NO. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

LAURO EDUARDO RUIZ,	§	**COURT OF APPEALS**
Petitioner,	§	**IN THE FOURTH**
v.	§	**JUDICIAL DISTRICT**
STATE OF TEXAS,	§	**SAN ANTONIO, TEXAS**
Respondent.	§	**No. 04-16-00226-CR**

PETITION FOR DISCRETIONARY REVIEW

ON APPEAL FROM THE 186TH JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS
CAUSE NUMBER 2015CR4068

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***Oral Argument Requested**

IDENTITY OF PARTIES AND COUNSEL

The parties to this ligigation are as follows:

1) **Lauro Eduardo Ruiz**, petitioner herein was the defendant in the trial court;

2) **Travis Baskin**, trial attorney for petitioner; **Shawn C. Brown** and **Adrian Flores**, trial and appellate attorneys for petitioner; **Alex J. Scharff** Appellate Attorney for petitioner.

3) **S. Patrick Ballantyne**, trial attorney for the **State of Texas**; **Lauren A. Scott**, trial and appellate attorney for the **Bexar County District Attorney's Office, Nicholas LaHood, District Attorney**;

4) The trial judge was **The Honorable Andrew Carruthers**, as referred by **The Honorable Jefferson Moore** of the 186^{h} Judicial District Court of Bexar County, Texas.

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument before this Honorable Court. Although Petitioner submits that the facts and legal arguments are thoroughly presented in this brief and in the record, Petitioner also believes that the decision-making process of the Court will be significantly aided by oral argument.

This appeal presents issues that strike to the very heart of Tex. Code Crim. Proc. Art. 38.23, which permits suppression of evidence if an illegal search and seizure was performed by an officer or *other person*, as well as this Court's ruling in *Miles v. State*, 241 S.W.3d 28 (Tex. Crim. App. 2007).

STATEMENT OF CASE

The State of Texas indicted Lauro Eduardo Ruiz, with ten counts of attempted production of sexual performance by a child on April 13, 2015. (C.R. at 3-6). On December 31, 2015, Mr. Ruiz filed a motion to suppress evidence arguing that several photographs and digital files had been illegally obtained when his cell phone was seized from his possession, and when its contents were searched, both without his consent. (C.R. at 7-22).

On March 9, 2016 the Court heard testimony and evidence in a pretrial hearing on Appellee's motion, and, after hearing arguments on April 7, 2016 granted the motion to suppress evidence, made oral findings on the record, and signed the evidence suppression order. (C.R. at 35, Supp. C.R.3-4, and 2 R.R. at 24-25.). On April 8, 2016, the State filed a notice of appeal and request for stay of trial court proceedings. (C.R. at 31-33.).

STATEMENT OF PROCEDURAL HISTORY

The San Antonio Court of Appeals issued its memorandum opinion reversing the ruling of the trial court on July 26, 2017. *State v. Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928. Petitioner filed a Motion for *En Banc* Reconsideration on August 9, 2017. The Fourth Court of Appeals denied the Petitioner's motion by virtue of its ruling on November 16, 2017. This timely petition follows.

ISSUES PRESENTED

1. The court of appeals misapplies the standard of review when examining article 38.23 of the Texas Code of Criminal Procedure.
2. The court of appeals' opinion puts it in conflict with other courts of appeals, which have applied constitutional violation analysis to private individuals under article 38.23 of the Texas Code of Criminal Procedure.
3. As Petitioner was the prevailing party at the Motion to Suppress, the court of appeals should have deferred to the trial court and presume it found a violation of law sufficient to trigger the Texas Exclusionary Rule.

I. ARGUMENT

1. The Fourth Court of Appeals Majority Opinion misapplies the Standard of Review when examining article 38.23 of the Texas Code of Criminal Procedure.

The Fourth Court of Appeals' majority opinion, written by the Honorable Justice Alvarez, joined by the Honorable Justice Chapa, misapplied the standard of review when examining Tex. Code Crim. Proc. 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." (West 2005).

The trial court found after hearing the Motion to Suppress, to which the State agreed on appeal that "the pertinent facts are not in dispute --- the school administrator, Mr. Saenz, picked up Ruiz's phone, scrolled briefly through the [cell]phone, [by pushing the Pictures cellphone 'App' and looking at the pictures] and turned the phone over to the police." (bracketed language added to reflect testimony from the suppression hearing). *State v. Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 18 (Tex. App.—San Antonio, July 26, 2017) (per curiam) (Martinez, J., dissenting). The trial court, Honorable Andrew Carruthers, issued findings of fact and conclusions of law:

> "Okay. I will grant the Motion to Suppress. I find that the information obtained from the cell phone was a result of a private citizen seizing the defendant's telephone. Though the defendant may or may not have consented to leaving his cell phone with school authorities, he did not consent to the search.
>
> Gilbert Saenz, the witness who testified in this matter as the ex-principal of the school at which the defendant was employed, conducted a search of the defendant's telephone without obtaining a search warrant. He subsequently gave the information he had obtained from the search of the defendant's cell phone to law enforcement authorities. That resulted in that information being fruit of the poisonous tree since the initial examination of the contents of the defendant's cell phone was without a warrant, was without the defendant's consent or permission.
>
> Subsequently, a search warrant was obtained by police officers. And information was obtained from the defendant's cell phone through the search warrant. However, that information was originally derived from Gilbert Saenz's examination of the defendant's cell phone without a warrant, without the defendant's consent, without exigent circumstances which justified a warrantless search. Therefore, I conclude that all of the information obtained from the defendant's cell phone is inadmissible against the defendant in his trial. We stand in recess on that matter."

(2RR-24-5).

The clear, unambiguous language of Tex. Code Crim. Proc. Art. 38.23 allows for the exclusion of evidence by law enforcement or "other persons" if obtained in violation of any Texas or Federal Constitutions. Clearly, the search of Ruiz's cellphone by School Administrator Saenz was done without a search warrant or any showing of an exception to the warrant requirement, specifically by consent or showing of exigent circumstances in violation of the Fourth Amendment. *Id.*; *see also Pitonyak v. State*, 253 S.W.3d 834, 850 (Tex. App.—Austin, 2008, pet. ref'd, rehearing overruled). Moreover, the United States Supreme Court has unequivocally held that "...a warrant is generally required before... a search [of the information on a cell phone] even when a cell phone is

seized incident to arrest." *Riley v. California*, 573 U.S. ____, 134 S. Ct. 2473, 2493 (2014). The Court did not foreclose the search of a cell phone without a warrant if a generally accepted exception to the warrant requirement was proven. *Riley* at 2494.

The crux of Ruiz' complaint in this Petition for Discretionary Review is the failure by the Fourth Court of Appeals to follow the 2007 Court of Criminal Appeals case *Miles v. State* which exhaustively examined the history and meaning of "an officer or other person" as plainly set out in Tex. Code Crim. Proc. Art. 38.23(a), where the court held "...**that a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do**..." Miles v. State, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007) (emphasis added). The *Miles* case was relied on by the Fourth Court of Appeals in *Melendez v. State,* 467 S.W.3d 586 (Tex. App.—San Antonio 2015) (authored by Honorable Chief Justice Sandee Bryan Marion on a panel with Justices Martinez and Chapa) to affirm the denial of a Motion to Suppress evidence where there was a lawful detention by security guards (not security officers or off-duty policemen) who had reasonable suspicion to believe Melendez was committing a crime. *See* Melendez, 467 S.W.3d at 592; State v. Ruiz, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 20–21 (Tex. App.—San Antonio July 26, 2017) (per curiam) (Martinez, J., dissenting). The Fourth Court of Appeals in *Ruiz* did not rely on

Miles for analysis but stated, "Simply put, if no violation of the law occurred, article 38.23(a) has no application in this case." *Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 7.

2. The court of appeals' opinion puts it in conflict with other courts of appeals, which have applied constitutional violation analysis to private individuals under 38.23 of the Texas Code of Criminal Procedure.

In its opinion, the Fourth Court of Appeals discusses the Fourth Amendment and Article I, section 9 of the Texas Constitution, finding that they apply only to searches and seizures by agents of the Government and not to the actions of private individuals. *See* State v. Ruiz, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 6 (Tex. App.—San Antonio, July 26, 2017) (citing many State and Federal cases that predate the current iteration of the Texas Exclusionary Rule as expounded by the Court of Criminal Appeals in *Miles v. State*, 241 S.W.3d 28 (Tex. Crim. App. 2007)). The Fourth Court of Appeals held that "because Saenz is a private individual, his alleged search of the cell phone under either the Fourth Amendment or the Texas Constitution cannot substantiate the violation of law required under article 38.23." *Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 8.

However, the Fourth Court of Appeals previously recognized in *Melendez v. State*, 467 S.W.3d 586 (Tex. App.—San Antonio 2015, no pet.) that the "Texas exclusionary rule is broader than the federal exclusionary rule that applies only to

governmental actors, not private individuals" and that the Texas exclusionary rule "applies to illegal searches or seizures conducted by 'other persons' even when those other persons are not acting in conjunction with, or at the request of government officials." *See id.* at 592 (citing the *Miles* doctrine). The *Melendez* Court applied a constitutionally-based reasonable suspicion analysis to the conduct of a private (not off-duty police officer or certified peace officer) security guard in determining whether there was an illegal seizure. *See id.* at 592–93. The Fourth Court of Appeals walked us through a survey of Fourth Amendment jurisprudence and identified a litany of factors that ultimately provided this private citizen sufficient indicia of suspicion to justify a temporary investigative detention. *See id.* The appellate court essentially conducted a *Terry* analysis to the conduct of a private citizen where the only violation alleged was the right to be free from unreasonable searches or seizures. As the Honorable Chief Justice Sandee Bryan Marion recognized in *Melendez*: "a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do." *See id.* (quoting *Miles*). The appellate court's ruling on Petitioner's case stands in contrast to this previous decision by the same appeals court.

Furthermore, the ruling in the present case has now created a rift among the other courts of appeals who have relied upon the *Melendez* ruling in applying section 38.23 to the conduct of private citizens. Mancia v. State, No. 13-16-00401-

CR, 2017 Tex. App. LEXIS 7949 (Tex. App.—Corpus Christi Aug. 17, 2017); Denkowski v. State, No. 14-16-00273-CR, 2017 Tex. App. LEXIS 7815 (Tex. App.—Houston [14th Dist.] Aug. 17, 2017). In *Mancia*, the Thirteenth Court of Appeals applied a Fourth Amendment seizure inquiry to the conduct of a private citizen in a DWI investigation. *Mancia*, No. 13-16-00401-CR, 2017 Tex. App. LEXIS 7949 at 3–10. In *Denkowski*, the Fourteenth Court of Appeals employed a similar constitutional framework when analyzing whether to apply the exclusionary rule when a private citizen detained a suspected drunk driver. *Denkowski*, No. 14-16-00273-CR, 2017 Tex. App. LEXIS 7815 at 11–17.

3. As Petitioner was the prevailing party at the Motion to Suppress, the court of appeals should have deferred to the trial court and presume it found a violation of law sufficient to trigger the Texas Exclusionary Rule as such a finding is supported by the record.

The majority in the Fourth Court of Appeals also held, "...the record does not support that Saenz violated any state or federal law that would require suppression in this case." *Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 11. However, the record did support a finding that Saenz violated Tex. Penal Code 33.02 Breach of Computer Security, which provides,

> (a) A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

It is uncontradicted that Ruiz did not consent to Saenz' search of Ruiz' cellphone, thus Saenz broke the law when he knowingly accessed Ruiz' cellphone without Ruiz' consent. While it is a defense to the prosecution "that the person acted with the intent to facilitate a lawful seizure or search of, or lawful access to, a computer, computer network, or computer system for a legitimate law enforcement purpose" under section (e) of 33.02, that finding was not made by the trial court in the Findings of Fact or Conclusions of Law.

Thus, the appellate court also misapplied the correct standard of review of a trial judge's granting of a Motion to Suppress cited in the opinion at page 4:

> "This court must "uphold the trial court's ruling on appellant's motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case." *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003) (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000)). We will reverse the trial court's suppression decision if it is unsupported by the record, "arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). "

Ruiz, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 6.

Because the trial court's ruling granting Ruiz' Motion to Suppress was not unsupported by the record, arbitrary, unreasonable, or "outside the zone of reasonable disagreement," the appellate court erred when reversing the trial court's granting of the Motion to Suppress. The appellate court's dissenting opnion by the Honorable Justice Rebecca C. Martinez correctly applied the standard of review in

relying on the clear rule set out by *Miles*, "...that a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do..." because law enforcement needed a warrant to search Ruiz' phone, so did Saenz (a private person), who also committed the offense of Tex. Penal Code 33.02 Breach of Computer Security. *Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 20.

II. CONCLUSION

The trial court's granting of Ruiz's Motion to Suppress Evidence was correctly based on the law and his findings regarding the facts surrounding the illegal search of Ruiz's phone were clearly based on the evidence adduced at the hearing. Because the appellate court's opinion misapplied the standard of review set out in *State v. Dixon, Miles v. State, Pitonyak v. State,* and the Fourth Court of Appeals own *Melendez v. State,* this court should grant the present Petition and reverse the Fourth Court of Appeals' opinion.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Ruiz respectfully prays that this Honorable Court grant his Petition for Discretionary Review and, after a hearing on the merits, that the Opinion of the Fourth Court of Appeals in *State v. Ruiz*, No. 04-16-00226-CR be reversed and that the ruling of the 186th District

Court be affirmed and reinstated. In the alternative, petitioner prays this Honorable Court to reverse the ruling of the San Antonio Court of Appeals and to remand the cause to the Fourth Court so it may apply the correct standard of review and harm analysis.

Respectfully submitted,

LAW OFFICES OF SHAWN C. BROWN

/S/ Alex J.Scharff

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the following Brief for Appellant was delivered to the Bexar County District Attorney's via E-file on this 15th day of December, 2017.

/S/ Alex J. Scharff
ALEX J. SCHARFF

CERTIFICATE OF COMPLIANCE

This is to certify that the above and foregoing Petition for Discretionary Review, save and except all portions expressly excluded from the final word count pursuant to Tex. R. App. P. 9.4(i)(1), contains 2,152 words and is thus in compliance with Tex. R. App. P. 9.4(i)(2)(D).

/S/ Alex J.Scharff

APPENDIX

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-16-00226-CR

The **STATE** of Texas,
Appellant

v.

Lauro Eduardo **RUIZ**,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR4068
Honorable Andrew Carruthers, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 26, 2017

REVERSED AND REMANDED

This case stems from Appellee Lauro Eduardo Ruiz's ten-count indictment charging Ruiz with attempted production of sexual performance by a child. TEX. PENAL CODE ANN. § 43.25(d) (West 2016) ("A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child younger than 18 years of age."). The trial court granted Ruiz's motion to suppress and excluded all photographs, evidence, and data obtained from the search of Ruiz's cell phone. This State's appeal ensued.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2014, two female students at a private high school notified Dean of Students Dolores Rodriguez that Ruiz, a substitute teacher, was acting inappropriately. The students provided images of Ruiz's cell phone, placed on top of his bag, near the podium, with the camera facing up, and allegedly capturing images from underneath the female students' skirts. Rodriguez contacted Academic Dean and Vice Principal Steven Hayward; Hayward summoned Ruiz to the administrative offices. Principal Gilbert Saenz was not on campus at the time.

Pending Principal Saenz's return to campus, Rodriguez and Hayward began investigating the allegations. Rodriguez posed the initial question to Ruiz—whether "anything happened that day in the classroom." A very nervous Ruiz acknowledged "he had a problem." Ruiz's nervousness and "fidgeting" with his cell phone led Rodriguez to fear the possible deletion of information. Rodriguez requested that Ruiz place the cell phone on Saenz's desk; both Rodriguez and Hayward testified that Ruiz complied without incident, comment, or objection. Shortly thereafter, Principal Saenz arrived. All three administrators testified that Ruiz again admitted that "he had a problem" and that there were inappropriate images on his cell phone. Saenz terminated Ruiz's employment and informed Ruiz that law enforcement would be notified.

Principal Saenz advised Ruiz that the cell phone would be turned over to law enforcement authorities. Pursuant to his own request, Ruiz retrieved several phone numbers from the cell phone. At some point, Saenz saw approximately twenty videos or images on the cell phone. After Ruiz obtained the information from his cell phone, he returned the cell phone to Saenz, and Saenz placed the cell phone in a manila envelope and sealed the envelope. Consistent with his statement to Ruiz, Saenz contacted the Castle Hills Police Department, made a report, and turned the cell phone over to the officers. Pursuant to a search warrant, the Castle Hills Police Department officers viewed and secured several images depicting the area underneath the students' skirts. Ruiz

was subsequently charged with multiple counts of attempted production of sexual performance by a child.

On December 31, 2015, Ruiz filed a motion to suppress any and all tangible evidence seized in connection with the case asserting that Principal Saenz did not obtain a warrant and no exception to the warrant requirement applies. The State filed a memorandum of law in opposition to the motion to suppress on March 11, 2016. Following an evidentiary hearing on March 9, 2016, and on April 7, 2016, the trial court made the following oral findings of fact, *see State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006) (explaining that trial court's findings on a motion to suppress may be written or oral):

- "the information obtained from Ruiz's cell phone was a result of a private citizen seizing [Ruiz's] telephone;"
- "Ruiz may or may not have consented to leaving his cell phone with school authorities;"
- "Ruiz did not consent to [Saenz's search of Ruiz's cell phone];"
- "Saenz . . . conducted a search of the defendant's telephone without obtaining a search warrant;"
- "[Saenz] subsequently gave the information he had obtained from the search of [Ruiz]'s cell phone to law enforcement authorities;"
- "a search warrant was obtained by police officers;" and
- "information was obtained from [Ruiz's] cell phone through the search warrant."

The trial court concluded that because Saenz's actions did not fall under the warrantless search exceptions of either consent to search or exigent circumstances, Saenz's warrantless examination of Ruiz's cell phone violated Texas Code of Criminal Procedure article 38.23(a). *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005).

The trial court also made the following oral conclusions of law:

- "Information [taken from the cell phone was] fruit of the poisonous tree since the initial examination of the contents of [Ruiz's] cell phone was without a warrant, was without [Ruiz's] consent or permission."

- "Saenz's examination of [Ruiz's] cell phone [was] without a warrant, without [Ruiz's] consent, [and] without exigent circumstances which justified a warrantless search."
- "[A]ll of the information obtained from [Ruiz's] cell phone is inadmissible against [Ruiz].

The one-sentence, handwritten, order signed by the trial court on April 7, 2016, provides as follows:

> The motion to Suppress Granted as to all photographs, evidence & data obtained from the search of [Ruiz's] cell phone.

STANDARD OF REVIEW

An appellate court reviews a trial court's ruling on a motion to suppress on a bifurcated standard of review; a reviewing court must

> give almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. But when application-of-law-to-fact questions do not turn on the credibility and demeanor of the witnesses, we review the trial court's rulings on those questions de novo.

Wilson v. State, 442 S.W.3d 779, 783 (Tex. App.—Fort Worth 2014, pet. ref'd) (citing *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007)); *see also Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *Swearingen v. State*, 143 S.W.3d 808, 811 (Tex. Crim. App. 2004). This court must "uphold the trial court's ruling on appellant's motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case." *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003) (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000)). We will reverse the trial court's suppression decision if it is unsupported by the record, "arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

MOTION TO SUPPRESS BEFORE THE TRIAL COURT

The State contends the trial erred in granting Ruiz's motion to suppress under the Texas exclusionary rule. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

A. Texas Code of Criminal Procedure Article 38.23(a)

The Texas exclusionary rule provides as follows:

> 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.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a); *see Miles v. State*, 241 S.W.3d 28, 34 (Tex. Crim. App. 2007). If the search or seizure violated the law, the Texas exclusionary rule is applicable to "'other persons,' even when those other persons are not acting in conjunction with, or at the request of, government officials." *Miles*, 241 S.W.3d at 36; *see also Cobb v. State*, 85 S.W.3d 258, 270–71 (Tex. Crim. App. 2002) (considering private citizen under section 38.23(a)'s "other person" status); *Royston v. State*, No. 14-13-00920-CR, 2015 WL 3799698, at *3 (Tex. App.—Houston [14th Dist.] June 18, 2015, pet. ref'd) (mem. op., not designated for publication) (same). Simply put, if no violation of the law occurred, article 38.23(a) has no application in the present case.

B. Burden of Proof on a Motion to Suppress

"'[T]he burden of persuasion is properly and permanently placed upon the shoulders of the moving party. When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case.'" *Pham v. State*, 175 S.W.3d 767, 773 (Tex. Crim. App. 2005) (quoting *Mattei v. State*, 455 S.W.2d 761, 766 (Tex. Crim. App. 1970)). When the evidence is collected by a private person, the Texas Code of Criminal Procedure requires proof that the private person obtained the evidence in violation of the law. *See Cobb*, 85 S.W.3d at 270–

71 (citing *State v. Johnson*, 939 S.W.2d 586, 588 (Tex. Crim. App. 1996)) (considering private citizen under section 38.23(a)'s "other person" status); *Royston*, 2015 WL 3799698, at *3 (same).

C. Proof that Evidence Obtained in Violation of Law

In this case, the trial court made an affirmative finding that Principal Saenz was a private person, and we afford the finding "almost total deference." *Wilson*, 442 S.W.3d at 783. Because Saenz was a private person, or "other person" pursuant to article 38.23(a), Ruiz bore the burden to prove that Saenz obtained the evidence "in violation of law." *See Baird v. State*, 379 S.W.3d 353 (Tex. App.—Waco 2012), *aff'd*, 398 S.W.3d 220 (Tex. Crim. App. 2013); *see also Mayfield v. State*, 124 S.W.3d 377, 378 (Tex. App.—Dallas 2003, pet. ref'd) ("If a defendant challenges the admissibility of evidence under article 38.23(a) on the ground it was wrongfully obtained by a private person in a private capacity, the defendant must establish that the private person obtained that evidence in violation of law."). In other words, to implicate the protections of the Texas exclusionary rule, Ruiz had to establish that Saenz violated a law in the process of seizing Ruiz's phone. *See Baird*, 379 S.W.3d at 357. Here, the only alleged violation of law Ruiz raised in his motion to suppress was a violation of the Fourth Amendment to the United States Constitution and article I, section 9, of the Texas Constitution. U.S. CONST. amend. XIV; TEX. CONST. art. I, § 9.

1. Alleged Fourth Amendment Violation

The Fourth Amendment only applies to searches and seizures by agents of the government; it does not extend to the conduct of private persons who are not acting as government agents. *Walter v. United States*, 447 U.S. 649 (1980); *Brimage v. State*, 918 S.W.2d 466, 479 n.14 (Tex. Crim. App. 1994); *Gillett v. State*, 588 S.W.2d 361, 363 (Tex. Crim. App. 1979). Similarly, article I, section 9 of the Texas Constitution does not apply to the actions of private individuals. *Lee v. State*, 773 S.W.2d 47, 48 (Tex. App.—Houston [1st Dist.] 1989, no pet.). Therefore, because Saenz is a private individual, his alleged search of the cell phone under either the Fourth

Amendment or the Texas Constitution cannot substantiate the violation of law required under article 38.23.

2. Violation of Law by Private Individual

When the movant on a motion to suppress proves the individual acted with intent to deprive the owner of the seized property, the evidence is properly excluded under article 38.23(a). *See* TEX. CODE CRIM. PROC. ANN. § 38.23(a); *see also Cobb*, 85 S.W.3d at 270–71 (explaining court's first question when evidence obtained through private individual is whether private individual was acting to deprive the owner of the seized items). In *Dixon v. State*, No. 13-09-00445-CR, 2010 WL 3419231, at *1 (Tex. App.—Corpus Christi Aug. 27, 2010, pet. ref'd) (mem. op., not designated for publication), a private citizen was shopping when he noticed a cell phone "laying on a pair of pants." The individual took the cell phone, handed it to his sister, and she placed the cell phone in her pants pocket. *Id.* The individual and his sister left the store with the cell phone. *Id.*

Upon discovering that the cell phone's battery was dead, the individual removed the SIM card and placed the card into another cell phone. *Id.* Instead of the anticipated music, the SIM card contained videos depicting "individuals being beaten up." *Id.* Several weeks later, the individual's girlfriend showed the videos to a security officer at her place of employment. *Id.* The security guard confiscated the phone as evidence of a crime. *Id.* Based on the videos, the State charged Dixon, the cell phone owner, with injury to a disabled individual; Dixon filed a motion to suppress the videos. *Id.* at *2. The trial court concluded the private individual obtained the evidence in question by violating the law. *Id.* In other words, because the individual's original intent in taking the cell phone was to deprive the owner of the property, i.e. he intended to steal the cell phone, article 38.23(a) mandated exclusion of the videos. *See id.* (citing TEX. CODE CRIM. PROC. ANN. § 38.23); *see also State v. Johnson*, 939 S.W.2d 586, 588 (Tex. Crim. App. 1996)

(suppressing evidence obtained by victim's son who illegally entered a funeral home and removed evidence resulting in burglary charges filed against son); *Jenschke v. State*, 147 S.W.3d 398, 403 (Tex. Crim. App. 2004) (suppressing evidence of used condom obtained by victim's parents from defendant's truck and held evidence for almost two years before turning over to police).

Here, Ruiz does not contend Saenz obtained the phone by theft, criminal trespass, or similar criminal violation.

3. Individual Actions Cannot Exceed Actions Warranted by Officer

In *Miles v. State*, 241 S.W.3d at 43–46, the Texas Court of Criminal Appeals addressed whether *any* violation of law perpetrated by private individual implicates article 38.23. After an intoxicated Miles drove away from the scene of an accident, a tow-truck driver followed Miles the wrong direction down a one-way street. *Id.* at 44. The individual, along with others, ultimately stopped Miles and detained him until officers arrived. *Id.* A firearm was located in the vehicle and Miles was charged with unlawful possession. *Id.* Miles filed a motion to suppress the firearm alleging that, because the private citizen violated the traffic laws, the evidence obtained after the stop violated article 38.23. *Id.*

During the motion to suppress, the tow-truck driver acknowledged violating the traffic laws, but explained that he activated his overhead lights as he followed Miles in an attempt to both stop Miles and to warn on-coming traffic of Miles's reckless behavior. *Id.* at 45. The court concluded that contrary to Miles's contention that the individual's conduct increased the risk to public safety, the tow-truck driver's actions warned oncoming traffic of the danger Miles posed to other drivers. *Id.* An officer could have acted as the individual did in attempting to stop Miles, i.e. violate the traffic laws in an attempt to arrest Miles; thus, the private individual's actions did not implicate article 38.23. *Id.* at 45–46. Because Miles failed to prove the private individual's violation of the traffic laws exceeded the manner in which a peace officer could have acted in

effectuating Miles's arrest, article 38.23 did not apply and the trial court properly denied the motion to suppress. *See id.*

Like the Texas Court of Criminal Appeals' determination that the Texas exclusionary rule did not apply to the tow-truck driver in *Miles*, Ruiz failed to prove Saenz violated the law and the Texas exclusionary rule does not apply to Saenz.

4. Possession with Intent to Provide Evidence to Police Officers

Courts have long held that a private citizen taking possession of evidence—solely with the intent to provide the evidence to police officers for purposes of a criminal investigation—does not implicate article 38.23(a). In *Stone v. State*, 574 S.W.2d 85, 87 (Tex. Crim. App. 1978), the defendant and his wife "hired their next-door neighbor to babysit their children while both [parents] were at work." Although the children were generally cared for at the babysitter's home, the babysitter had access to the Stone residence to obtain diapers and other necessary supplies for the Stone children. *Id.*

On the day in question, the babysitter accessed the Stone residence "to get soap for the infant's bath." *Id.* "While in the bedroom, the baby-sitter saw a stack of photographs on a dresser and looked through them." *Id.* The top photograph depicted the youngest Stone child. *Id.* Four of the other photographs in the stack were pictures of Stone. *Id.* Four pictures were of a naked Stone engaged in sexual activity, including oral sex with an unrelated seven-year-old victim who lived nearby. *Id.* Two more photographs showed the same child performing oral sex on Stone's wife. *Id.* The remaining photograph was of the victim naked from the waist down. *Id.*

The babysitter took the photographs to the manager of the housing complex in which Stone lived. *Id.* The manager contacted law enforcement; the babysitter and the manager identified the seven-year-old victim as the child of another family in the housing complex. *Id.* Prior to the photographs being turned over to law enforcement, the photographs were also shown to the

victim's parents. *Id.* Stone was charged with sexual abuse. *Id.* Stone filed a motion to suppress the photographs alleging that article 38.23 of the Texas Code of Criminal Procedure prohibited the admission of the photographs obtained in violation of the law by a private citizen. *Id.* at 88.

The Texas Court of Criminal Appeals began its analysis explaining that, "[i]f no violation of the law occurred, [article 38.23] can have no application in the present case." *Id.*; *see also Hailil v. State*, 430 S.W.3d 549, 554–55 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (concluding exclusionary rule did not apply when private person did not violate a law in procuring the evidence—no criminal trespass because he was invited into the room). The babysitter was authorized to be in the Stone residence when she found the photographs. *Stone*, 574 S.W.2d at 87. The court noted that after taking possession of the photographs, the photographs "were turned over to the police and the owners identified." *Id.* at 88. "This negates any inference that [the babysitter] sought to deprive the owner of his property." *Id.* The court further explained that if the photographs had not been evidence of a crime, law enforcement would have returned the photographs to Stone. *Id.* at 88–89. The court concluded that article 38.23 "[did] not require the exclusion of [the photographs]." *Id.* at 89.

D. Application to Present Case

Here, the trial court made a finding that Saenz was a private citizen, but did not determine whether Ruiz "consented to leaving his cell phone with school authorities." We defer to such findings. *See Wilson*, 442 S.W.3d at 783; *Baird*, 398 S.W.3d at 226. This case, however, does not turn on whether Ruiz consented to Saenz's search of the cell phone. Rather, it turns on whether Ruiz met his burden to prove that Saenz violated the law in obtaining the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a). Ruiz's motion to suppress did not allege that either Saenz or the Castle Hills Police Department violated any other law, and the trial court did not make such a

finding. Furthermore, the record does not support that Saenz violated any state or federal law that would require suppression in this case.

1. Lawfully on the Premises

The babysitter in *Stone* clearly did not obtain consent from Stone before taking possession of the photographs. The court's analysis in *Stone* began with a determination that the babysitter, a private individual, was lawfully in Stone's residence when she found and took possession of the photographs. *See Stone*, 574 S.W.2d at 87; *Cobb*, 85 S.W.3d at 271. Like the *Stone* babysitter, when Saenz took possession of Ruiz's cell phone, he was acting as a private individual and was lawfully in his office when the cell phone came into his possession. *See Stone*, 574 S.W.2d at 87; *Cobb*, 85 S.W.3d at 271.

2. Taking Possession of the Evidence

In *Stone*, the defendant argued the babysitter committed a theft when she removed the pictures from the defendant's residence. *See Stone*, 574 S.W.2d at 88; *see also Baird*, 379 S.W.3d at 357 (concluding defendant's effective consent to access bedroom and computer negated claims of trespass or breach of computer security); *Kane*, 458 S.W.3d at 187–88 (concluding administrator's access of thumb drive did not constitute breach of computer security). Ruiz, on the other hand, does not assert Saenz committed any criminal offense—Ruiz does not contend Saenz violated the law in obtaining the pictures; he does not allege that Saenz committed a theft, that Saenz trespassed, or that Saenz breached computer security in viewing the pictures or procuring the cell phone. *Cf. Stone*, 574 S.W.2d at 87–88 (theft); *Baird*, 379 S.W.3d at 357 (trespass); *Kane*, 458 S.W.3d at 187–88 (breach of computer security). Instead, Ruiz argues that Saenz grabbed Ruiz's cell phone, "without Ruiz's consent, and thus, in violation of his legitimate expectation of privacy, the Fourth Amendment, and article 38.23."

Similar to the photographs obtained by the babysitter in *Stone*, Saenz believed the cell phone contained images involving minor, female students, i.e. evidence of criminal wrongdoing, and took possession of the cell phone with the intent "of turning it over" to the police. *See Stone*, 574 S.W.2d at 87. The record substantiates, and Ruiz's counsel argued the same during oral argument, that *prior to viewing any images* contained on the cell phone, Saenz told Ruiz that the cell phone would be turned over to law enforcement and that the cell phone would not be returned to Ruiz. Saenz told him "I'm taking your phone and I'm going to give it to the police."[1] It was Saenz's directive that the cell phone would not be returned that prompted Ruiz's request to access the cell phone to retrieve stored telephone numbers. Saenz subsequently placed Ruiz's cell phone in a manila envelope "to secure the evidence" and "to protect the chain of custody."

E. Conclusion

Giving deference to the trial court's findings of fact, the record clearly supports that (1) Saenz was a private person and was lawfully in his office, (2) Saenz took possession of the cell phone with the intent to turn the evidence over to law enforcement, (3) Saenz placed the cell phone in a manila envelope, and (4) Saenz turned the cell phone over to law enforcement authorities. Bearing in mind that Ruiz bore the burden of persuasion on his motion to suppress, *see Pham*, 175 S.W.3d at 773, Ruiz failed to establish that Saenz violated any law when he took possession of Ruiz's cell phone, *see* TEX. CODE CRIM. PROC. ANN. art. 38.23(a). In other words, Ruiz failed to prove Saenz took the cell phone for any purpose other than to turn the cell phone over to law enforcement. *See Stone*, 574 S.W.2d at 88–89; *see also Pham*, 175 S.W.3d at 773.

[1] We further note that Saenz never relinquished possession of the cell phone—even after Ruiz requested permission to obtain a telephone number from the cell phone's directory. Although Saenz allowed Ruiz to physically hold the cell phone in order to obtain telephone numbers, Saenz was present the entire time and monitoring Ruiz's actions. After Ruiz wrote down the information in question, Ruiz returned the cell phone to Saenz's physical possession and Saenz immediately placed the cell phone in the manila envelope.

Based on a review of the entire record, we conclude Ruiz failed to establish that article 38.23(a) applies to Saenz. Because the statute does not apply, the trial court erred in suppressing the photographs, evidence, and data obtained from the subsequent search of Ruiz's cell phone by the Castle Hill Police Department officers. *See Stone*, 574 S.W.2d at 88–89; *Cobb*, 85 S.W.3d at 270–71. Additionally, because article 38.23 does not apply, the question of exigent circumstances is of no consequence. Accordingly, the trial court erred in concluding that the information taken from Ruiz's cell phone was "fruit of the poisonous tree." We, therefore, reverse the trial court's order granting the motion to suppress and remand this matter to the trial court for further proceedings consistent with this opinion.

Patricia O. Alvarez, Justice

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Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-16-00226-CR

The **STATE** of Texas,
Appellant

v.

Lauro Eduardo **RUIZ**,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR4068
Honorable Andrew Carruthers, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 26, 2017

I dissent from the majority opinion because the high school principal's conduct in scrolling through the photograph and video images on Ruiz's cell phone, without his consent or any exigent circumstances, constituted an illegal search, and therefore the evidence obtained as a result of such conduct must be excluded under article 38.23 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005).

In its brief, the State agrees that, "the pertinent facts are not in dispute — the school administrator, Mr. Saenz, picked up Ruiz's phone, scrolled briefly through the phone, and turned the phone over to police." Thus, the State does not dispute that, instead of merely holding the cell

phone in a safe place and waiting for police, Saenz himself conducted a search on Ruiz's cell phone before calling the police. It is similarly undisputed that no search warrant existed at the time Saenz searched the cell phone. Indeed, the trial court expressly found that Saenz conducted a search of Ruiz's cell phone without a warrant and gave the information he obtained to law enforcement authorities. As framed by the State and the majority opinion, the ultimate issue on appeal is the legal question of whether Saenz's conduct as a private citizen triggered the article 38.23 exclusionary rule.

The majority opinion adopts the State's argument that Saenz could not violate the Fourth Amendment's protection against unreasonable search and seizure because he is a private citizen, and that Saenz did not obtain the cell phone evidence through any other violation of the law; therefore, article 38.23 does not apply. I disagree. As the Court of Criminal Appeals explained in *Miles v. State*,

> [T]he plain language and history of Article 38.23 lead to an inescapable conclusion: if an officer violates a person's privacy rights by his illegal conduct making the fruits of his search or seizure inadmissible in a criminal proceeding under Article 38.23, that same illegal conduct undertaken by an 'other person' is also subject to the Texas exclusionary rule. If the police cannot search or seize, then neither can the private citizen.

Miles v. State, 241 S.W.3d 28, 36 (Tex. Crim. App. 2007) (also stating the converse is equally true). The court in *Miles* discussed many of the cases relied on in the majority opinion in the context of this "shoes of the police officer" interpretation. *See id.* at 37-39 (discussing *Stone v. State*, 574 S.W.2d 85 (Tex. Crim. App. 1978) (panel op.),[1] *Cobb v. State*, 85 S.W.3d 258 (Tex. Crim. App. 2002), *State v. Johnson*, 939 S.W.2d 586 (Tex. Crim. App. 1996), and *Jenschke v. State*, 147 S.W.3d 398 (Tex. Crim. App. 2004)). The court conceded that these cases were not

[1] The majority's heavy reliance on *Stone v. State* is misplaced, particularly since it is factually distinguishable and legally inapposite.

explained on that basis, but stated, "this rule—that a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do—would explain the outcome in each case and is consistent with the purpose of Article 38.23." *Miles*, 241 S.W.3d at 39. Finally, the court stated, "[w]e conclude that the historical rationale for including unlawful conduct by an 'other person' under the Texas exclusionary rule is best explained and implemented by this rule." *Id.*[2]

Using the *Miles* rule as guidance, absent a warrant, consent, or exigent circumstances, a police officer standing in the shoes of the school principal, Mr. Saenz, could not have picked up and searched through Ruiz's cell phone after it was secured on top of the desk under the supervision of two administrators. Ruiz had a legitimate expectation of privacy in the contents of his cell phone, and it is just such interest that the Texas exclusionary rule protects. *See Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473, 2488-91, 189 L.Ed.2d 430 (2014) (discussing the scope of privacy interests at stake in a cell phone search); *see Miles*, 241 S.W.3d at 36 n.33 (only those acts which violate a person's privacy rights or property rights are subject to the state or federal exclusionary rule). With respect to whether Saenz reasonably believed he had Ruiz's consent to look through the cell phone, as the State argues in its brief, the trial court expressly found that Ruiz did not give consent to the search of his cell phone and the record supports that finding. *See Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013) (appellate court reviews the record in the light most favorable to the trial court's resolution of disputed facts, and affords almost total deference to the court's findings of facts supported by the record).

[2] The most recent Court of Criminal Appeals case addressing a private citizen search in the context of article 38.23, *Baird v. State*, was resolved on the distinguishable fact that the dog sitter had access to "everything" in the house, and thus had apparent consent to access the home's computer and did not commit the offense of breach of computer security. *Baird v. State*, 398 S.W.3d 220, 228-30 (Tex. Crim. App. 2013).

Further, based on the record, there were no exigent circumstances to justify an immediate search of the phone as there was no danger that Ruiz would delete any of the information or images on the phone after it was securely placed on the desk and being monitored by school administrators. *See Riley*, 134 S.Ct. at 2486-88 (discussing exigent circumstance of "imminent destruction of evidence" in context of cell phone data). In addition, as it was later, the phone could have easily been further secured inside an envelope until a search warrant was obtained by police. The Supreme Court has recognized the unique characteristics of modern cell phones as different "in both a quantitative and a qualitative sense" from other objects, acknowledging that they "implicate privacy concerns far beyond . . . the search of . . . a wallet, or a purse." *Id.* at 2488-89 (discussed in the context of the search-incident-to-arrest exception to a warrant). The Court noted that modern cell phones are "in fact minicomputers" with an immense storage capacity, containing many distinct types of information such as photos, addresses, bank information, internet search history, etc. that amount to "the sum of an individual's private life." *Id.* at 2489. In rejecting government suggestions for guidelines permitting warrantless cell phone searches incident to arrest, the Court emphasized the importance of the warrant requirement and the increased ease and efficiency in obtaining a warrant due to recent technological advances. *Id.* at 2493. The Court held that a search warrant is required for a cell phone search, and that the search-incident-to-arrest exception does not apply. *Id.* In so holding, the Court also recognized that "other case-specific exceptions may still justify a warrantless search of a particular phone," such as when exigent circumstances make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Id.* at 2494 (citing as examples the need to prevent imminent destruction of evidence, to pursue a fleeing suspect, and to assist a seriously injured person). As noted, none of those exigencies were present in Ruiz's case. By scrolling through the images on

Ruiz's cell phone, Saenz did what a police officer in the same shoes could not have legally done without a warrant or an exception to the warrant requirement. *See Miles*, 241 S.W.3d at 39; *see also Melendez v. State*, 467 S.W.3d 586, 592 (Tex. App.—San Antonio 2015, no pet.) (applying the *Miles* rule). Therefore, for this reason I would affirm the trial court's ruling granting Ruiz's motion to suppress.

Rebeca C. Martinez, Justice

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