive promise rather than totality of the circumstance involuntariness.

At page seven, the memorandum opinion summarizes the portion of Appellee's argument involving involuntariness as follows: "his confession was 'involuntary,' as Agent [redacted] used 'coercive insistence and seductive assurance' during and after the polygraph examination to obtain his confession, *in part* by suggesting he might receive probation if he were to confess." (*5, emphasis added.) This was, in fact, *part* of Appellee's voluntariness argument. However, by page seven, the opinion takes the "seductive assurance" component of the argument, controverts it into a would-be positive promise, and makes that the entirety of Appellee's argument, thereby neglecting to consider Appellee's totality of the circumstance analysis.

The opinion mirrors the State's brief to the extent that it cites, briefly, the proper totality of the circumstances analysis, but then does not apply it. As the State had done the same, Appellee proffered in his brief not only a totality of the circumstances argument, but an analysis of Court of Criminal Appeals caselaw which suggests the three-prong test is not proper on these facts. (*See* Appellee's Brief at 27-30.) The memorandum opinion sidesteps this question and does not explain why the proper totality of the circumstances analysis ought not be applied, other than to hold that the conditions under which the statement was given are not relevant.

II. The memorandum opinion states, incorrectly, that Appellee agrees that "the portion of the recording in which the polygraph examination was conducted, as well any portion of the recording in which either Agent [redacted] or Pena referred to the examination or its results, would not be admissible."

This suggests that Appellee stipulates to its exclusion. Appellee does not. It is true that Appellee understands this is the state evidentiary rule. However, from his proposed order on suppression through his brief to this Court, Appellee has advocated that, should the entirety of the statement not be suppressed, then the local rule on polygraph evidence must take a backseat to Appellee's Fifth and Sixth Amendment rights.

The defense having raised the voluntariness question, Reynaldo Peña also has a statutory right to a jury instruction. *See* Tex. Code Crim. Proc. Art. 38.22, section 6;[1] *see, also, Oursborn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008).[2] "When

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[1] "In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions."

[2] "The language 'where a *question* is raised' contrasts with the language found in Article 38.22, § 7 and Article 38.23 which speaks of the *evidence* raising an issue. Because raising a 'question' is what triggers the trial court's duty under Section 6 to conduct a hearing outside the presence of the jury, the only reasonable reading of this language is that a "question is raised" when the trial judge is notified by a party or raises on his own an issue about the voluntariness of the confession. This is the sequence of events that seems to be contemplated by Section 6: (1) a party notifies the trial judge that there is an issue about the voluntariness of the confession (or the trial judge raises the issue on his own); (2) the trial judge holds a hearing outside the presence of the jury; (3) the trial judge decides whether the confession was voluntary; (4) if the trial judge decides that the confession was voluntary, it will be admitted, and a party may offer evidence before the jury suggesting that the confession was not in fact voluntary; (5) if such evidence is offered before the jury, the trial judge shall give the jury a voluntariness instruction. It is only

the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement." Tex. Code Crim. Proc. Art 38.22, section 7. Even where a judge finds "as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof." Tex. Code Crim. Proc. Art. 38.22. Thus, jury instructions on voluntariness are required when some evidence regarding the voluntariness of a defendant's statement is presented, *even where a judge correctly denies a motion to suppress* the statement. *See Paz v. State*, 548 S.W.3d 778 (Tex. App. 2018) (emphasis added).

The Art. 38.22 right to have a jury hear the fact question of voluntariness under the totality of the circumstances actually goes beyond police conduct because a "claim of involuntariness under article 38.22 is broader than federal due process claims for involuntariness." *Paz v. State*, 548 S.W.3d 778, 789 (Tex. App. 2018). "Claims of involuntariness under Article 38.22 can be, but need not be, predicated on police overreaching, and they *could involve the sweeping inquiries into the state*

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after the trial judge is notified of the voluntariness issue (or raises it on his own) that a chain of other requirements comes into play, culminating in the defendant's right to a jury instruction."

of mind of a criminal defendant who has confessed that are excluded under federal due process claims." *Id.* (emphasis added). This demonstrates further the inadequacy of a three-prong test for a positive promise to be dispositive on the voluntariness issue rather than the traditional totality of the circumstances analysis proffered by Appellant, and which he has a right to have a jury assess if the entirety of the statement is not to be suppressed. In effect, the decision handed down in this Court's memorandum opinion will impinge upon this right by admitting the statement while effectively prohibiting any cross-examination pertaining to all relevant factors—including, but not limited to, the polygraph test—present during the first three hours of the encounter which are relevant to Appellee's state of mind while making the statement in question.

III. This Court should reconsider the assertion in its memorandum opinion that, "[a]lthough Pena believes he has a Sixth Amendment right to question Agent [redacted] regarding the methods he used to conduct the examination, we see no relevance to such a line of questioning under these circumstances." (at 12).

Having misconstrued Appellee's voluntariness argument, and thereby neglecting to apply the totality of the circumstances analysis to the voluntariness question concerning the first three hours of the encounter, this Court neglects to specify why Appellee's Fifth and Sixth Amendment rights ought to be submissive to a State evidentiary rule concerning polygraph testing rather than the other way around, except as to state that such evidence would be "irrelevant." Such evidence

might be irrelevant if the three-prong test for a positive promise were dispositive. Since it is not, and because the voluntariness inquiry hinges in part on Mr. Peña's state of mind, this Court ought to reexamine the relevance question.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *See* Tex. R. Evid. 401. To be relevant to the proper totality of the circumstances analysis, the polygraph testing aspect of the encounter need not be the entire dispositive structure establishing a proper question for the jury on voluntariness; it need only be a contributing piece of the foundation, or, "a brick in the wall." Moreover, it is not just the polygraph testing itself that is a brick in the wall, but everything that comes with it. By ordering that entirety of the first three hours of the encounter is inadmissible but the resulting statement is admissible, this Court would impinge upon Reynaldo Peña's statutory right to present to a jury—with a proper instruction from the trial court—the fact question of voluntariness. This includes that he was instructed not to move, told how to position himself, had wires attached to him, subjected to an embarrassing questioning (multiple times), was enticed by (if not positively promised) the possibility of probation, and that this portion of the encounter lasted three hours.

If this Court prohibits the trial Court from allowing a robust cross examination of the polygraph examiner on the totality of the circumstances of his administration

of the polygraph examination, it subjugates Mr. Peña's Fifth and Sixth Amendment rights and his Art. 38.22 rights to a state evidentiary rule, and the trial court will not be able to fulfill its duty to give a proper jury instruction on voluntariness.

Surely, to address the issue of voluntariness, Reynaldo Peña will have to ask the polygraph examiner questions such as, "Did you ask him to change his posture? Did you ask him to sit still? Did he have anything attached to him? Did you ask him a series of questions? How many times did you ask him those questions and why? How long did you keep him seated in a restrained position and connected to a device? What did you tell the Defendant was your purpose in interviewing him?" Will the state evidentiary rule be satisfied if Appellee just does not use the word "polygraph? Moreover, by admitting the portion of the encounter that begins after three hours, but nothing before it, Reynaldo Peña not only is prevented from fully cross examining the agent on the circumstances of the statement; he is prevented from presenting relevant evidence in his case in chief on the issue of voluntariness. He is denied his Fifth Amendment right to testify freely on his state of mind at the time that an inculpatory statement was allegedly made and how he got there. If the ruling from this Court prevents the Defendant from calling an expert to testify on the impropriety of the polygraph examiner's behavior when administering the polygraph examination and the effect of how such a scenario could bring forth an involuntary statement, then the Court tramples not only his statutory rights under Art. 38.22, but

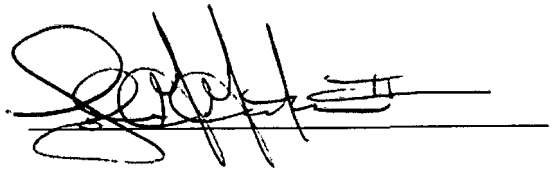
also his Fifth Amendment right to Due Process and Sixth Amendment Right to have a jury trial on issues related to guilt or innocence.

To hold that the United States Constitution must genuflect to a state evidentiary rule so that the prosecutor may more easily achieve his goal, is to trumpet a fanfare of welcome to the cynic who regards not those principles of the Natural Law which the Founders enshrined through the Fourth, Fifth, and Sixth Amendments.

PRAYER FOR RELIEF

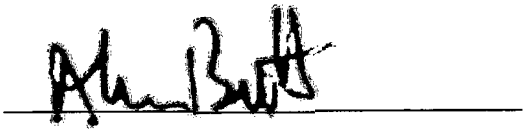
Therefore, Appellee prays this Honorable Court grant this Motion for En Banc Reconsideration and, should the Court grant said motion, this Court should announce that where the Appellee wishes to address the voluntariness of a statement allegedly made by the Appellee, `the right provided by the Confrontation Clause overrides the evidentiary rules excluding evidence of a polygraph examination having been administered. This Court should order that the trial court allow full and robust cross-examination of Special Agent [redacted] and allow the Defendant time and means to obtain a polygraph expert to contest or at least explain the methods used by Special Agent [redacted] in the administration of the polygraph examination at issue. The Appellee reasserts the request for oral argument.

Respectfully submitted,



JOHN GOODMAN II,
Attorney for Defendant
State Bar No. 24134581

Anglican Legal Aid & Reconciliation
221 E. 12th Street
Mission, TX 78572
(956) 377-0195
director@alartx.org



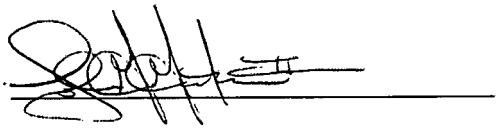
ABNER BURNETT
Attorney of Record
State Bar No. 03425770

205 W. Gardenia Avenue
McAllen, TX 78501
lawyerburnett@gmail.com

CERTIFICATE OF SERVICE

I, John Goodman II, Attorney for Appellee, do herein certify that on October 11, 2024, the foregoing motion was served on the State via e-filing.

Signed,



JOHN GOODMAN II,
Attorney for Appellee
State Bar No. 24134581

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director@alartx.org
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Associated Case Party: ReynaldoAlbertoPena

Name	BarNumber	Email	TimestampSubmitted	Status
Abner Burnett		lawyerburnett@gmail.com	10/11/2024 4:25:17 PM	SENT
John Goodman II		director@alartx.org	10/11/2024 4:25:17 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Barbara M.Ramirez		barbara.ramirez@co.duval.tx.us	10/11/2024 4:25:17 PM	SENT

APPENDIX 11

COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

THE STATE OF TEXAS,	§	
	§	No. 08-23-00303-CR
Appellant,	§	
	§	Appeal from the
v.	§	
	§	229th Judicial District Court
REYNALDO ALBERTO PENA	§	
	§	of Duval County, Texas
Appellee.	§	
	§	(TC# 20-CRD-45)
	§	

ORDER

The Court has considered Appellee's Second Motion for En Banc Reconsideration and concludes that the motion should be DENIED.

IT IS SO ORDERED this 7th day of January 2025.

LISA J. SOTO, Justice

Before Salas Mendoza, C.J., Palafox and Soto, JJ., Alley, C.J.,(Ret.)
Alley, C.J., (Ret., not participating)

APPENDIX 12

CAUSE NO. 08-23-00303-CR

IN THE COURT OF APPEALS

FOR THE EIGHTH JUDICIAL DISTRICT OF TEXAS

AT EL PASO, TEXAS

THE STATE OF TEXAS

V.

REYNALDO ALBERTO PEÑA

APPELLEE'S SECOND MOTION FOR EN BANC RECONSIDERATION

To the Honorable Court of Appeals:

As this court has modified its judgment and issued a substituted opinion, Reynaldo Peña, Appellee, files this Further Motion for Rehearing as provided for under Tex. R. App. P. 49.4. Appellee clarifies two things:

I.

Reynaldo Peña does not challenge the position that the courts have held for over 60 years, that polygraph examinations are inherently unreliable, *Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012). The issue is whether alleged statements of culpability in this case were given voluntarily. The trial court determined the statements were not voluntarily given. This Court disagrees. Regardless, Texas law grants Reynaldo Peña the right to have the issue decided by a jury, if he so requests at trial. As such, the portion of the recording in which the polygraph examination was conducted, as well any portion of the recording in which either Agent [redacted] or Peña referred to the examination or its results, would certainly be admissible in evidence at trial as critical evidence upon which Reynaldo Peña relies to demonstrate to the jury his contention that his alleged statements of culpability were not voluntarily made.

The State seeks to admit a statement made by the Appellee during the polygraph examination. The State may now contend, as this Court seems to do, that the "post-test interview" was not part of said examination. That contention does not match the State's own evidence, given that Special Agent [redacted] himself admitted under oath that the "post-test interview" is actually part of the polygraph test methodology that the State includes in its training of polygraph examiners. (Reporter's Transcript, 77-78.) Reynaldo Peña has a Fifth and Fourteenth

Amendment Due Process right under the United States Constitution to challenge the voluntariness of the statement, and a procedural right in Texas to present evidence and submit a question to the jury as to voluntariness. *See* Tex. Code Crim. Proc. Art. 38.22, sections 6-7.

To establish that the statements were given under circumstances that raise a question for the jury as to whether they were given voluntarily, a defendant must address comprehensively the circumstances surrounding his making of the statements. Reynaldo Peña must have broad leeway to cross-examine Special Agent [redacted] Otherwise, Reynaldo Peña is denied Due Process under the Fifth and Fourteenth Amendments, and the Rights afforded by the Sixth Amendment Confrontation Clause. The circumstances are relevant to the voluntariness question, a question to which the Appellee has statutory right to a jury instruction. Tex. Code Crim. Proc. Art. 38.22, sections 6-7, *see*, *also*, *Oursborn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008).

The Art. 38.22 right to have a jury hear the fact question of voluntariness under the totality of the circumstances actually goes beyond police conduct because a "claim of involuntariness under article 38.22 is broader than the federal due process claims for involuntariness." *Paz v. State*, 548 S.W.3d 778, 789 (Tex. App. 2018). "Claims of involuntariness under Article 38.22 can be, but need not be, predicated on police overreaching, and they could involve the sweeping inquiries into the state

of mind of a criminal defendant who has confessed that are excluded under federal due process claims." *Id.* Even where a judge finds "as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it *shall be instructed* that *unless the jury believes beyond a reasonable doubt that the statement was voluntarily made*, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof." Tex. Code Crim. Proc. Art. 38.22 (emphasis added). Thus, jury instructions on voluntariness are required when some evidence regarding the voluntariness of a defendant's statement is presented, even where a judge correctly denies a motion to suppress the statement, *Paz v. State*, 548 S.W.3d 778 (Tex. App. 2018) (emphasis added), citing *Vasquez v. State*, 179 S.W.3d 646, 662-663 (Tex. App.—Austin 2005), aff'd , 225 S.W.3d 541 (Tex. Crim. App. 2007).

In sum, Reynaldo Peña has a right to have a jury of his peers consider his state of mind when he made the statements in question, which requires that the jury consider the entirety of the encounter—that is, the hours immediately preceding the statements—and how said questioning, *including the polygraph testing*, would influence the state of mind of an ordinary citizen of Duval County, Texas, or even this one in particular. It is a mixed question of law and fact, and, with a proper jury instruction on the law concerning voluntariness and evidentiary relevance, institutional competence belongs to a jury of Reynaldo Peña peers to

decide whether the *entirety* of the polygraph interrogation—rather than merely the "post-test interview" portion—raises reasonable doubt as to whether Reynaldo Peña was immediately thereafter in the state of mind that would permit him to make a voluntary statement.

II.

In his brief supporting the Motion to Suppress, Reynaldo Peña raised his right to present the issue of voluntariness to a jury at trial. He dedicated an entire section of his brief to the argument that his right to present the issue of voluntariness at trial overrides the old general rule that polygraphs were inadmissible due to being unreliable. (Brief in Support of Motion, Clerk's Record - 98 ("The Confrontation Clause in the Sixth Amendment to the United States").) The relevance of the polygraph experience for Reynaldo Peña speaks to the issue of voluntariness. Appellee requested the pertinent alternative relief in the Brief. "In the alternative, the Court should announce that the right provided by the Confrontation Clause overrides the evidentiary rules regarding admissibility of evidence of a polygraph examination having been administered, allow full and robust cross-examination of Special Agent [redacted] and allow the Defendant time and means to obtain a polygraph expert to contest or at least explain the methods used by Special Agent [redacted] in the administration of the polygraph examination at issue." Brief in Support of Motion, Clerk's Record -104.

Reynaldo Peña addressed the issue again in his Appellee brief at page 14: "The Appellee, Reynaldo Peña, has a Due Process Constitutional right to challenge the voluntariness of the statement, and a procedural right in Texas to present evidence and submit a question to the jury as to voluntariness. *See* Tex. Code Crim. Proc. Art. 38.22 Sections 6-7." He addressed it again in his Motion for En Banc Reconsideration, page three, "The defense having raised the voluntariness question, Reynaldo Peña also has a statutory right to a jury instruction. *See* Tex. Code Crim. Proc. Art. 38.22, section 6; *see, also, Oursborn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008)."

The trial court granted the Motion to Suppress, so it did not address the alternative request for relief. This Court first affirmed the trial court's decision insofar as it suppressed evidence of the polygraph examination having been administered and its results but reversed to the extent that the trial court had suppressed the "post-test interview" and inculpatory statements Pena made during that part of the polygraph interrogation. In the subsequent opinion, the one giving rise to this Second Motion for Rehearing, this Court sets out a long analysis of the Defendant's Sixth Amendment right to cross examine a witness, concluding that:

1. Admitting a redacted portion of the recording without reference to the polygraph examination or its results would not violate Pena's Sixth Amendment rights;
2. Questioning Agent [redacted] regarding the methods he used to conduct the examination could not produce any relevant evidence; and

3. The trial court could not have properly granted Pena's motion to suppress based on his Sixth Amendment argument.

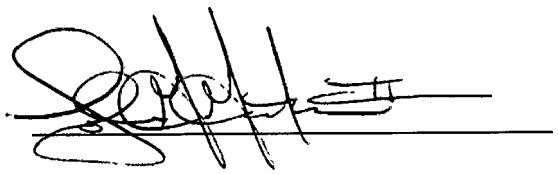
This Court never addresses directly whether, or why, it believes it is appropriate to deny the Defendant an opportunity to present evidence and get an instruction to the jury about the voluntary nature of the alleged inculpatory statements, given the circumstances under which they were obtained. This Court neglects to specify why Appellee's Fifth and Sixth Amendment rights under the United States Constitution ought to be submissive to a state case law evidentiary rule concerning the reliability of polygraph testing, a matter not even pertaining to the position asserted by the Appellee. In point of fact, the current ruling of this Court invites and supports law enforcement using the polygraph examination as an interrogation tool that can never be called into question in the presence of a jury. Despite the admission by Agent [redacted] that the polygraph examination protocol includes the "post-test interview" and that examiners are trained to use it as an interrogation tool, this ruling deliberately inoculates all manner of questionable behavior protected under the ragged umbrella of that case law from scrutiny by a jury given instructions by the judge.

PRAYER FOR RELIEF

As the trial court did not rule on the Appellee's alternative request for relief and the State did not address it at all in its appeal, Reynaldo Peña asks this Court to reconsider this appeal in the light articulated above, and to withdraw its ruling insofar as it suppresses evidence of the polygraph examination having been administered and its results, and to remand the case to the trial court with the issue of the alternative relief requested being left for the trial court to decide.

In the alternative, Appellee asks this Court to recognize the primacy of the Appellee's right to a jury instruction, as provided by Tex. Code Crim. Proc. Art. 38.22, sections 6-7, and the right provided by the Confrontation Clause of the Sixth Amendment, in order that he be permitted to explore evidence that could give rise to such an instruction; to give preference to the constitutional and statutory rights of the accused over the general evidentiary rules regarding the unreliability of polygraph evidence and its general inadmissibility; to allow for a full and robust cross-examination of Special Agent [redacted] in the presence of a jury; and to allow the Defendant time and means to obtain a polygraph expert to contest or at least explain the methods used by Special Agent [redacted] in the administration of the polygraph examination at issue.

Respectfully submitted,



JOHN GOODMAN II,
Attorney for Defendant
State Bar No. 24134581

Anglican Legal Aid & Reconciliation
221 E. 12th Street
Mission, TX 78572
(956) 377-0195
director@alartx.org

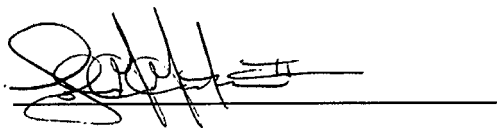
ABNER BURNETT
Attorney of Record
State Bar No. 03425770

205 W. Gardenia Avenue
McAllen, TX 78501
lawyerburnett@gmail.com

CERTIFICATE OF SERVICE

I, John Goodman II, Attorney for Appellee, do herein certify that on December 19, 2024, the foregoing motion was served on the State via e-filing.

Signed,



JOHN GOODMAN II,
Attorney for Appellee
State Bar No. 24134581

APPENDIX 13

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-23-00303-CR
Appellant,	§	Appeal from the
v.	§	229th Judicial District Court
REYNALDO ALBERTO PENA	§	of Duval County, Texas
	§	(TC# 20-CRD-45)
Appellee.	§	

SUBSTITUTED MEMORANDUM OPINION[1]

Appellee Reynaldo Alberto Pena was indicted on one count of aggravated sexual assault of a child under the age of six. Prior to his indictment, Pena voluntarily submitted to a polygraph examination and a post-polygraph interview, which were recorded in a single session. Pena moved to suppress the entire recording as well as any evidence of the inculpatory statements he made during the post-polygraph interview, claiming they were involuntarily made due to the allegedly coercive tactics the polygraph agent used before and during the post-polygraph interview, which included the agent's alleged promises or "reassurances" that Pena would be treated more

[1] The Appellee's Motion for En Banc Reconsideration is denied. The September 27, 2024 opinion has been withdrawn, and this opinion is substituted in its place.

"leniently" if he confessed to the assault. In addition, Pena argued that because evidence of the examination itself would not be admissible at trial, the admission of his statements during the post-polygraph examination would violate his Sixth Amendment right to confront witnesses, as he would be unable to fully cross-examine the polygraph agent regarding the context in which the statements were made. The trial court granted the motion and suppressed the entire recording without stating its reasons. This appeal followed.[2]

For the reasons below, we affirm the trial court's decision insofar as it suppresses evidence of the polygraph examination and its results, but we reverse to the extent it suppresses the post-polygraph interview and the inculpatory statements Pena made during the interview.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The polygraph examination

The child-victim reported to her mother that Pena, who at the time was married to the mother's aunt, had licked her vagina while he was babysitting the child and her siblings. Pena thereafter voluntarily agreed to submit to a polygraph examination at the Jim Hogg County Sheriff's Office. Pena arrived at the office of his own accord and met with a Texas Department of Public Safety (DPS) special agent, [redacted]

Prior to the examination, Agent [redacted] read Pena his *Miranda* rights, and Pena stated that he understood his rights. He signed a "waiver of rights" affirming that he was "knowingly, intelligently, and voluntarily" waiving his *Miranda* rights as listed on the document. Pena also signed a document that indicated he voluntarily agreed to the polygraph examination.

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[2] This case was transferred from the Fourth Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* Tex. Gov't Code Ann. § 73.001. We decide the case in accordance with the precedent of the transferor court to the extent it conflicts with our own. Tex. R. App. P. 41.3.

The examination lasted approximately two hours and 42 minutes. During the examination, Agent [redacted] asked Pena several baseline questions as well as two questions related to the offense: (1) whether he had sexual contact with a minor; and (2) whether he licked a child's vagina. Agent [redacted] repeated the examination five times, asking the same or similar baseline questions each time. Each time, Pena denied he had engaged in any such conduct.

B. The post-polygraph interview

Following the examination, Agent [redacted] took a break of approximately 20 minutes. After the break, Agent [redacted] indicated that he had reviewed the "data" and asked Pena if he was a "predator" or a "monster" from whom we must "protect" our children.

Pena responded in the negative and said he had never been in trouble before. Agent [redacted] informed Pena that during the examination, the question of whether he had licked a child's vagina "affected" him the most. Agent [redacted] told Pena that this was "the one" thing he needed to "explain" so that people would not think he was "that type of person," i.e., a "predator." But Pena continued to deny having engaged in any such conduct.

Thereafter, Agent [redacted] made no further reference to the polygraph examination. Instead, he focused on the child-victim's allegation that Pena had licked her vagina while they were in the bedroom. Agent [redacted] pointed out that the child-victim indicated that Pena stopped when she asked him to, which the agent opined made her statement both "good and bad," as it demonstrated he did not "force" himself on her in other ways and showed that he had "compassion." Agent [redacted] repeatedly told Pena he did not believe Pena was a predator, but rather a "good guy" who made a "mistake" and stopped when he realized it was wrong.[3]

[3] Agent [redacted] also told Pena he believed the child's mother was to blame for not taking care of her daughters and for "forcing" him to watch them. He further blamed the mother's aunt (Pena's now ex-wife) for leaving him alone with the children, assuring Pena that he was only "human," that "curiosity got the best of [him]," and that he got "lost in the heat of the moment."

Agent [redacted] then encouraged Pena to acknowledge his "mistake," suggesting that if he did, the "decision-makers" would view him as "sincere" and as a "human being" who simply made a mistake as we all do, rather than a "monster." At one point, Agent [redacted] suggested that a person who took responsibility for his actions could possibly receive "probation."

Agent [redacted] told Pena he believed the situation could have been much "worse," detailing cases in which individuals had committed much more serious sex offenses.

He stated that Pena's case was not like those, as the allegation in his case was a "simple lick" and "nothing serious." However, Agent [redacted] repeatedly told Pena that he needed to explain his conduct, take responsibility for it, and apologize to the child, or else he would "look bad" and would risk being viewed as "the type we need to put away" or "lock[ ] up."

C. The confession

After repeatedly being encouraged to apologize, Pena said he was "sorry." When Agent [redacted] asked why, Pena stated that "nothing happened." However, when Agent [redacted] insisted that he "knew" something happened because the child's sisters had seen him go into the bedroom with her, Pena responded, "I just licked . . . that's it." Then, Pena explained that the child had walked into the room by herself, laid down on the bed, lifted up her dress, pulled down her panties, and asked him to lick her. Pena stated that he pulled her panties up and pulled them to the side, then licked the child in the middle of her vagina, but stopped when she asked him to. At Agent [redacted] request, Pena marked the area where he had licked the child on a plastic replica, and he signed and dated it July 25, 2019. When asked why he licked her, Pena asserted that the child was "teasing" him, but he realized he "screwed up." When Agent [redacted] asked why he did not tell him about the incident sooner, Pena explained he was "embarrassed" and thought that what he had done was "worse."

Agent [redacted] then called an investigator into the room, and Pena repeated the same sequence of events to him, indicating that he licked her once but did "nothing else." The investigator placed Pena under arrest. Pena was indicted on one count of aggravated sexual assault based on the allegation that he penetrated the child's vagina with his mouth.

D. Pena's motion to suppress

Pena filed what he labeled as: "Defendant's Motion to Suppress Electronic Recording, Both Video and Audio, of Polygraph Examination of the Defendant." In his motion and supplemental briefing, he sought to suppress the entire recording, to include the approximately two-hour-42-minute polygraph examination as well as the one-hour-ten-minute post-polygraph interview. Alternatively, he sought to suppress "any statement made by the Defendant that the State asserts is an inculpatory admission of any wrongdoing."

Pena's argument was two-fold. First, he argued his confession was "coerc[ed] and involuntary," asserting [redacted] used "coercive insistence and seductive assurance" during and after the polygraph examination to obtain his confession, in part by suggesting that he might receive probation if he were to confess. According to Pena, during the interview, Agent [redacted] also engaged in "badgering and cajoling." Pena asserted the agent's "argumentative and accusatory conduct, prolonged and aggressively repetitive for over three hours, was so egregious that any statement obtained thereby was unlikely to have been the product of essentially free and unconstrained choice by the Defendant."

Second, he argued that because his confession came on the heels of the polygraph examination, and because evidence of a polygraph examination is inadmissible at trial, his Sixth Amendment right to cross-examine Agent [redacted] about the context in which his confession arose would be violated if his inculpatory statements were admitted at trial.

The State, in turn, acknowledged that evidence of a polygraph examination is not admissible at trial and assured the court it had "no intention of offering any statements or questions that arose during the polygraph portion of the defendant's interview nor make any reference to the polygraph examination." However, the State asserted it was entitled to offer Pena's statements during the post-polygraph portion of his interview, subject to redacting any reference to the polygraph examination itself or the results thereof. The State also maintained that Agent [redacted] did not engage in any coercive tactics or make Pena any improper promises.

E. The hearing

At the hearing on the motion, Agent [redacted] testified that Pena voluntarily appeared for the polygraph and waived his *Miranda* rights both orally and in writing. Agent [redacted] testified that Pena never asked to terminate the interview and did not ask for an attorney.

Agent [redacted] explained that following a polygraph examination, he typically tells an examinee what questions "affected" him or what caused him to "not pass the test." He then asks the examinee to explain why a particular question may have affected him and typically continues to ask the examinee for an explanation until the examinee wants to leave or requests an attorney.

During the post-polygraph phase of his interview with Pena, Agent [redacted] explained, he was trying to get him to "be honest and tell the truth," in part by trying to get him "to minimize his [conduct] so he [could] overcome the fear and embarrassment of admitting to his . . . actions." According to Agent [redacted] he did not make any promise that Pena would get probation or any other favorable treatment if he confessed; he was just "throw[ing] options out there that are available for everybody" and letting Pena know "some possibilities" if he did or did not confess.

F. The trial court's order

The trial court granted Pena's motion to suppress. In its amended "Order Granting Defendant's Motion To Suppress Electronic Recording, Both Video And Audio, Of Polygraph Examination Of The Defendant," the trial court ruled:

> After having heard from both parties and considered this Motion and submitted Briefs, the Court Grants the Motion to Suppress and rules inadmissible at trial the entire above-described audio and video recording of the polygraph examination, including but not limited to any excerpts that the State asserts are an inculpatory admission of wrongdoing. This includes any evidence deriving from the polygraph examination episode. It includes testimony from Special Agent [redacted] or any other witness regarding any portion of the polygraph examination or any evidence deriving from the polygraph examination.

The State appealed.[4]

II. PARTIES' ARGUMENTS

The State first notes that the trial court did not provide the basis for its ruling and assumes the trial court's decision was based on Pena's argument that his confession resulted from Agent [redacted] improper promise of a benefit, i.e., that he could receive probation if he confessed. And the State argues the record does not support a conclusion that Agent [redacted] made an improper promise that would render Pena's inculpatory statements involuntary.

Pena counters that the trial court could have reasonably concluded that his confession was coerced and involuntary, applying a "totality of the circumstances" test, primarily due to Agent [redacted] "[r]epeated reassurances—including, but not limited to, the possibility of probation" if he confessed with the intent to "gain an inculpatory statement from [him]." In addition, Pena contends Agent [redacted] influenced him to incriminate himself using "hope" and "fear"; Pena posits that the agent's "insistence" that he was guilty caused him to fear imminent arrest, and the agent's

[4] The State asserts that it requested findings of fact and conclusions of law, which the trial court failed to issue. But its request is not in the clerk's record. No findings of fact or conclusions of law appear in the record.

"seductive assurances" provided "false hope" that he could be treated more leniently if he confessed.

Pena further points out that he raised a second issue in the trial court, which the State did not address in its appellate briefing, regarding whether his Sixth Amendment rights would be violated by admitting his inculpatory statements due to his inability to fully cross-examine Agent [redacted] regarding the context in which the statements were made, given the inadmissibility of evidence relating to polygraph examinations. And Pena contends this could have properly formed the basis for the trial court's decision to grant his motion to suppress.

III. INADMISSIBILITY OF POLYGRAPH EXAMINATIONS AND RESULTS

As a preliminary matter, the parties appear to agree that the portion of the recording in which the polygraph examination was conducted, as well any portion of the recording in which either Agent [redacted] or Pena referred to the examination or its results, would not be admissible in evidence. We agree.

The Court of Criminal Appeals has repeatedly recognized that due to the inherent unreliability of polygraph examinations, any evidence of the existence and results of a polygraph examination is inadmissible over proper objection. *See Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012); *see also Ross v. State*, 133 S.W.3d 618, 625 (Tex. Crim. App. 2004) (reaffirming the court's prior holdings that "polygraph evidence is inadmissible for all purposes"). We therefore agree with the trial court's decision to suppress the portion of the recording in which the examination itself is being conducted—ending at two hours and 42 minutes.

In addition, we recognize that during the initial portion of the post-polygraph interview, beginning at three hours and two minutes into the recording, Agent [redacted] informed Pena that he had been "affected" by certain questions during the examination then asked Pena to "explain" his

reaction to those questions. Accordingly, we conclude that this portion of the recording, and any other portion of the recording in which the polygraph examination is either directly or indirectly mentioned, is also inadmissible. We therefore affirm the trial court's judgment insofar as it suppresses these inadmissible portions of the recording.

We next address the State's argument that the trial court acted improperly when it suppressed the remaining portion of the recording, as well as any evidence pertaining to the inculpatory statements Pena made during the interview.

IV. STANDARD OF REVIEW

We review a trial court's suppression ruling under a bifurcated standard of review. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). When there are findings of fact, we afford them "almost total deference if they are reasonably supported by the record." *Id.* But when, as here, there are no factual findings, "we assume that the court made implicit findings that support its ruling, provided that those implied findings are supported by the record." *Ex Parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013). Although we defer to the trial court's express or implied factual findings, we review questions of law and the application of the law to the facts de novo. *Sims*, 569 S.W.3d at 640.

V. PENA'S SIXTH AMENDMENT ARGUMENT

We first examine whether the trial court could have properly based its decision to suppress the post-polygraph interview portion of the recording, as well as the inculpatory statements Pena made during the interview, based on Pena's argument that their admission would violate his Sixth Amendment right to confront witnesses. We conclude, as a matter of law, that Pena's Sixth Amendment rights would not be violated under these circumstances.

A. Applicable law

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Woodall v. State*, 336 S.W.3d 634, 641 (Tex. Crim. App. 2011) (citing U.S. Const. amend. VI). "This constitutional guarantee applies to both federal and state criminal prosecutions." *Id.* (citing U.S. Const. amend. XIV; *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). "The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony." *Coronado v. State*, 351 S.W.3d 315, 326 (Tex. Crim. App. 2011) (quoting Black's Law Dictionary 433 (9th ed. 2009)). Thus, "[t]he cross-examiner may discredit the witness's direct testimony in several different ways, depending upon the witness, the questioner, and the specific situation as it unfolds in the hearing." *Id.*

However, the right is not unlimited, and it does not include "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010); *see also Woodall*, 336 S.W.3d at 643 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (per curiam)). Thus, a trial court may impose restrictions on cross-examination based on such criteria as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Johnson v. State*, 490 S.W.3d 895, 910 (Tex. Crim. App. 2016) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

B. Analysis

Pena contends that because his confession came during his post-polygraph interview, his Sixth Amendment right to confront witnesses would be violated if his attorney could not cross-examine Agent [redacted] regarding the "context" in which his confession arose. In particular, Pena maintains that to protect his rights, his attorney should be able to question Agent [redacted] about his polygraph techniques to ensure they were proper and about the "validity of polygraph science, at least as to its propensity to produce false confessions." But, Pena posits, because evidence of polygraph examinations is inadmissible, he would be barred from doing so. Pena refers to this as an "evidentiary conundrum" Agent [redacted] created by not conducting the polygraph examination separately from the post-polygraph interview. We find no "evidentiary conundrum" or Sixth Amendment violation in admitting Pena's post-polygraph confession under these circumstances.

Although evidence of a polygraph examination and its results are not admissible at trial, the use of polygraphs as a means of interrogation does not violate an accused's constitutional rights or render a subsequent confession inadmissible. *See Hazlett v. State*, No. 05-16-00495-CR, 2018 WL 1373949, at *2 (Tex. App.—Dallas Mar. 19, 2018, pet. ref'd) (mem. op., not designated for publication). To the contrary, confessions made during a post-polygraph interview are not deemed inadmissible simply because the examination itself would not be admissible. *McCorkle v. State*, No. 14-22-00512-CR, 2023 WL 6561068, at *3 (Tex. App.—Houston [14th Dist.] Oct. 10, 2023, no pet.) (mem. op., not designated for publication) ("Appellant has not provided any authority on point, nor after reasonable research have we found any, to support[] his contention that the inadmissibility of the polygraph test taints, or implicates the inadmissibility of, his confession given after the exam.") (citing *Collins v. State*, 352 S.W.2d 841, 845 (Tex. Crim. App. 1961) ("The

fact that appellant was given a lie detector test prior to making the confession did not render the same inadmissible.")).

Pena appears to acknowledge other courts' holdings that when a defendant has made a confession on the heels of polygraph examination, the proper course of action is—when possible—to redact any reference to the polygraph examination or its results when admitting evidence of the confession. *See Holt v. State*, No. 05-14-00914-CR, 2016 WL 3018793, at *22 (Tex. App.—Dallas May 18, 2016, pet. ref'd) (mem. op., not designated for publication).

Here, we find no impediment to redacting evidence of the polygraph examination and its results from Pena's post-polygraph confession. As set forth above, during the post-polygraph interview, Agent [redacted] initially made a series of references to the polygraph examination and its results, informing Pena that he appeared to be "affected" by one of the questions he asked during the examination. However, Agent [redacted] later questioning centered solely on the child-victim's statement and his urging Pena to apologize to the child and take responsibility for his conduct. By our estimation, Pena's first inculpatory statement was not made until over 20 minutes after Agent [redacted] last reference to the polygraph examination, thereby allowing a redacted portion of the recording to be played for the jury without the jury hearing any evidence of the examination. We encourage the parties to thoroughly review the recording to ensure that no such reference is contained in any redacted version of the recording that may be played for the jury.

We further conclude that admitting a redacted portion of the recording without reference to the polygraph examination or its results would not violate Pena's Sixth Amendment rights. Although Pena believes he has a Sixth Amendment right to question Agent [redacted] regarding the methods he used to conduct the examination, we see no relevance to such a line of questioning under these circumstances. Pena's inculpatory statements not only came well after Agent [redacted]

last reference to the polygraph examination, but more importantly, they did not arise, either directly or indirectly, from any questions Agent [redacted] asked him about the examination. Instead, Pena made his inculpatory statements in direct response to Agent [redacted] statement that he "knew" Pena committed the offense based on the child-victim's statements, rather than on any knowledge he obtained from the polygraph examination.

Accordingly, we cannot say that Pena's Sixth Amendment rights would be violated by his inability to question Agent [redacted] about his polygraph examination methods. *See Foster v. State*, 180 S.W.3d 248, 251 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.) (concluding that defendant's Sixth Amendment rights were not violated where the question he sought to ask the witness was not only irrelevant but likely to cause confusion of the issues). We therefore conclude that the trial court could not have properly granted Pena's motion to suppress based on his Sixth Amendment argument.

VI. WHETHER PENA'S CONFESSION WAS INVOLUNTARY

We next consider whether the trial court could have properly granted Pena's motion to suppress based on the argument he made in the trial court that his confession was involuntary as the result of Agent [redacted] use of allegedly coercive techniques, including his repeated assurances that he would be treated more leniently if he confessed. We conclude that there is no basis in the record for finding that Pena's confession was involuntary.

A. Applicable law

Article 38.21 of the Code of Criminal Procedure provides that an accused's statement "may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." Tex. Code Crim. Proc. Ann. art. 38.21. To meet constitutional standards, a confession must be both voluntary and taken in

compliance with *Miranda.*[5] *Moss v. State*, 75 S.W.3d 132, 139 (Tex. App.—San Antonio 2002, pet ref'd). In assessing the voluntariness of a statement, we consider the totality of the circumstances under which the statement was made, and ultimately whether the appellant's will was overborne. *See Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997) (en banc). "A statement is not voluntary if there was 'official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.'" *Moss*, 75 S.W.3d at 139 (quoting *Matter of V.M.D.*, 974 S.W.2d 332, 346 (Tex. App.—San Antonio 1998, pet. denied)).

B. Analysis

(1) No promises of leniency

As set forth above, in the trial court, Pena's motion to suppress focused almost exclusively on his claim that his confession was coerced because Agent [redacted] made "repeated assurances" that he would receive more lenient treatment, including the possibility of probation, if he confessed. On appeal, the State contends that to the extent Pena's argument hinged on a claim that Agent [redacted] made an improper promise of leniency that rendered his confession involuntary, the trial court could not have used this as a basis for its decision to grant Pena's motion. We agree.

For a promise to render a confession involuntary, the Court of Criminal Appeals has adopted a three part-test, requiring evidence that (1) the promise was "positive"; (2) it was "made or sanctioned by someone in authority"; and (3) it was "of such an influential nature that it would cause a defendant to speak untruthfully." *Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App.

[5] Although Pena points out that Agent [redacted] only read him his *Miranda* rights before the polygraph examination and did not read them again before beginning his post-polygraph interview, he does not argue on appeal that his confession was given in violation of *Miranda.* Instead, he correctly points out that being properly Mirandized does not resolve the question of whether his confession was voluntarily made.

2004); *Lopez v. State*, 610 S.W.3d 487, 498 (Tex. Crim. App. 2020) (recognizing same). As the San Antonio Court of Appeals has explained, "[t]o determine whether a promise is likely to influence the defendant to speak untruthfully, we look to whether the circumstances of the promise made the defendant inclined to admit a crime she had not committed." *Cameron v. State*, 630 S.W.3d 579, 593 n.3 (Tex. App.—San Antonio 2021, no pet.) (citing *Harty v. State*, 229 S.W.3d 849, 856 (Tex. App.—Texarkana 2007, pet. ref'd)). The "promise at issue must be of an exceptional character before it will invalidate an otherwise voluntary confession." *Id.* (citing *Espinosa v. State*, 899 S.W.2d 359, 364 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Guerrero v. State*, No. 04-08-00249-CR, 2009 WL 2525434, at *8 (Tex. App.—San Antonio Aug. 19, 2009, pet. ref'd) (mem. op., not designated for publication)).

Applying the three-part test for determining whether an interviewer made an improper promise of leniency, we conclude, as a matter of law, that Pena did not establish his confession was involuntary. First, the record reflects that Agent [redacted] did not hold himself out as a person who was "in authority" or in a position to make a promise of a benefit. To the contrary, throughout the interview, Agent [redacted] told Pena that he was not the investigator assigned to his case and that it would be up to the investigator and the other "decision-makers" to determine how his case would be handled.

Moreover, even if we were to assume that Agent [redacted] was a person "in authority" to make a promise of leniency, we disagree with Pena's argument that Agent [redacted] made any "positive" statements of such an influential nature so as to cause him to confess to a crime that he did not commit or to speak untruthfully. Pena's argument rests exclusively on a passage in which Agent [redacted] informed Pena that the investigator assigned to his case would want to know he takes "responsibility for [his] actions," he knows what he did was "wrong," it was "one mistake, one

time," and was "not [going] to happen again" and did not "happen again." Agent [redacted] then stated, it was "one mistake, one time [and] a person like that . . . maybe probation . . . classes, counseling . . . something like that[.]" And he further told Pena that if he were to say he was sorry and apologize to the child and her family, "that's what [the investigator] needs to know, and I think you'll come out pretty good," as the "decisionmakers" will view you as a "human being . . . not a predator."

We do not find that this passage—or any other passage in the recording—constituted an improper promise that would have overborne Pena's will such that it caused him to confess to a crime he did not commit. "A confession is not rendered inadmissible because it is made after an accused has been told by the officer taking the confession that it would be best to tell the truth . . ." or "it would be best for him to go ahead and make a statement," or "it would be better to get his business straight." *Dykes v. State*, 657 S.W.2d 796, 797 (Tex. Crim. App. 1983) (en banc); *see also Johnson v. State*, 68 S.W.3d 644, 654 (Tex. Crim. App. 2002) (providing that officer's representation that an accused's cooperation would be conveyed to the trial court was not a promise inducing a confession); *Drake v. State*, 123 S.W.3d 596, 603 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (concluding that an officer's general, non-specific statement that an appellant "could help herself" if she confessed did not render appellant's statement involuntary). Stated otherwise, such statements suggesting that a person may be treated more favorably if he confessed are not considered to be so influential that they would cause a person's will to be "overborne" to such an extent that he would involuntarily confess to a crime he did not commit. *See Allen v. State*, No. 14-14-00708-CR, 2016 WL 269900, at *3–4 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016, no pet.) (mem. op., not designated for publication) (interviewer's suggestion that he would be treated more favorably if he provided an "explanation" for his conduct and that interviewer would

speak with the "investigators" about his case did not rise to the level of a "promise" that would have rendered the defendant's statements involuntary); *Herrera v. State*, 194 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

Agent [redacted] statement was simply a statement of fact that a confession can sometimes result in leniency; we do not view it as a promise. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (en banc) (noting that interviewer's statement that a confession could result in leniency was a statement of fact and not a promise of leniency in exchange for a confession); *Mason v. State*, 116 S.W.3d 248, 261 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (officer's statements that defendant's situation would "go better" for him if he gave a confession did not amount to a promise).

(2) Totality of the circumstances test

Aside from the any alleged promise of leniency, Pena also contends we should uphold the trial court's decision to suppress his confession as involuntary under a broader "totality of the circumstances" test. *See Creager*, 952 S.W.2d at 856 (recognizing that when a defendant alleges his confession was coerced by more than an improper promise, a court should apply a "totality of the circumstances" test in determining whether the confession was involuntary). Even applying such a test, however, we conclude that Pena has not pointed to any factors from which the trial court could have concluded his confession was involuntary.

There are a variety of factors that may render a confession involuntary under a totality of the circumstances test, including but not limited to situations in which: the interrogation is unduly lengthy; the defendant has been deprived of sleep, food, water, or the opportunity to take needed breaks; and the interviewer has made threats or engaged in other inappropriate conduct. *See, e.g.*, *Sandoval v. State*, 665 S.W.3d 496, 523 (Tex. Crim. App. 2022), reh'g denied (May 17, 2023), cert.

denied, 144 S. Ct. 1166 (2024) (recognizing among other factors that may render a confession involuntary, "the lack of any advice about constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep"); *Lopez v. State*, 610 S.W.3d 487, 496 (Tex. Crim. App. 2020) (recognizing that "threatening to arrest a close family member . . . depriv[ing] the accused of food and sleep and interrogat[ing]him for hours on end" can be factors a court may consider in determining whether a confession was involuntary under a totality of the circumstance test).

But as the Texas Court of Criminal Appeals has repeatedly recognized, even when such factors are present, the key issue is whether the suspect's "will has been overborne and his capacity for self-determination critically impaired" by police "overreaching." *Sandoval*, 665 S.W.3d at 523; *see also Creager*, 952 S.W.2d at 855 (recognizing that in determining whether a confession was involuntary due to police overreaching, "[t]he ultimate question is whether appellant's will was overborne").

Here, the record does not support such a finding. To the contrary, during the videotaped interview, Pena appears to be calm and cooperative. He never asked to speak to an attorney or terminate the interview; he was not deprived of food, beverage, or the opportunity to take a break if needed. There is nothing in the record to indicate that Agent [redacted] made any threats to Pena. And as set forth above, the record does not support a finding that Agent [redacted] made any improper promises of leniency. Moreover, although [redacted] appears to complain that the entire process of conducting the examination and the interview lasted almost four hours, he does not contend that the length of the interrogation rendered his confession involuntary. Nor do we believe it did, particularly given the fact that Pena appeared willing at all times to continue the interview. *See Smith v. State*, 779 S.W.2d 417, 429 (Tex. Crim. App. 1989) (holding that eight hours of

questioning without food did not render confession involuntary in light of the defendant's willingness to continue with the interview).

Pena nevertheless maintains that the trial court could have found that his will was overborne by Agent [redacted] allegedly improper tactic of alternating between filling him with the fear of being arrested and imprisoned—by accusing him of committing the offense—and giving him "false hope" that he would be treated leniently if he confessed. In support of his argument, Pena seeks to analogize his situation to the facts in *Arizona v. Fulminante*, 499 U.S. 279 (1991) in which the United States Supreme Court agreed with a state court's finding that there was sufficient evidence upon which to find that a defendant's confession had been coerced by a law enforcement agent's promise of protection. In that case, the defendant was facing possible charges for raping and murdering his eleven-year-old stepdaughter but was in prison on an unrelated offense. *Fulminante*, 499 U.S. at 282. An undercover law enforcement agent in the prison told him that his fellow inmates were threatening to harm him due to what he had done to his stepdaughter, and he promised to "protect" the defendant if he confessed to the crime. *Id.* at 282–83. The Court found that the defendant's resulting confession was involuntary because the defendant faced a "credible threat of physical violence" if he did not confess, and the agent's promise of protection therefore caused the defendant's "will [to be] overborne in such a way as to render his confession the product of coercion." *Id.* at 287–88.

Pena urges the similarity in his case, arguing it is well-known that Texas prisons are dangerous places for those convicted of sexual crimes against children, and therefore, "even a glimmer of false hope of probation could persuade the accused to incriminate himself to lessen the risk." Unlike the situation in *Fulminante*, however, there is nothing in the record before us to suggest that Pena faced a "credible threat of violence" if he did not confess or that Agent [redacted]

offered to protect him from any such threat. To the contrary, Agent [redacted] made it clear that he was not able to provide Pena with any direct help and that it would be up to the investigator or other decisionmakers to make the decisions.

Accordingly, we conclude that the trial court could not have properly granted Pena's motion to suppress on the basis that Pena's confession was involuntary for any or all of the reasons discussed above.

VII. CONCLUSION

The trial court's judgment is affirmed in part and reversed in part. We affirm the trial court's order granting Pena's motion to suppress insofar as it orders the suppression of any evidence relating to the polygraph examination and its results. But we reverse the trial court's order insofar as it (1) suppresses the recorded portion of the post-polygraph interview that contains no reference to the examination or its results and (2) suppresses the inculpatory statements Pena made during that portion of the interview.[6]

LISA J. SOTO, Justice

December 4, 2024

Before Alley, C.J., Palafox, Soto, JJ.

[6] This opinion should not be read as prohibiting Pena from challenging the admissibility of the post-polygraph interview or his inculpatory statements on other grounds in the trial court. Our holding only pertains to the two grounds addressed in the opinion.

APPENDIX 14

Abner Burnett, Attorney
205 West Gardenia, McAllen, Texas 78501
Phone: (956) 534-4829 ~ Email: lawyerburnett@gmail.com

PD-0087-25
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/12/2025 9:42 AM
Accepted 3/12/2025 9:57 AM
DEANA WILLIAMSON
CLERK

Wednesday, March 12, 2025

Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

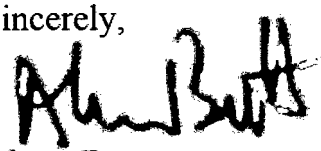
Re: No. PD-0087-25, State v. Reynaldo Alberto Peña, Amended Petition for Discretionary Review, Second Corrected Version

To the Honorable Judges of this Court:

Abner Burnett, an attorney for the Petitioner Reynaldo Alberto Peña, humbly offers this 2nd corrected version of an amended petition for review. My apologies for the repeated corrections. I have no staff and am working with an updated version of Microsoft Word that I believe has deliberately confused me at every turn.

This version should be correct both in content and format.

Sincerely,



Abner Burnett

No. PD-0087-25

TO THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 08-23-00303-CR from the Eighth Judicial District of Texas at El Paso, Texas

Trial Court No. 20-CRD-45, 229TH Judicial District Court, Duval, County, Texas

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THE STATE OF TEXAS

V.

REYNALDO ALBERTO PEÑA

APPELLEE'S AMENDED PETITION FOR DISCRETIONARY REVIEW

Second Corrected Version

[Correcting and Clarifying the Index of Authorities]

To the Honorable Judges of the Court of Criminal Appeals of Texas:

Comes now Petitioner Reynaldo Alberto Peña, Appellee below, and files this Amended Petition for Discretionary Review seeking review of the decision rendered by the Court of Appeals, Eighth Judicial District of Texas

at El Paso, Texas. The Petitioner files this Amended Petition to correct errors in format of the Index of Authorities.

Identity of Judge, Parties, and Counsel

The presiding trial court judge in the 229TH Judicial District Court, Duval, County, Texas was Judge Hon. Baldamar Garza, 400 E. Gravis, P.O. Box 1070, San Diego, TX 78384

The parties in the trial court were:

The State of Texas through the Duval County District Attorney's Office

Reynaldo Alberto Peña, Defendant in the trial Court, Petitioner before this Court

Trial and Appellate Counsel for the State were:

G. Allen Ramirez, 229th Judicial District Attorney, and Assistant District Attorney Rumaldo Solis, Jr., Duval County, P. O. Drawer 1061, San Diego, Texas 78384

Trial and Appellate Counsel for the Appellee below were:

Abner Burnett 205 West Gardenia Avenue. McAllen, TX 78501, and John Goodman, 221 E. 12th St., Mission, TX 78572

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Statement Regarding Oral Argument

Petitioner, Reynaldo Alberto Peña waives oral argument.

Statement of the Case

The Petitioner, Reynaldo Alberto Peña, was charged by indictment with aggravated sexual assault of a child. At the time of his arrest, Mr. Peña underwent a polygraph examination. The polygraph examination lasted for 3 hours and 53 minutes. It included what the examiner called a "post-test interview". Mr. Peña made some inculpatory statements during the examination. He was arrested immediately after the post-test interview.

Mr. Peña filed a Motion to Suppress and Brief in Support of the Motion with the trial Court. The Petitioner, Mr. Peña, argued in the Brief and at the hearing that if the trial judge were to allow any portion of the polygraph examination into evidence, then the video recording of the entire session lasting for 3 hours and 53 minutes should be admissible and that the Petitioner should be allowed to thoroughly cross-examine the polygraph examiner and present expert testimony criticizing the methodology of the polygraph examiner. The Petitioner argued that this evidence must be heard by a jury to raise and address an issue on voluntariness of the Petitioner's statements offered by the State.

The trial court judge granted the Motion to Suppress and suppressed the entire recording of the polygraph examination and any evidence deriving from the polygraph examination. The State appealed.

The Court of Appeals affirmed in part and reversed in part, ruling that all evidence of the polygraph examination was inadmissible except the alleged inculpatory statement made by the Petitioner during the post-test interview.

Statement of Procedural History

The trial court issued its Amended Order granting the Motion to Suppress on September 25, 2023. The State filed a Notice of Appeal on

October 9, 2023, and filed its brief in the Eighth Court of Appeals on May 28, 2024.

The Court of Appeals handed down its Opinion on September 7, 2024, affirming the trial court's decision insofar as it suppressed evidence of the polygraph examination and its results but reversing to the extent it suppressed the remainder of the interview and the inculpatory statements that the Petitioner, Reynaldo Alberto Peña, allegedly made during the interview.

The Court of Appeals denied Mr. Peña's first Motion for Rehearing on December 4, 2024, but substituted a new Opinion and Judgment along with its ruling. The Court denied a second Motion for Rehearing on January 7, 2025.

Ground for Review

The Petitioner presents a single ground upon which this Petition is based.

Allowing the prosecution to present evidence to a jury of a defendant's inculpatory statements carved out of the post-test interview portion of a polygraph examination, while excluding all evidence of the

circumstances and context under which the statements occurred, unduly restricts a defendant's constitutional rights provided by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, U.S. Const, amend. V, VI, XIV. The Court of Criminal Appeals should clarify whether the federal constitutional rights to cross-examine a witness and present rebuttal evidence about the voluntariness of a confession outweigh a general rule that pertains to the unreliability of polygraph examination results. Discretionary Review is appropriate as described in Rules 66.3 (b) and (c), Texas Rules of Appellate Procedure.

This issue was first raised by the Petitioner in trial Court by a Brief in Support of a Motion to Suppress, Clerk's Record P. 97-P. 100. The relief requested pertinent to this issue is first found in the same Brief at P. 104 in the Clerk's Record. The matter is subsequently brought up:

- As the Appellee in the Reply Brief, at P. 14 and P. 20;
- As the Appellee in the Motion for En Banc Reconsideration, at P. 3; and
- As the Appellee in the Second Motion for En Banc Reconsideration at P.1 – P.7.

Argument

The rule against admitting polygraph examination results aims to prevent a defendant from claiming innocence based on passing the test, or the state from asserting guilt based on the defendant failing the test. Courts generally find polygraph results unreliable, *Leonard v. State*, 385 S.W.3d 570 (Tex. Crim. App. 2012); *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973) However, Texas courts allow confessions made during a polygraph examination to be admitted if all references to the polygraph are removed from evidence and questioning, *Wright v. State*, 154 S.W.3d 235 (Tex.App. Texarkana - 2005) pet. ref'd; citing *Hoppes v. State*, 725 S.W.2d 532 (Tex.App. Houston, 1st Dist. - 1987). However, this exception to the general rule prevents the Defendant from giving a proper presentation to the jury on the matter of voluntariness of the alleged confession. No meaningful cross examination by the defendant of the sponsoring witness can occur and no presentation of other evidence on the issue can occur if all reference to the circumstances giving rise to the confession, that is the polygraph examination, is excised from the evidence presented and from any questioning regarding the administration of the polygraph examination.

Texas law entitles the Defendant in a criminal case to a jury instruction on the voluntariness of having given an alleged inculpatory

statement, Art 38.22 §6, *Tex. Code Crim. Pro. Ann.*; *Oursbourn v. State,* 259 S.W.3d 159 (Tex. Crim. App. 2008). The defendant in a criminal case raising an issue regarding voluntariness ought to be able to challenge the way a polygraph examination is being used for interrogation, just as he would be allowed to examine and challenge any other interrogation technique used to gain a confession. Where the defendant is not challenging or bolstering the validity of a polygraph examiner's findings, the imposition of a complete bar against any mention of or allusion to the polygraph examination in its entirety irrationally and unfairly deprives a defendant of rights provided under the United States Constitution, the right to Due Process Clause as articulated in the Fifth Amendment and the Confrontation Clause within the Sixth Amendment, U.S. Const. amend V, VI, as applied to the states by the Fourteenth Amendment, U.S. Const. amend XIV.

The administration of the polygraph examination of Reynaldo Alberto Peña was actually used as a method of interrogation. During direct and cross examination, the procedure was identified at least 80 times as an "interview", Reporter's Record [hereinafter 'RR"], testimony of special agent [redacted] P.4 – P.90.

When asked directly about this, Special Agent [redacted] admitted the examination continued as a question and answer session in the "post-test interview".

"Q. -- you continue -- you can call it an

interview, sir, you can call it an interrogation. But

what I'd like to know is does questioning continue?

A. Yes, it does." RR P.51

The session lasted over an hour before any testing was done, RR P. 63, and continued for over three hours, including into the "post-test interview", RR P. 66. Special Agent [redacted] was working for law enforcement when he conducted the polygraph examination, RR 68.

Under the ruling of the Court of Appeals, the State will enjoy the low hanging fruit of an apparent confession protected from scrutiny by the general rule against polygraph evidence, protection it does not need since the State is offering the confession rather than the test results. The State additionally enjoys the benefit of the Defendant being denied an opportunity to develop his presentation to the jury on the issue of voluntariness of the confession.

On the other hand, if the defendant is allowed to cross-examine a State's witness on the manner of the test's administration, the polygraph examiner's opinion regarding the results of the test will certainly come out. The Defendant knowingly risks that peril. It should be his right to choose that path, having decided that developing his presentation to the jury on the issue of voluntariness outweighs the obvious risk.

The Confrontation Clause in the Sixth Amendment to the United States Constitution, U.S. Const, amend.VI, establishes the Defendant's right to conduct a broad and robust cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), *Alford v. U.S.*, 282 U.S. 687 (1931). A trial court has discretion to limit the scope of cross-examination to prevent such things as harassment, confusion of the issues, or the injection of cumulative or collateral evidence, *Van Arsdall*, supra, at 689. However, cross-examination is by nature "exploratory and there is no general requirement that the defendant indicate the purpose of his inquiry. [cite omitted] Indeed, the defendant should be granted a wide latitude even though he is unable to state what facts he expects to prove through his cross-examination. [cite omitted]", *Carroll v. State*, 916 S.W.2d 494 (Tex.Crim.App. 1996) The strength and scope of the constitutional right to cross-examination may control to allow cross examination on a matter that a state rule of evidence

would exclude, *Henley v. State*, 493 S.W.3d 77, at 95 (Tex.Crim.App. 2016), citing *Lopez v. State*, 18 S.W.3d 220, at 225 (Tex.Crim.App. 2000)

This was the argument that the petitioner made in his brief supporting the Motion to Suppress. It continued to be his argument throughout his briefs in the appellate process. It is here still the argument.

At page 11 of its Substituted Memorandum Opinion, the Court of Appeals says that the use of polygraphs as a means of interrogation does not violate an accused's constitutional rights or render a subsequent confession inadmissible. It relies on *Hazlett v. State*, No. 05-16-00495-CR, 2018 WL 1373949, at *2 (Tex. App.—Dallas Mar. 19, 2018, pet. ref'd and *McCorkle v. State*, No. 14-22-00512-CR, 2023 WL 6561068, at *3 (Tex. App.—Houston [14th Dist.] Oct. 10, 2023, no pet.) Both opinions cited are not designated for publication. The case cited by *McCorkle*, *Collins v. State*, 352 S.W.2d 841, 845 (Tex. Crim. App. 1961) is irrelevant to our issue here. None of the cited cases are pertinent to the issue of being barred from cross-examining a polygraph examiner and presenting evidence on the issue of voluntariness of a confession given during the administration of a polygraph examination.

Factual Errors in Court of Appeals Opinion

1. In a section title on page three of its Substituted Memorandum Opinion, the Court of Appeals calls the part of the polygraph examination during which the petitioner made an inculpatory statement a "Post Polygraph Interview", implying that it is something separate from the polygraph examination. However, when he was asked by the State to describe what a polygraph examination was, the agent that conducted the examination included as part of the examination what he called the "post-test interview", RR, P.11

2. On page five of its Substituted Memorandum Opinion, the Court of Appeals mistakenly stated that the Petitioner's argument was that "because his confession came on the heels of the polygraph examination, and because evidence of a polygraph examination is inadmissible at trial, his Sixth Amendment right to cross-examine Agent [redacted] about the context in which his confession arose would be violated if his inculpatory statements were admitted at trial." That is incorrect. The position of Mr. Peña in his trial brief and consistently thereafter has been that the Defendant must have broad leeway to cross-examine the polygraph examiner. Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, and the Rights afforded by the Sixth Amendment

Confrontation Clause, U.S. Const, amend. V. VI, XIV, should override the general rule regarding polygraph tests.

3. On page eight of its Substituted Memorandum Opinion, the Court of Appeals inaccurately stated that "As a preliminary matter, the parties appear to agree that the portion of the recording in which the polygraph examination was conducted, as well any portion of the recording in which either Agent [redacted] [the polygraph examiner] or Peña referred to the examination or its results, would not be admissible in evidence." The defendant directed this Court in his Ground for Review above to his Brief in Support of the Motion to Suppress. The brief noted that while that is the general rule, it ought not be applicable in the circumstances in the present case. The general rule should be overridden by the rights afforded under the United States Constitution.

Prayer for Relief

Reynaldo Alberto Peña prays that this Court grant his Petition for Discretionary Review. After having considered all briefs submitted by the Petitioner and any reply briefs, the Petitioner prays that this Court reverse that portion of the ruling from the Court of Appeals that orders the suppression of any evidence relating to the polygraph examination,

announce that the Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution, U.S. const. amend. V, XIV, and the Rights afforded by the Sixth Amendment Confrontation Clause, U.S. Const. amend. VI, override the evidentiary rule regarding admissibility of evidence of a polygraph examination having been administered, allow full and robust cross-examination of Special Agent [redacted] and allow the Defendant to include in its offer of evidence to a jury on the issue of voluntariness a challenge to the methods used by Special Agent [redacted] in the administration of the polygraph examination at issue.

Respectfully submitted,

JOHN GOODMAN II,
Attorney for Defendant
State Bar No. 24134581

Anglican Legal Aid & Reconciliation
221 E. 12th Street
Mission, TX 78572
(956) 377-0195
director@alartx.org

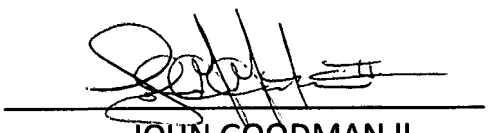
ABNER BURNETT
Attorney of Record
State Bar No. 03425770

205 W. Gardenia Avenue
McAllen, TX 78501
lawyerburnett@gmail.com

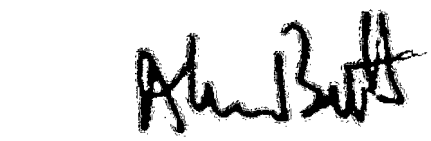
CERTIFICATE OF SERVICE

John Goodman II and Abner Burnett, Attorneys for Appellee, do herein certify that on March 12, 2025, the foregoing Petition was served on the State via e-filing.

Signed,



JOHN GOODMAN II,



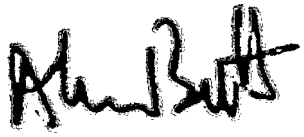
Abner Burnett

CERTIFICATE OF COMPLIANCE

This is to certify this document contains 1,498 words, not including those words excluded in such count under Tex. R. App. P. 9.4(i)(1).

Signed,

JOHN GOODMAN II,



Abner Burnett

APPENDIX

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-23-00303-CR
Appellant,	§	Appeal from the
v.	§	229th Judicial District Court
REYNALDO ALBERTO PENA	§	of Duval County, Texas
	§	(TC# 20-CRD-45)
Appellee.	§	

SUBSTITUTED MEMORANDUM OPINION[1]

Appellee Reynaldo Alberto Pena was indicted on one count of aggravated sexual assault of a child under the age of six. Prior to his indictment, Pena voluntarily submitted to a polygraph examination and a post-polygraph interview, which were recorded in a single session. Pena moved to suppress the entire recording as well as any evidence of the inculpatory statements he made during the post-polygraph interview, claiming they were involuntarily made due to the allegedly coercive tactics the polygraph agent used before and during the post-polygraph interview, which included the agent's alleged promises or "reassurances" that Pena would be treated more

[1] The Appellee's Motion for En Banc Reconsideration is denied. The September 27, 2024 opinion has been withdrawn, and this opinion is substituted in its place.

"leniently" if he confessed to the assault. In addition, Pena argued that because evidence of the examination itself would not be admissible at trial, the admission of his statements during the post-polygraph examination would violate his Sixth Amendment right to confront witnesses, as he would be unable to fully cross-examine the polygraph agent regarding the context in which the statements were made. The trial court granted the motion and suppressed the entire recording without stating its reasons. This appeal followed.[2]

For the reasons below, we affirm the trial court's decision insofar as it suppresses evidence of the polygraph examination and its results, but we reverse to the extent it suppresses the post-polygraph interview and the inculpatory statements Pena made during the interview.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The polygraph examination

The child-victim reported to her mother that Pena, who at the time was married to the mother's aunt, had licked her vagina while he was babysitting the child and her siblings. Pena thereafter voluntarily agreed to submit to a polygraph examination at the Jim Hogg County Sheriff's Office. Pena arrived at the office of his own accord and met with a Texas Department of Public Safety (DPS) special agent, [redacted]

Prior to the examination, Agent [redacted] read Pena his *Miranda* rights, and Pena stated that he understood his rights. He signed a "waiver of rights" affirming that he was "knowingly, intelligently, and voluntarily" waiving his *Miranda* rights as listed on the document. Pena also signed a document that indicated he voluntarily agreed to the polygraph examination.

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[2] This case was transferred from the Fourth Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* Tex. Gov't Code Ann. § 73.001. We decide the case in accordance with the precedent of the transferor court to the extent it conflicts with our own. Tex. R. App. P. 41.3.

The examination lasted approximately two hours and 42 minutes. During the examination, Agent [redacted] asked Pena several baseline questions as well as two questions related to the offense: (1) whether he had sexual contact with a minor; and (2) whether he licked a child's vagina. Agent [redacted] repeated the examination five times, asking the same or similar baseline questions each time. Each time, Pena denied he had engaged in any such conduct.

B. The post-polygraph interview

Following the examination, Agent [redacted] took a break of approximately 20 minutes. After the break, Agent [redacted] indicated that he had reviewed the "data" and asked Pena if he was a "predator" or a "monster" from whom we must "protect" our children.

Pena responded in the negative and said he had never been in trouble before. Agent [redacted] informed Pena that during the examination, the question of whether he had licked a child's vagina "affected" him the most. Agent [redacted] told Pena that this was "the one" thing he needed to "explain" so that people would not think he was "that type of person," i.e., a "predator." But Pena continued to deny having engaged in any such conduct.

Thereafter, Agent [redacted] made no further reference to the polygraph examination. Instead, he focused on the child-victim's allegation that Pena had licked her vagina while they were in the bedroom. Agent [redacted] pointed out that the child-victim indicated that Pena stopped when she asked him to, which the agent opined made her statement both "good and bad," as it demonstrated he did not "force" himself on her in other ways and showed that he had "compassion." Agent [redacted] repeatedly told Pena he did not believe Pena was a predator, but rather a "good guy" who made a "mistake" and stopped when he realized it was wrong.[3]

[3] Agent [redacted] also told Pena he believed the child's mother was to blame for not taking care of her daughters and for "forcing" him to watch them. He further blamed the mother's aunt (Pena's now ex-wife) for leaving him alone with the children, assuring Pena that he was only "human," that "curiosity got the best of [him]," and that he got "lost in the heat of the moment."

Agent [redacted] then encouraged Pena to acknowledge his "mistake," suggesting that if he did, the "decision-makers" would view him as "sincere" and as a "human being" who simply made a mistake as we all do, rather than a "monster." At one point, Agent [redacted] suggested that a person who took responsibility for his actions could possibly receive "probation."

Agent [redacted] told Pena he believed the situation could have been much "worse," detailing cases in which individuals had committed much more serious sex offenses.

He stated that Pena's case was not like those, as the allegation in his case was a "simple lick" and "nothing serious." However, Agent [redacted] repeatedly told Pena that he needed to explain his conduct, take responsibility for it, and apologize to the child, or else he would "look bad" and would risk being viewed as "the type we need to put away" or "lock[ ] up."

C. The confession

After repeatedly being encouraged to apologize, Pena said he was "sorry." When Agent [redacted] asked why, Pena stated that "nothing happened." However, when Agent [redacted] insisted that he "knew" something happened because the child's sisters had seen him go into the bedroom with her, Pena responded, "I just licked . . . that's it." Then, Pena explained that the child had walked into the room by herself, laid down on the bed, lifted up her dress, pulled down her panties, and asked him to lick her. Pena stated that he pulled her panties up and pulled them to the side, then licked the child in the middle of her vagina, but stopped when she asked him to. At Agent [redacted] request, Pena marked the area where he had licked the child on a plastic replica, and he signed and dated it July 25, 2019. When asked why he licked her, Pena asserted that the child was "teasing" him, but he realized he "screwed up." When Agent [redacted] asked why he did not tell him about the incident sooner, Pena explained he was "embarrassed" and thought that what he had done was "worse."

Agent [redacted] then called an investigator into the room, and Pena repeated the same sequence of events to him, indicating that he licked her once but did "nothing else." The investigator placed Pena under arrest. Pena was indicted on one count of aggravated sexual assault based on the allegation that he penetrated the child's vagina with his mouth.

D. Pena's motion to suppress

Pena filed what he labeled as: "Defendant's Motion to Suppress Electronic Recording, Both Video and Audio, of Polygraph Examination of the Defendant." In his motion and supplemental briefing, he sought to suppress the entire recording, to include the approximately two-hour-42-minute polygraph examination as well as the one-hour-ten-minute post-polygraph interview. Alternatively, he sought to suppress "any statement made by the Defendant that the State asserts is an inculpatory admission of any wrongdoing."

Pena's argument was two-fold. First, he argued his confession was "coerc[ed] and involuntary," asserting [redacted] used "coercive insistence and seductive assurance" during and after the polygraph examination to obtain his confession, in part by suggesting that he might receive probation if he were to confess. According to Pena, during the interview, Agent [redacted] also engaged in "badgering and cajoling." Pena asserted the agent's "argumentative and accusatory conduct, prolonged and aggressively repetitive for over three hours, was so egregious that any statement obtained thereby was unlikely to have been the product of essentially free and unconstrained choice by the Defendant."

Second, he argued that because his confession came on the heels of the polygraph examination, and because evidence of a polygraph examination is inadmissible at trial, his Sixth Amendment right to cross-examine Agent [redacted] about the context in which his confession arose would be violated if his inculpatory statements were admitted at trial.

The State, in turn, acknowledged that evidence of a polygraph examination is not admissible at trial and assured the court it had "no intention of offering any statements or questions that arose during the polygraph portion of the defendant's interview nor make any reference to the polygraph examination." However, the State asserted it was entitled to offer Pena's statements during the post-polygraph portion of his interview, subject to redacting any reference to the polygraph examination itself or the results thereof. The State also maintained that Agent [redacted] did not engage in any coercive tactics or make Pena any improper promises.

E. The hearing

At the hearing on the motion, Agent [redacted] testified that Pena voluntarily appeared for the polygraph and waived his *Miranda* rights both orally and in writing. Agent [redacted] testified that Pena never asked to terminate the interview and did not ask for an attorney.

Agent [redacted] explained that following a polygraph examination, he typically tells an examinee what questions "affected" him or what caused him to "not pass the test." He then asks the examinee to explain why a particular question may have affected him and typically continues to ask the examinee for an explanation until the examinee wants to leave or requests an attorney.

During the post-polygraph phase of his interview with Pena, Agent [redacted] explained, he was trying to get him to "be honest and tell the truth," in part by trying to get him "to minimize his [conduct] so he [could] overcome the fear and embarrassment of admitting to his . . . actions." According to Agent [redacted] he did not make any promise that Pena would get probation or any other favorable treatment if he confessed; he was just "throw[ing] options out there that are available for everybody" and letting Pena know "some possibilities" if he did or did not confess.

F. The trial court's order

The trial court granted Pena's motion to suppress. In its amended "Order Granting Defendant's Motion To Suppress Electronic Recording, Both Video And Audio, Of Polygraph Examination Of The Defendant," the trial court ruled:

> After having heard from both parties and considered this Motion and submitted Briefs, the Court Grants the Motion to Suppress and rules inadmissible at trial the entire above-described audio and video recording of the polygraph examination, including but not limited to any excerpts that the State asserts are an inculpatory admission of wrongdoing. This includes any evidence deriving from the polygraph examination episode. It includes testimony from Special Agent [redacted] or any other witness regarding any portion of the polygraph examination or any evidence deriving from the polygraph examination.

The State appealed.[4]

II. PARTIES' ARGUMENTS

The State first notes that the trial court did not provide the basis for its ruling and assumes the trial court's decision was based on Pena's argument that his confession resulted from Agent [redacted] improper promise of a benefit, i.e., that he could receive probation if he confessed. And the State argues the record does not support a conclusion that Agent [redacted] made an improper promise that would render Pena's inculpatory statements involuntary.

Pena counters that the trial court could have reasonably concluded that his confession was coerced and involuntary, applying a "totality of the circumstances" test, primarily due to Agent [redacted] "[r]epeated reassurances—including, but not limited to, the possibility of probation" if he confessed with the intent to "gain an inculpatory statement from [him]." In addition, Pena contends Agent [redacted] influenced him to incriminate himself using "hope" and "fear"; Pena posits that the agent's "insistence" that he was guilty caused him to fear imminent arrest, and the agent's

[4] The State asserts that it requested findings of fact and conclusions of law, which the trial court failed to issue. But its request is not in the clerk's record. No findings of fact or conclusions of law appear in the record.

"seductive assurances" provided "false hope" that he could be treated more leniently if he confessed.

Pena further points out that he raised a second issue in the trial court, which the State did not address in its appellate briefing, regarding whether his Sixth Amendment rights would be violated by admitting his inculpatory statements due to his inability to fully cross-examine Agent [redacted] regarding the context in which the statements were made, given the inadmissibility of evidence relating to polygraph examinations. And Pena contends this could have properly formed the basis for the trial court's decision to grant his motion to suppress.

III. INADMISSIBILITY OF POLYGRAPH EXAMINATIONS AND RESULTS

As a preliminary matter, the parties appear to agree that the portion of the recording in which the polygraph examination was conducted, as well any portion of the recording in which either Agent [redacted] or Pena referred to the examination or its results, would not be admissible in evidence. We agree.

The Court of Criminal Appeals has repeatedly recognized that due to the inherent unreliability of polygraph examinations, any evidence of the existence and results of a polygraph examination is inadmissible over proper objection. *See Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012); *see also Ross v. State*, 133 S.W.3d 618, 625 (Tex. Crim. App. 2004) (reaffirming the court's prior holdings that "polygraph evidence is inadmissible for all purposes"). We therefore agree with the trial court's decision to suppress the portion of the recording in which the examination itself is being conducted—ending at two hours and 42 minutes.

In addition, we recognize that during the initial portion of the post-polygraph interview, beginning at three hours and two minutes into the recording, Agent [redacted] informed Pena that he had been "affected" by certain questions during the examination then asked Pena to "explain" his

reaction to those questions. Accordingly, we conclude that this portion of the recording, and any other portion of the recording in which the polygraph examination is either directly or indirectly mentioned, is also inadmissible. We therefore affirm the trial court's judgment insofar as it suppresses these inadmissible portions of the recording.

We next address the State's argument that the trial court acted improperly when it suppressed the remaining portion of the recording, as well as any evidence pertaining to the inculpatory statements Pena made during the interview.

IV. STANDARD OF REVIEW

We review a trial court's suppression ruling under a bifurcated standard of review. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). When there are findings of fact, we afford them "almost total deference if they are reasonably supported by the record." *Id.* But when, as here, there are no factual findings, "we assume that the court made implicit findings that support its ruling, provided that those implied findings are supported by the record." *Ex Parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013). Although we defer to the trial court's express or implied factual findings, we review questions of law and the application of the law to the facts de novo. *Sims*, 569 S.W.3d at 640.

V. PENA'S SIXTH AMENDMENT ARGUMENT

We first examine whether the trial court could have properly based its decision to suppress the post-polygraph interview portion of the recording, as well as the inculpatory statements Pena made during the interview, based on Pena's argument that their admission would violate his Sixth Amendment right to confront witnesses. We conclude, as a matter of law, that Pena's Sixth Amendment rights would not be violated under these circumstances.

A. Applicable law

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Woodall v. State*, 336 S.W.3d 634, 641 (Tex. Crim. App. 2011) (citing U.S. Const. amend. VI). "This constitutional guarantee applies to both federal and state criminal prosecutions." *Id.* (citing U.S. Const. amend. XIV; *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). "The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony." *Coronado v. State*, 351 S.W.3d 315, 326 (Tex. Crim. App. 2011) (quoting Black's Law Dictionary 433 (9th ed. 2009)). Thus, "[t]he cross-examiner may discredit the witness's direct testimony in several different ways, depending upon the witness, the questioner, and the specific situation as it unfolds in the hearing." *Id.*

However, the right is not unlimited, and it does not include "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010); *see also Woodall*, 336 S.W.3d at 643 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (per curiam)). Thus, a trial court may impose restrictions on cross-examination based on such criteria as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Johnson v. State*, 490 S.W.3d 895, 910 (Tex. Crim. App. 2016) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

B. Analysis

Pena contends that because his confession came during his post-polygraph interview, his Sixth Amendment right to confront witnesses would be violated if his attorney could not cross-examine Agent [redacted] regarding the "context" in which his confession arose. In particular, Pena maintains that to protect his rights, his attorney should be able to question Agent [redacted] about his polygraph techniques to ensure they were proper and about the "validity of polygraph science, at least as to its propensity to produce false confessions." But, Pena posits, because evidence of polygraph examinations is inadmissible, he would be barred from doing so. Pena refers to this as an "evidentiary conundrum" Agent [redacted] created by not conducting the polygraph examination separately from the post-polygraph interview. We find no "evidentiary conundrum" or Sixth Amendment violation in admitting Pena's post-polygraph confession under these circumstances.

Although evidence of a polygraph examination and its results are not admissible at trial, the use of polygraphs as a means of interrogation does not violate an accused's constitutional rights or render a subsequent confession inadmissible. *See Hazlett v. State*, No. 05-16-00495-CR, 2018 WL 1373949, at *2 (Tex. App.—Dallas Mar. 19, 2018, pet. ref'd) (mem. op., not designated for publication). To the contrary, confessions made during a post-polygraph interview are not deemed inadmissible simply because the examination itself would not be admissible. *McCorkle v. State*, No. 14-22-00512-CR, 2023 WL 6561068, at *3 (Tex. App.—Houston [14th Dist.] Oct. 10, 2023, no pet.) (mem. op., not designated for publication) ("Appellant has not provided any authority on point, nor after reasonable research have we found any, to support[] his contention that the inadmissibility of the polygraph test taints, or implicates the inadmissibility of, his confession given after the exam.") (citing *Collins v. State*, 352 S.W.2d 841, 845 (Tex. Crim. App. 1961) ("The

fact that appellant was given a lie detector test prior to making the confession did not render the same inadmissible.")).

Pena appears to acknowledge other courts' holdings that when a defendant has made a confession on the heels of polygraph examination, the proper course of action is—when possible—to redact any reference to the polygraph examination or its results when admitting evidence of the confession. *See Holt v. State*, No. 05-14-00914-CR, 2016 WL 3018793, at *22 (Tex. App.—Dallas May 18, 2016, pet. ref'd) (mem. op., not designated for publication).

Here, we find no impediment to redacting evidence of the polygraph examination and its results from Pena's post-polygraph confession. As set forth above, during the post-polygraph interview, Agent [redacted] initially made a series of references to the polygraph examination and its results, informing Pena that he appeared to be "affected" by one of the questions he asked during the examination. However, Agent [redacted] later questioning centered solely on the child-victim's statement and his urging Pena to apologize to the child and take responsibility for his conduct. By our estimation, Pena's first inculpatory statement was not made until over 20 minutes after Agent [redacted] last reference to the polygraph examination, thereby allowing a redacted portion of the recording to be played for the jury without the jury hearing any evidence of the examination. We encourage the parties to thoroughly review the recording to ensure that no such reference is contained in any redacted version of the recording that may be played for the jury.

We further conclude that admitting a redacted portion of the recording without reference to the polygraph examination or its results would not violate Pena's Sixth Amendment rights. Although Pena believes he has a Sixth Amendment right to question Agent [redacted] regarding the methods he used to conduct the examination, we see no relevance to such a line of questioning under these circumstances. Pena's inculpatory statements not only came well after Agent [redacted]

last reference to the polygraph examination, but more importantly, they did not arise, either directly or indirectly, from any questions Agent [redacted] asked him about the examination. Instead, Pena made his inculpatory statements in direct response to Agent [redacted] statement that he "knew" Pena committed the offense based on the child-victim's statements, rather than on any knowledge he obtained from the polygraph examination.

Accordingly, we cannot say that Pena's Sixth Amendment rights would be violated by his inability to question Agent [redacted] about his polygraph examination methods. *See Foster v. State*, 180 S.W.3d 248, 251 (Tex. App.—Fort Worth 2005, pet. ref'd) (mem. op.) (concluding that defendant's Sixth Amendment rights were not violated where the question he sought to ask the witness was not only irrelevant but likely to cause confusion of the issues). We therefore conclude that the trial court could not have properly granted Pena's motion to suppress based on his Sixth Amendment argument.

VI. WHETHER PENA'S CONFESSION WAS INVOLUNTARY

We next consider whether the trial court could have properly granted Pena's motion to suppress based on the argument he made in the trial court that his confession was involuntary as the result of Agent [redacted] use of allegedly coercive techniques, including his repeated assurances that he would be treated more leniently if he confessed. We conclude that there is no basis in the record for finding that Pena's confession was involuntary.

A. Applicable law

Article 38.21 of the Code of Criminal Procedure provides that an accused's statement "may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed." Tex. Code Crim. Proc. Ann. art. 38.21. To meet constitutional standards, a confession must be both voluntary and taken in

compliance with *Miranda*.[5] *Moss v. State*, 75 S.W.3d 132, 139 (Tex. App.—San Antonio 2002, pet ref'd). In assessing the voluntariness of a statement, we consider the totality of the circumstances under which the statement was made, and ultimately whether the appellant's will was overborne. *See Creager v. State*, 952 S.W.2d 852, 855 (Tex. Crim. App. 1997) (en banc). "A statement is not voluntary if there was 'official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker.'" *Moss*, 75 S.W.3d at 139 (quoting *Matter of V.M.D.*, 974 S.W.2d 332, 346 (Tex. App.—San Antonio 1998, pet. denied)).

B. Analysis

(1) No promises of leniency

As set forth above, in the trial court, Pena's motion to suppress focused almost exclusively on his claim that his confession was coerced because Agent [redacted] made "repeated assurances" that he would receive more lenient treatment, including the possibility of probation, if he confessed. On appeal, the State contends that to the extent Pena's argument hinged on a claim that Agent [redacted] made an improper promise of leniency that rendered his confession involuntary, the trial court could not have used this as a basis for its decision to grant Pena's motion. We agree.

For a promise to render a confession involuntary, the Court of Criminal Appeals has adopted a three part-test, requiring evidence that (1) the promise was "positive"; (2) it was "made or sanctioned by someone in authority"; and (3) it was "of such an influential nature that it would cause a defendant to speak untruthfully." *Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App.

[5] Although Pena points out that Agent [redacted] only read him his *Miranda* rights before the polygraph examination and did not read them again before beginning his post-polygraph interview, he does not argue on appeal that his confession was given in violation of *Miranda*. Instead, he correctly points out that being properly Mirandized does not resolve the question of whether his confession was voluntarily made.

2004); *Lopez v. State*, 610 S.W.3d 487, 498 (Tex. Crim. App. 2020) (recognizing same). As the San Antonio Court of Appeals has explained, "[t]o determine whether a promise is likely to influence the defendant to speak untruthfully, we look to whether the circumstances of the promise made the defendant inclined to admit a crime she had not committed." *Cameron v. State*, 630 S.W.3d 579, 593 n.3 (Tex. App.—San Antonio 2021, no pet.) (citing *Harty v. State*, 229 S.W.3d 849, 856 (Tex. App.—Texarkana 2007, pet. ref'd)). The "promise at issue must be of an exceptional character before it will invalidate an otherwise voluntary confession." *Id.* (citing *Espinosa v. State*, 899 S.W.2d 359, 364 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd); *Guerrero v. State*, No. 04-08-00249-CR, 2009 WL 2525434, at *8 (Tex. App.—San Antonio Aug. 19, 2009, pet. ref'd) (mem. op., not designated for publication)).

Applying the three-part test for determining whether an interviewer made an improper promise of leniency, we conclude, as a matter of law, that Pena did not establish his confession was involuntary. First, the record reflects that Agent [redacted] did not hold himself out as a person who was "in authority" or in a position to make a promise of a benefit. To the contrary, throughout the interview, Agent [redacted] told Pena that he was not the investigator assigned to his case and that it would be up to the investigator and the other "decision-makers" to determine how his case would be handled.

Moreover, even if we were to assume that Agent [redacted] was a person "in authority" to make a promise of leniency, we disagree with Pena's argument that Agent [redacted] made any "positive" statements of such an influential nature so as to cause him to confess to a crime that he did not commit or to speak untruthfully. Pena's argument rests exclusively on a passage in which Agent [redacted] informed Pena that the investigator assigned to his case would want to know he takes "responsibility for [his] actions," he knows what he did was "wrong," it was "one mistake, one

time," and was "not [going] to happen again" and did not "happen again." Agent [redacted] then stated, it was "one mistake, one time [and] a person like that . . . maybe probation . . . classes, counseling . . . something like that[.]" And he further told Pena that if he were to say he was sorry and apologize to the child and her family, "that's what [the investigator] needs to know, and I think you'll come out pretty good," as the "decisionmakers" will view you as a "human being . . . not a predator."

We do not find that this passage—or any other passage in the recording—constituted an improper promise that would have overborne Pena's will such that it caused him to confess to a crime he did not commit. "A confession is not rendered inadmissible because it is made after an accused has been told by the officer taking the confession that it would be best to tell the truth . . ." or "it would be best for him to go ahead and make a statement," or "it would be better to get his business straight." *Dykes v. State*, 657 S.W.2d 796, 797 (Tex. Crim. App. 1983) (en banc); *see also Johnson v. State*, 68 S.W.3d 644, 654 (Tex. Crim. App. 2002) (providing that officer's representation that an accused's cooperation would be conveyed to the trial court was not a promise inducing a confession); *Drake v. State*, 123 S.W.3d 596, 603 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (concluding that an officer's general, non-specific statement that an appellant "could help herself" if she confessed did not render appellant's statement involuntary). Stated otherwise, such statements suggesting that a person may be treated more favorably if he confessed are not considered to be so influential that they would cause a person's will to be "overborne" to such an extent that he would involuntarily confess to a crime he did not commit. *See Allen v. State*, No. 14-14-00708-CR, 2016 WL 269900, at *3–4 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016, no pet.) (mem. op., not designated for publication) (interviewer's suggestion that he would be treated more favorably if he provided an "explanation" for his conduct and that interviewer would

speak with the "investigators" about his case did not rise to the level of a "promise" that would have rendered the defendant's statements involuntary); *Herrera v. State*, 194 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

Agent [redacted] statement was simply a statement of fact that a confession can sometimes result in leniency; we do not view it as a promise. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (en banc) (noting that interviewer's statement that a confession could result in leniency was a statement of fact and not a promise of leniency in exchange for a confession); *Mason v. State*, 116 S.W.3d 248, 261 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (officer's statements that defendant's situation would "go better" for him if he gave a confession did not amount to a promise).

(2) Totality of the circumstances test

Aside from the any alleged promise of leniency, Pena also contends we should uphold the trial court's decision to suppress his confession as involuntary under a broader "totality of the circumstances" test. *See Creager*, 952 S.W.2d at 856 (recognizing that when a defendant alleges his confession was coerced by more than an improper promise, a court should apply a "totality of the circumstances" test in determining whether the confession was involuntary). Even applying such a test, however, we conclude that Pena has not pointed to any factors from which the trial court could have concluded his confession was involuntary.

There are a variety of factors that may render a confession involuntary under a totality of the circumstances test, including but not limited to situations in which: the interrogation is unduly lengthy; the defendant has been deprived of sleep, food, water, or the opportunity to take needed breaks; and the interviewer has made threats or engaged in other inappropriate conduct. *See, e.g.*, *Sandoval v. State*, 665 S.W.3d 496, 523 (Tex. Crim. App. 2022), reh'g denied (May 17, 2023), cert.

denied, 144 S. Ct. 1166 (2024) (recognizing among other factors that may render a confession involuntary, "the lack of any advice about constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep"); *Lopez v. State*, 610 S.W.3d 487, 496 (Tex. Crim. App. 2020) (recognizing that "threatening to arrest a close family member . . . depriv[ing] the accused of food and sleep and interrogat[ing]him for hours on end" can be factors a court may consider in determining whether a confession was involuntary under a totality of the circumstance test).

But as the Texas Court of Criminal Appeals has repeatedly recognized, even when such factors are present, the key issue is whether the suspect's "will has been overborne and his capacity for self-determination critically impaired" by police "overreaching." *Sandoval*, 665 S.W.3d at 523; *see also Creager*, 952 S.W.2d at 855 (recognizing that in determining whether a confession was involuntary due to police overreaching, "[t]he ultimate question is whether appellant's will was overborne").

Here, the record does not support such a finding. To the contrary, during the videotaped interview, Pena appears to be calm and cooperative. He never asked to speak to an attorney or terminate the interview; he was not deprived of food, beverage, or the opportunity to take a break if needed. There is nothing in the record to indicate that Agent [redacted] made any threats to Pena. And as set forth above, the record does not support a finding that Agent [redacted] made any improper promises of leniency. Moreover, although [redacted] appears to complain that the entire process of conducting the examination and the interview lasted almost four hours, he does not contend that the length of the interrogation rendered his confession involuntary. Nor do we believe it did, particularly given the fact that Pena appeared willing at all times to continue the interview. *See Smith v. State*, 779 S.W.2d 417, 429 (Tex. Crim. App. 1989) (holding that eight hours of

questioning without food did not render confession involuntary in light of the defendant's willingness to continue with the interview).

Pena nevertheless maintains that the trial court could have found that his will was overborne by Agent [redacted] allegedly improper tactic of alternating between filling him with the fear of being arrested and imprisoned—by accusing him of committing the offense—and giving him "false hope" that he would be treated leniently if he confessed. In support of his argument, Pena seeks to analogize his situation to the facts in *Arizona v. Fulminante*, 499 U.S. 279 (1991) in which the United States Supreme Court agreed with a state court's finding that there was sufficient evidence upon which to find that a defendant's confession had been coerced by a law enforcement agent's promise of protection. In that case, the defendant was facing possible charges for raping and murdering his eleven-year-old stepdaughter but was in prison on an unrelated offense. *Fulminante*, 499 U.S. at 282. An undercover law enforcement agent in the prison told him that his fellow inmates were threatening to harm him due to what he had done to his stepdaughter, and he promised to "protect" the defendant if he confessed to the crime. *Id.* at 282–83. The Court found that the defendant's resulting confession was involuntary because the defendant faced a "credible threat of physical violence" if he did not confess, and the agent's promise of protection therefore caused the defendant's "will [to be] overborne in such a way as to render his confession the product of coercion." *Id.* at 287–88.

Pena urges the similarity in his case, arguing it is well-known that Texas prisons are dangerous places for those convicted of sexual crimes against children, and therefore, "even a glimmer of false hope of probation could persuade the accused to incriminate himself to lessen the risk." Unlike the situation in *Fulminante*, however, there is nothing in the record before us to suggest that Pena faced a "credible threat of violence" if he did not confess or that Agent [redacted]

offered to protect him from any such threat. To the contrary, Agent [redacted] made it clear that he was not able to provide Pena with any direct help and that it would be up to the investigator or other decisionmakers to make the decisions.

Accordingly, we conclude that the trial court could not have properly granted Pena's motion to suppress on the basis that Pena's confession was involuntary for any or all of the reasons discussed above.

VII. CONCLUSION

The trial court's judgment is affirmed in part and reversed in part. We affirm the trial court's order granting Pena's motion to suppress insofar as it orders the suppression of any evidence relating to the polygraph examination and its results. But we reverse the trial court's order insofar as it (1) suppresses the recorded portion of the post-polygraph interview that contains no reference to the examination or its results and (2) suppresses the inculpatory statements Pena made during that portion of the interview.[6]

LISA J. SOTO, Justice

December 4, 2024

Before Alley, C.J., Palafox, Soto, JJ.

[6] This opinion should not be read as prohibiting Pena from challenging the admissibility of the post-polygraph interview or his inculpatory statements on other grounds in the trial court. Our holding only pertains to the two grounds addressed in the opinion.

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Bar No. 3425770
lawyerburnett@gmail.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Abner Burnett		lawyerburnett@gmail.com	3/12/2025 9:42:39 AM	SENT
John Goodman		director@alartx.org	3/12/2025 9:42:39 AM	SENT
G. AllenRamirez		gocha.ramirez@da.co.starr.tx.us	3/12/2025 9:42:39 AM	SENT

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APPENDIX 15

4/23/2025 **COA No. 08-23-00303-CR**

PENA, REYNALDO ALBERTO Tr. Ct. No. 20-CRD-45 PD-0087-25

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

Deana Williamson, Clerk

STATE PROSECUTING ATTORNEY
STACEY SOULE
PO BOX 13046
AUSTIN, TX 78711
* DELIVERED VIA E-MAIL *

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4/23/2025 **COA No. 08-23-00303-CR**
PENA, REYNALDO ALBERTO Tr. Ct. No. 20-CRD-45 PD-0087-25

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

Deana Williamson, Clerk

ABNER BURNETT
4820 E UNIVERSITY BLVD
ODESSA, TX 79762
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PENA, REYNALDO ALBERTO Tr. Ct. No. 20-CRD-45 PD-0087-25

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

Deana Williamson, Clerk

DISTRICT ATTORNEY DUVAL COUNTY
COUNTY COURTHOUSE RM 303
RIO GRANDE CITY, TX 78582
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PENA, REYNALDO ALBERTO Tr. Ct. No. 20-CRD-45 **PD-0087-25**

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

Deana Williamson, Clerk

JOHN GOODMAN II
ANGLICAN LEGAL AID & RECONCILIATION
221 E 12TH ST
MISSION, TX 78572-4170
* DELIVERED VIA E-MAIL *

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Deana Williamson, Clerk

8TH COURT OF APPEALS CLERK
500 E. SAN ANTONIO AVE., ROOM 1203
EL PASO, TX 79901-2421
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APPENDIX 16

Fifth, Sixth, and Fourteenth Amendments to the United Staes Constitution

Amendment V

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

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section 1.

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

APPENDIX 17

Texas Code of Criminal Procedure – Tex. Code Crim. Pro., Art. 38.22. Secs. 6 & 7. And 38.23(a)

Current as of January 01, 2024

Art 38.22, Sec. 6.

In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause. Such order shall not be exhibited to the jury nor the finding thereof made known to the jury in any manner. Upon the finding by the judge as a matter of law and fact that the statement was voluntarily made, evidence pertaining to such matter may be submitted to the jury and it shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof. In any case where a motion to suppress the statement has been filed and evidence has been submitted to the court on this issue, the court within its discretion may reconsider such evidence in his finding that the statement was voluntarily made and the same evidence submitted to the court at the hearing on the motion to suppress shall be made a part of the record the same as if it were being presented at the time of trial. However, the state or the defendant shall

be entitled to present any new evidence on the issue of the voluntariness of the statement prior to the court's final ruling and order stating its findings.

Art 38.22,, Sec. 7.

When the issue is raised by the evidence, the trial judge shall appropriately instruct the jury, generally, on the law pertaining to such statement.

Art. 38.23 (a)

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.